

THE HONOURABLE JUSTICE G. SRIDEVI

CRIMINAL PETITION No.851 of 2019

ORDER :

1. The present Criminal Petition is filed under Section 482 Cr.P.C. by the petitioner/de facto complainant seeking to quash the order, dated 30.01.2019, passed in CrI.M.P.No.1594 of 2018 in C.C.No.727 of 2015 on the file of the XVI Additional Metropolitan Magistrate, Ranga Reddy District at Rajendranagar, wherein and whereunder an application filed by the prosecution under Section 311 of Cr.P.C., for recalling of one K.Narsimhulu, who is the brother of P.W.1, was dismissed.

2. The facts, in issue, are as under:

The 2nd respondent/accused was charge sheeted for the offences punishable under Sections 498-A and 506 of I.P.C. The averments in the charge sheet disclose that 35 years back the petitioner/de facto complainant got married the 2nd respondent/accused and out of wedlock, they blessed with three children. Since 2012, the 2nd respondent/accused used to come to the house in a drunken state, harass her both mentally and physically for petty issues and used to abuse her in filthy language and also threaten her with dire consequences. A panchayat was held before the elders, who pacified the matter, but the 2nd

respondent/accused did not change his attitude and continued his harassment.

3. After completion of the entire trial and when the case was posted for examination of the 2nd respondent/accused under Section 313 Cr.P.C., the Prosecution filed an application under Section 311 Cr.P.C. seeking to recall one N.Narsimhulu, who is the brother of P.W.1, stating that Ex.P7/Receipt issued by the 2nd respondent/accused to the said Narsimhulu, discloses the receipt of certain sum of Rs.50,000/- by the 2nd respondent/accused in pursuance of his demand for additional dowry from P.W.1 and therefore, the evidence of the said Narsimhulu is very crucial for better and proper adjudication of the case, otherwise the *de facto* complainant will be put to great loss, which cannot be compensated in any other way. A counter came to be filed by the 2nd respondent/accused opposing the said petition. After considering the entire material on record, the trial Court dismissed the said application. Challenging the same, the *de facto* complainant filed the present Criminal Petition.

4. Heard learned Counsel for the petitioner/de facto complainant, learned Additional Public Prosecutor appearing for the 1st respondent-State and learned Counsel appearing for the 2nd respondent/accused.

5. It has been submitted on behalf of the petitioner that the Court below failed to see that Ex.P7/Receipt shows that the 2nd respondent/accused received an amount of Rs.50,000/- towards dowry from the brother of P.W.1 by name K.Narsimhulu and Ex.P7 was marked through P.W.1 and hence the evidence of the said K.Narsimhulu is essential to the just decision of the case to identify Ex.P7. It is also submitted that recall petition may be filed at any stage of enquiry, trial or other proceedings. It is further submitted that if the prosecution fails to examine the said Narsimhulu, as a prosecution witness, the accused may take it as an advantage and argue that non-examination of the said Narsimhulu is fatal to the case of the prosecution.

6. Learned Counsel appearing for the 2nd respondent/accused would submit that the name of the said Narsimhulu has not been cited as a witness in the charge sheet. He further submits that the petitioner/de facto complainant did not mention in her complaint that her brother i.e.,Narsimhulu had given an amount of Rs.50,000/- to the 2nd respondent/accused towards dowry and as such the petition is not maintainable. However, when the case was posted for the examination of the 2nd respondent/accused under Section 313 Cr.P.C., the present application came to be filed only to fill up the lacunae in the prosecution case and the trial Court has rightly dismissed the application.

7. Before proceeding further, it would be appropriate to refer to Section 311 of Cr.P.C., which reads as under:

"311. Power to summon material witness, or examine person present .-

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall and re- examine any person if his evidence appears to it to be essential to the just decision of the case."

8. Dealing with the scope and object of Section 311 Cr.P.C., the Apex Court in *Hanuman Ram v. The State of Rajasthan and others*¹ held as under:

"6. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re- examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court by duty of examining a material witness who would not be brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only

¹ AIR 2009 SC 69

the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

7. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

8. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine

all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short 'Evidence Act'), are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

9. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant."

9. In the instant case, PW.1-the de facto complainant in her chief-examination dated 07.03.2018, categorically stated that "My brother Narsimha has paid an amount of Rs.50,000/- to the accused even after payment of the above amount, the accused did not stop his harassment. In the year 2012 I performed the marriage of my daughter. Even after marriage of my daughter, the accused did not look me well." Thus, there is specific averment regarding payment of Rs.50,000/- by the brother of PW.1 to the accused and his continuous harassment to PW.1 thereafter.

10. Considering the position of law laid down in the aforesaid decision of the Apex Court and having regard to the facts and circumstances of the case, I am of the considered view that no party to the trial can be denied an opportunity to adduce evidence and if brother of PW.1 is examined as witness, no prejudice would be caused to the accused as adequate opportunity would be available to the accused to cross-examine the witnesses and to lead rebuttal evidence.

11. In the light of the aforesaid observations, the impugned order passed by the trial Court is liable to be set aside and is hereby set aside.

12. Accordingly, the Criminal Petition is allowed. The trial Court is directed to issue summons to the proposed witness Mr.N.Narsimhulu.

11. Miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand closed.

JUSTICE G. SRIDEVI

04.11.2019
Gsn/gkv.

