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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL. REV. P. 236/2019 & Crl. M. A. 29727/2018 & 35524/2019

Date of Decision: 12.12.2019

IN THE MATTER OF:

RAHUL SOLANKI

..... Petitioner

Through: Mr. Sandeep Kumar and Mr. Jayant
Sharma, Advocates.

versus

THE STATE (NCT OF DELHI) & ANR

..... Respondents

Through: Ms. Manjeet Arya, APP for State with SI
Raju Yadav, P.S. Sultan Puri, Delhi.
Mr.Shams Khwaja, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

Learned counsel for respondent No.2/accused has taken a preliminary objection to the maintainability of the present petition in view of decision of Supreme Court in Sethuraman v. Rajamanickam reported as (2009) 5 SCC 153 wherein it was held that orders on application under Section

311 Cr.P.C are interlocutory in nature, hence revision under Section 397(2) Cr.P.C. is not maintainable. In this regard, it is seen that initially the present petition was filed as a criminal misc. petition under Section 482 Cr.P.C however, subsequently, vide order dated 25.02.2019 passed by the Predecessor Bench, the same was directed to be treated as a revision petition and the Registry was directed to register and number the petition. The Registry is directed to restore the present petition as a criminal misc. petition to its original number.

Crl.M.C No...../2019 (to be registered and numbered)

1. The present petition has been filed on behalf of the complainant seeking quashing of the order dated 29.05.2018 passed by Addl. Sessions Judge whereby the application under Section 311 Cr.P.C filed by respondent No.2/accused was allowed in SC No.53606/16 arising out of FIR No.437/2017, registered under Section 302/307 IPC at Police Station Sultan Puri.
2. As per the status report filed on behalf of the State, the statement of the complainant /petitioner was recorded on 07.02.2017 and cross-examination was also completed on the aforesaid date. Thereafter, statement of the IO/Inspector Ashok Kumar was recorded on 13.04.2017 and 01.12.2017.
3. An application seeking recall of the complainant and the Investigating Officer came to be filed on 24.05.2018. The same was

allowed by order dated 29.05.2018 and the aforesaid witnesses were allowed to be summoned.

4. Learned counsel for the petitioner has submitted that the witnesses were discharged after examination and cross-examination and the application was filed only to delay the trial. On the other hand, learned counsel for respondent No.2 has submitted that there are many contradictions in the statement of the complainant which could not be confronted earlier. He submitted that denial of one opportunity to cross-examine would cause grave prejudice to the case of the respondent/accused.

5. Respondent No.2/accused is facing trial for the offence punishable under Sections 302 and 307 IPC. The trial is still at the stage of recording of statement of accused.

6. The scope of Section 311 Cr.PC was considered by the Supreme Court in the case of P.Sanjeeva Rao v. State of A.P. reported as (2012) 7 SCC 56, wherein it was held as under:-

“20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs (2000) 10 SCC 430. The following passage is in this regard apposite: (SCC p.432, para 6)

“6. ...In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly

when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

(emphasis supplied)

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23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old..... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

7. In Natasha Singh v CBI reported as **(2013) 5 SCC 741**, while referring to its earlier decisions in Mir Mohd. Omar v. State of W.B¹, Mohanlal Shamji Soni v Union of India², Rajeswar Prasad Misra v State

¹ (1989) 4 SCC 436

² AIR 1991 SC 1346

of W.B³, Rajendra Prasad v Narcotic Cell⁴, P. Sanjeeva Roa (supra), T Nagappa v Y.R Muralidhar⁵, the Supreme Court held as under:-

“8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at “any stage” of “any enquiry”, or “trial”, or “any other proceedings” under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application

³ AIR 1965 SC 1887

⁴ 1999 6 SCC 110

⁵ (2008) 5 SCC 633

under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as “any court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure

justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same.”

8. The application under Section 311 Cr.P.C. already stands allowed by the trial court. I find no ground to interfere with the order passed by the trial Court.

9. Accordingly, the present petition is dismissed along with pending applications. The Trial Court is directed to summon the aforesaid two witnesses for their cross-examination which shall be done by the learned counsel for respondent No.2 on not more than two dates. Respondent No.2/accused shall not seek any adjournment.

10. Copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 12, 2019
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