

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.02.2020

+ **CRL.REV.P. 177/2019**

JITENDER KUMAR

..... Petitioner

versus

STATE OF NCT OF DELHI & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ritesh Bahri, Mr Vinesh Kumar
: and Mr Sarthak Sharma, Advocates

For the Respondent : Ms Meenakshi Chauhan, APP for State
: with Insp. Santosh, PS Krishna Nagar
: Mr K. C. Mittal, Mr Yuganish Mittal,
: and Mr Amit Prakash Shahi,
: Advocates for R-4.
AND

+ **CRL.REV.P. 532/2019**

HARISH & ORS.

..... Petitioners

versus

STATE & ANR.

..... Respondents

Through:

Advocates who appeared in this case:

For the Petitioner : Mr K. C. Mittal, Mr Yuganish
: Mittal, and Mr Amit Prakash Shahi,
: Advocates.

For the Respondent : Ms Meenakshi Chauhan, APP for State
: with Insp. Santosh, PS Krishna Nagar.
: Mr Ritesh Bahri, Mr Vinesh Kumar

: and Mr Sarthak Sharma, Advocates for
: R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present revision petitions impugning the order dated 30.01.2019 passed by the Learned Additional Sessions Judge-01, District East, Karkardooma Courts (hereafter 'the impugned order'), whereby the Learned ASJ had partly allowed the application, under Section 311 of the CrPC, filed by the accused persons to recall certain witnesses for examination. Whilst, the Court had allowed PW9 and PW10 to be recalled for their cross examination; it had rejected the prayer of the accused to recall the witnesses, PW5 and PW17.

2. CRL REV. P No. 177 of 2019 has been filed by the brother of the deceased, who claims that respondent nos. 2 to 4 are responsible for her death. He is also one of the witnesses for the prosecution. He contends that the Court had erred in passing the impugned order, wherein PW9 and PW10 were recalled for cross examination and had failed to appreciate that the application for recalling the witnesses was only a means to delay the trial, as is evident from the fact that the said application had been moved after thirteen years of the commencement of trial in the year 2005.

3. CRL REV. P No. 532 of 2019 has been filed by the accused. They are aggrieved by the impugned order to the extent that their application for recalling of the witnesses, PW5 and PW17 for cross examination has been rejected. They contend that the Court had failed to appreciate that the post-mortem report had been tampered with. Whilst, the said report records dried blood over the nostrils and mouth openings of the deceased, but, according to the accused, the same is not found in the colored photographs of the deceased. The accused claim that a false post-mortem report had been prepared and cross examination of PW17 and PW5 was essential to elicit the truth.

4. On 15.06.2005, a woman (the deceased- also sister of the petitioner in CRL REV. P No. 177 of 2019) was found hanging from the fan, at her matrimonial home and it was alleged by the family members of the deceased that the said incident was not a suicide and that the husband and the in-laws of the deceased (the petitioners in CRL REV. P No. 532 of 2019) had murdered her. With reference to the alleged matter, FIR No. 251/2005, under Sections 498A/304B/34 of the IPC, was registered with Krishna Nagar. Investigation was conducted and a charge sheet was filed. Sessions Case No. 1228/2016 is pending before the Learned Additional Sessions Judge. The evidence of the witnesses was recorded and the matter was set down for hearing of final arguments.

5. On various occasions during trial, the accused persons moved applications before the Trial Court for the inspection of the judicial records. On 19.12.2005 and 20.12.2005, the counsel for the accused

Urmila Sharma moved applications for inspection of the judicial record. On 18.01.2006, 05.04.2006, 02.05.2006, and on 05.09.2006, the counsel for the accused Banarasi Dass moved applications for the inspection of the judicial record. On 04.08.2009, 11.11.2009, 06.12.2012 and on 13.03.2013, the counsel for the accused, Harish, moved applications for inspection of the judicial records. On all the above-mentioned occasions, file inspection was allowed and the accused were given an opportunity to peruse the judicial records.

6. During the course of the final arguments, the accused persons moved an application on 03.10.2018, under Section 311 of the CrPC, for recalling of the witnesses PW5- ASI Nagender Singh, PW9-Ct Ompal (photographer), PW10- SI Ajeet Kumar (Crime Team Incharge) and PW17- Dr. Akansh Jhanjee (doctor deposing with reference to the post mortem report).

7. On 30.01.2019, the Court considered the application filed and noted that the accused persons had filed the said application mainly on the ground that coloured photographs of the dead body were allegedly not supplied to the accused persons and there were various discrepancies between the post-mortem report and the coloured photographs of the dead body already placed on record. It was contended on their behalf that due to non-supply of the coloured photographs, the said witnesses could not be effectively cross examined.

8. The Learned ASJ perused the judicial file and noted that the record shows that the examination-in-chief of PW5 (ASI Nagender Singh) was recorded on 18.08.2009 and he was cross examined at length on behalf of accused Harish on 03.09.2010, and on behalf of the accused, Banarsi Dass and Urmila on 08.12.2011. PW5 (ASI Nagender Singh) was one of the police officials who was present on 15.06.2005 and had seen the dead body of the deceased. On the request of the Ld. Addional PP, he was re-examined on 24.11.2012 and was cross examined at length on behalf of accused persons on 24.11.2012.

9. The Ld. ASJ noted that PW17-Dr. Akansh Jhanjee had appeared before the Trial Court and deposed in place of Dr. Rajiv Sharma, who had prepared the post-mortem report, since he was conversant with his hand writing. PW17 had been examined-in-chief and cross-examined on behalf of the accused Banarasi Dass and Urmila on 07.08.2012.

10. It is relevant to note that, thereafter, on request of the learned counsel of the accused Harish, PW17 was recalled for further cross examination; And, on 11.02.2013, PW17 was cross-examined on behalf of the accused Harish.

11. On the basis of the abovementioned facts, the Trial Court was of the opinion that PW5 and PW17 had been cross-examined at length by the accused persons and held that sufficient opportunity was given to the accused persons to cross-examine them. Accordingly, the application for recalling of PW5 and PW17 was dismissed.

12. With reference to PW9 and PW10, the Trial Court noted that PW9 (Ct Ompal) was examined-in-chief and cross-examined at length on behalf of the accused Harish on 22.12.2019. PW9 (Ct Ompal) was the photographer with Mobile Crime Team, East District and had taken photographs of the body of the deceased on 15.06.2005. However, he was not cross-examined on behalf of remaining accused persons, despite the fact that opportunity for the same was granted. The examination-in-chief of PW10, SI Ajeet Kumar was recorded and he was cross-examined on behalf of all three accused persons on 22.12.2009. On 15.06.2005, PW10 was posted as Incharge Mobile Team, East District and had seen the body of the deceased on the said date.

13. The Trial Court held that since the opportunity given to the accused persons to cross-examine PW9 and PW10, was not effectively availed by them, it would be apposite to allow the same in the interest of justice and fair adjudication. Accordingly, PW9 and PW10 have been recalled for further cross-examination on behalf of the accused persons.

Reasons and Conclusion

14. The post-mortem report was prepared by Dr. Rajeev Sharma on 15.06.2005. The said report mentions that there were dried blood deposits near both the nostrils and the mouth opening. Indisputably, the post-mortem report was a part of the chargesheet as submitted before the Trial Court. It is also not disputed that the coloured photographs of the body are part of the record.

15. Dr. Akash Jhanjhi had exhibited the post-mortem report since he knew Dr. Rajeev Sharma and was familiar with his hand writing. His examination-in-chief was recorded on 07.08.2012 and he was cross-examined on behalf of the counsel for the accused Banarasi Das and Urmila on 07.08.2012. It is material to note that he was recalled for further cross-examination by the counsel for the accused Harish on 11.02.2013 and was cross-examined.

16. The examination-in-chief of PW5 (ASI Nagender Singh) was recorded way back in 18.08.2009. He was cross-examined on behalf of the accused Harish on 03.09.2010 and on behalf of the accused persons Banarasi Das and Urmila on 08.12.2011. Several years have elapsed since PW5 and PW17 were cross-examined and this Court finds no infirmity with the decision of the learned ASJ in rejecting the application of the accused for recalling them for further cross-examination.

17. It is relevant to note that the incident allegedly took place on 15.06.2005. PW5 (ASI Nagender Singh) was one of the officials who had witnessed the dead body of the deceased on 15.06.2005. The charges against the accused were framed on 10.01.2007 and the matter was directed to be put for recording of the evidence on 20.03.2007. It is also relevant to note that the accused had, on several occasions, filed various applications and had also moved this Court resulting in considerable delay in the proceedings.

18. PW5 had been extensively cross-examined. The accused now seeks to re-examine him on the sole ground that they have been provided coloured photographs, which are in variance of the description of the dead body in the post-mortem report. The coloured photographs were always part of the record.

19. The original record had been inspected on behalf of the accused. It has been pointed out that the counsel for the accused had inspected the file several times. Nine such applications for inspection, which were allowed, have been placed on record. Thus, the premise that the accused persons were not aware of the coloured photographs or the evidence that was placed on record, is unsustainable.

20. The witness cannot be called upon to rely on memory after several years. The record is replete with instances which indicate that the accused have been attempting to delay the proceedings. This Court is unable to accept that the recalling of PW5 and PW17 for cross-examination at this stage would be in the interest of fair trial.

21. In view of the above, this Court concurs with the decision of the Trial Court in declining the request on behalf of the accused to recall PW5 and PW17 for further examination.

22. PW9 was examined on 22.12.2009. He had merely stated that on 15.06.2005, he was posted as Ct. Photographer at Mobile Crime Team, East District and on that date at about 9 a.m., he was informed to reach the spot. He stated that he had reached H. No. 3811, Shanti Moholla, Krishna Nagar, Delhi and a lady was found on the bed. He stated that

other officials were also present there and he had taken photographs of the dead body at the instance of the crime team incharge. He deposed that he had taken thirteen snaps of the spot from different angles. He also produced the negatives of the photographs and he testified with reference to the positives of the said negatives. The photographs are exhibited as Ex.PW9/A-1 to Ex.PW9/A-13. And, the negatives were exhibited as Ex.PW9/B-1 to B-13. PW9 was extensively cross-examined by the counsel for the accused Harish. After his cross examination was completed, opportunity was granted to the counsel for the other accused to cross-examine him but they did not do so.

23. PW10 was examined on 22.12.2009. He affirmed that on 15.06.2005, he was posted as the incharge of the Mobile Crime Team, East District. He stated that he was summoned to reach the spot at 08:45 a.m. Accordingly, he along with Crime Team officials had reached H. No. 3811, Shanti Mohalla, Street No. 11, Krishna Nagar. He testified that the IO Narender Singh was present there and so were several other persons. He stated that he saw the body of a female lying on the bed in the room built on the ground floor. The photographer took photographs of the dead body from different angles. The fingerprint professional tried to lift chance prints from the spot, but no chance print was found. He stated that after giving directions, he returned to office.

24. PW10 was also cross-examined by the learned counsel for the accused Harish. The other counsel were given an opportunity, but they did not avail the same.

25. It is clear from the record that sufficient opportunity was granted to the counsel for the accused to cross-examine the said witnesses and in fact, the counsel for one of the accused had cross-examined the said witness. It is also material to note that the records were also inspected by the counsel for the accused, Harish, on 11.11.2009.

26. The recalling of the said witnesses for further cross-examination at this belated stage, would not aid fair trial and would not be essential to the just decision of the case. As noticed above, their testimony was limited as the said witnesses cannot now be called upon to rely on their memory and answers the questions that may be posed to them.

27. In view of the above, the impugned order, to the extent it directs recalling of PW9 and PW10 for cross-examination, is set aside. Accordingly, CRL. Rev. P. No. 117/2019 is allowed and CRL. Rev. P. No. 532/2019 is dismissed.

VIBHU BAKHRU, J

FEBRUARY 24, 2020
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