

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

+ **CRL. M.C. 5868/2018 & CrI. M.A. 47743/2018**

Date of Decision: 17.02.2020

IN THE MATTER OF:

MONIS KHAN

..... Petitioner

Through : Mohd. Danish, Adv.

versus

VINOD KUMAR

..... Respondent

Through : Mr. T.A. Siddiqui and Mr. Shirien
Raza, Advs.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

1. The present petition is directed against the order dated 25.09.2018 passed by the Metropolitan Magistrate in CC No. 623630/2016 whereby the petitioner's application under Section 311 Cr.P.C. seeking recall of the complainant for cross-examination was dismissed.

2. Subsequently, the Addl. Sessions Judge vide order dated 27.10.2018 upheld the dismissal of petitioner's application filed under Section 311 Cr.P.C.

3. The petitioner is facing trial for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. On 29.02.2016, the Metropolitan Magistrate framed notice against the petitioner. An application under Section 145(2) of the NI Act was filed on behalf of the petitioner which came to be allowed on 10.08.2016. The case was fixed from time to time and finally vide order dated 30.10.2017, the petitioner's

right to cross-examine was closed and the matter was fixed for 11.01.2018. The petitioner moved an application under Section 311 Cr.P.C. on 06.12.2017 i.e. prior to the date fixed in the matter, however the same was dismissed on 25.09.2018.

4. Learned counsel for the petitioner submits that the cross-examination could not be done as on two dates i.e. 01.02.2017 and 17.04.2017, the Court was on leave the case was adjourned on the request of the complainant on two dates i.e. 30.11.2016 and 17.01.2017. The petitioner sought adjournment only twice. Learned counsel for the petitioner submits that the statement of the petitioner has been recorded and the defence evidence is yet to be led. He further submits that only one opportunity be granted to the petitioner to cross-examine the complainant.

5. Learned counsel for the respondent has supported the impugned order. He submits that the present application is filed in order to delay the proceedings.

6. I have heard the learned counsels for the parties and perused the entire case records.

7. The scope of Section 311 Cr.P.C. 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 MANU/SC/1505/1999 : (2000) 10 SCC 430. The following passage is in this regard apposite:

"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."

8. 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.B. reported as **(1989) 4 SCC 436**, Mohanlal Shamji Soni v. Union of India reported as **AIR 1991 SC 1346**, Rajeswar Prasad Misra v. State of W.B. reported as **AIR 1965 SC 1887**, Rajendra Prasad v. Narcotic Cell reported as **1999 6 SCC 110**, P. Sanjeeva Rao (Supra), T Nagappa v. Y.R. Muralidhar reported as **(2008) 5 SCC 633**, the Supreme Court held as under:-

"8. Section 311 Cr.P.C. 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 Cr.P.C., 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, Cr.P.C. 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 under Section 311 Cr.P.C. 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 Cr.P.C. 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."

9. Looking into the facts and circumstances of the case, the impugned order is set aside and the present petition is allowed, subject to payment of cost of Rs. 10,000/- by the petitioner out of which Rs. 5,000/- shall be paid to the complainant and Rs. 5,000/- shall be deposited with the "Delhi High Court Legal Services Committee" within a period of two weeks from the passing of the order.

10. The petitioner's application under Section 311 Cr.P.C. filed on 06.12.2017 is allowed. The trial court shall grant the petitioner an opportunity to cross-examine the complainant on one date only unless, in

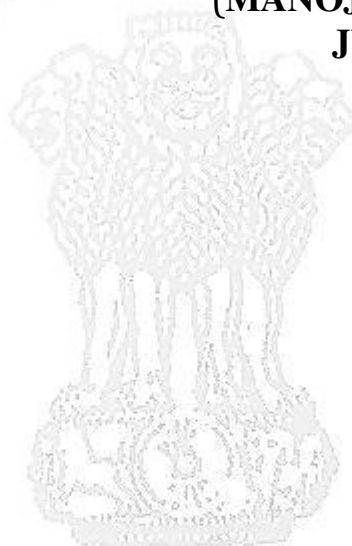
the opinion of the court, one more date is required for completion of the cross-examination. Learned counsel for the petitioner undertakes not to take any adjournment in this regard.

11. With the above observations, the present petition is disposed of along with the pending application.

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

(MANOJ KUMAR OHRI)
JUDGE

FEBRUARY 17, 2020
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