

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 405 of 2021

Order Reserved on : 02.07.2021

Order Delivered on : 09.07.2021

Yogesh Bajpai, S/o Durga Prasad Bajpai, Aged About 30 Years, R/o Gondpara, Police Station- City Kotwali, District- Bilaspur (C.G.)

---- Petitioner

Versus

State of Chhattisgarh, through Police Station- City Kotwali, Bilaspur, District- Bilaspur (C.G.)

---- Respondent

For Petitioner	:	Mr. Achyut Tiwari, Advocate.
For State/Respondent	:	Mr. Vikas Shrivastava, Panel Lawyer.

Hon'ble Shri Justice Narendra Kumar Vyas

CAV Order

1. The petitioner has filed this petition under Section 482 of the Cr.P.C. against the order dated 17.03.2021 (Annexure P/1) passed by First Additional Sessions Judge, Bilaspur, District- Bilaspur (C.G.) in Criminal Revision No. 36/2021 (Yogesh Bajpai Vs. State of Chhattisgarh), by which the order dated 27.10.2018 (Annexure P/2) passed by learned Judicial Magistrate First Class, Bilaspur, District- Bilaspur (C.G.) in Criminal Case No. 774/2013, has been affirmed and application filed by the petitioner under Section 311 of the Cr.P.C. has been rejected.
2. The brief facts as projected by the petitioner, are that a criminal case has been registered against the petitioner under Sections 294, 506 (Part-II), 323, 325, 332, 186 of I.P.C. for committing offence on 04.02.2011 at about 07:00 p.m. near Golbazar, Phool Chowk, P.S.- City Kotwali, Bilaspur, as the petitioner had used filthy language and threatened to complainant- Umakant Kaushik & Irfan Ul Rahim Khan.

Complainant- Umakant Kaushik police Constable & Irfan UI Rahim Khan Deputy Superintendent of Police posted at traffic police station, Bilaspur, were discharging their duties being public servants.

3. The learned trial Court vide its order dated 27.10.2018 has held that the accused has committed offence under Sections 294, 353 & 332 of I.P.C. and sentenced to undergo simple imprisonment for 0 day, 1 year & 2 years and fine of Rs. 500/-, 1000/- & 1000/- respectively and in default of payment of fine to undergo further simple imprisonment for 7 days, 15 days & 15 days respectively.
4. The petitioner preferred an appeal before learned Sessions Judge, Bilaspur in which, learned First Additional Sessions Judge, Bilaspur vide order dated 18.02.2020 in Criminal Appeal No. 274/2018 set aside the order of punishment passed by the trial Court on account that the cross-examination of witness & Irfan UI Rahim Khan has not been completed. Learned trial court has relied upon the incomplete evidence of the complainant and remanded the case with a direction to the learned trial court to give an opportunity to the petitioner to cross-examine the witness Irfan UI Rahim Khan. After remand, the matter was put to retrial. The petitioner filed an application under Section 311 of the Cr.P.C. after cross-examination of Irfan UI Rahim Khan, to recall both PW-1 Umakant Kaushik & PW-5- Lalit Kumar Dhritlahre for further cross-examination. It was contended in the application that the PW-1 & PW-5 though examined and cross-examined, but some question, which is relevant for adjudication of the trial, is required, therefore, they may be summoned as per provision of Section 311 of the Cr.P.C.
5. The learned trial court vide its order dated 24.02.2021 has rejected the application on the ground that the learned appellate court has remanded the case on the ground that witness Irfan UI Rahim Khan has not been cross-examined and without cross-examination, evidence should not have

been considered by the trial court while passing the judgment and accordingly, the application was rejected.

6. Being aggrieved with this order, the petitioner preferred a Criminal Revision No. 36/2021 before Sessions Judge, Bilaspur, which was heard by learned First Additional Sessions Judge, Bilaspur on transfer. The learned First Additional Sessions Judge, Bilaspur has rejected the Revision application stating that there is no irregularity and illegality in passing the order dated 24.02.2021. Thus, these orders have been challenged by filing the present Criminal Miscellaneous Petition under 482 Cr.P.C.
7. Learned counsel for the petitioner would submit that there is serious contradiction and omission in statement of PW-1 & PW-5, but some questions could not be asked from them, who are the main eye witnesses of the case, that is why when the matter was remanded back, the petitioner filed an application under Section 311 of the Cr.P.C. to recall them. He would further submit that the Revisional Court has also committed illegality in not calling PW-1 & PW-5 further recross-examination, as such, the application under Section 311 of the Cr.P.C. be allowed. The order of the trial court may be quashed and he may also be allowed for further cross-examination of PW-1 & PW-5. He had placed reliance upon the judgment passed by Hon'ble the Supreme Court in **The State Represented By the Deputy Superintendent of Police Vs. Tr. N. Seenivasagan**¹, which is extracted below:-

“13. In our view, having due regard to the nature and ambit of Section 311 of the CrPC, it was appropriate and proper that the applications filed by the prosecution ought to have been allowed. Section 311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the CrPC, 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 already examined and the Court shall summon and examine or recall and re-examine any such person “if his evidence

¹ 2021 (3) Scale 629

appears to it to be essential to the just decision of the case". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case. "

8. He would also place reliance upon the judgment passed by Hon'ble the Supreme Court in **V.N. Patil Vs. K. Niranjan Kumar & others**². The relevant para of the judgment is extracted below:-

"19. Indisputedly, the facts in the instant case are that the daughter of the appellant died an unnatural death on the intervening night of 2nd/3rd April, 2004 in Bangalore where she was living with the respondents who are facing trial under Sections 498A, 304-B, 302 read with Section 34 IPC and under Sections 4 and 6 of the Dowry Prohibition Act, 1961 and the trial is at the fag end of its closure and the case is listed for hearing.

20. At this stage, application came to be filed by Ld. Additional Special Public Prosecutor under Section 173(5) read with Section 311 CrPC for summoning the witnesses along with the concerned documents to adduce their evidence in connection with the second post mortem conducted on the body of the deceased and after perusal of the record, the factual statement has been recorded by the Ld. Trial Judge in paragraphs 9 & 10 as follows:-

"9. In connection with the same, at the very outset, on record it could be seen that it is contended that the said second postmortem is got conducted in J.J. Hospital, Mumbai. The second postmortem appears to have been made through the Worli Police, Mumbai by lodging the complaint thereat by the members of the family of the deceased, wherefore, at the very outset, it is not the postmortem having got made privately, as it is through the Police.

10. Notwithstanding as to whether the Worli Police have further continued the investigation or otherwise or directly connected to the instant case in hand, it is clear from the records as per Exhibits P-136, P-140 to P-142 which are available on record that the PW-44/Investigating

² AIR 2021 SC 1276

Officer had initiated the correspondence with the Worli Police as well as the Doctors of J.J. Hospital seeking for sending the copy of the second postmortem, which clearly goes to indicate that the very intendment prevailed with the PW- 44/Investigating Officer in corresponding with the said Worli Police, Mumbai and Mumbai Doctors in accordance with the Exhibits P-136 and P-142, reveals that the said copy of the second postmortem conducted at the J.J. Hospital, Mumbai, was required for the investigation by him in Bengaluru, by considering it as the part and parcel of his investigation.”

21. What had further transpired for summoning the witness along with the documents in connection with the second post mortem report has been noticed in paragraph 18 of the judgment of the Trial Court which is extracted hereunder:-

“18. It is also significant to note that, the Doctor by name Bhimappa Havanur having stated to have conducted the first postmortem at Bowring Hospital in Bengaluru, has turned hostile to the prosecution, according to the prosecution, by giving the two different contradictory and divergent opinions in connection with the cause of death, wherefore, now, it is equivalently incumbent upon this Court to determine and trace-out the real cause of death of the deceased through the medical experts only who have conducted the postmortem. Therefore, to make out the reality under the peculiar circumstances of the PW 27 having turned hostile to the prosecution by giving the contradictory and two divergent opinions, certainly the efforts being endeavoured to put in by the prosecution to summon the proposed witnesses along with the documents certainly need to be taken into consideration in the positive sense, only with an intention to see that the miscarriage of justice in any manner is prevented at any point of spell and juncture”.”

9. On the other hand learned State counsel would submit that there is no irregularity or illegality in the order passed by the both the courts below.

10. I have heard learned counsel for the parties and perused the documents placed on record.
11. For deciding the issue raised in this petition, it is necessary to apt explanation of provision of Section 311 of the 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 already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

12. From pleading of the parties and the material placed on record, it is quite vivid that the petitioner wants to fulfill his lacuna as he has stated in his application that there are serious contradictions and omissions in the statement of PW-1 & PW-5, which have been arisen after cross-examination of witness Irfan Ul Rahim Khan, some legal issues have been left during course of cross-examination of PW1 and PW5 . It is well settled by the Hon'ble Supreme Court in **State of Haryana Vs. Ram Mehar & others**³, that the lacuna of case either by Prosecution or defense cannot be fulfilled by exercising power conferred under Section 311 of the Cr.P.C. to the Courts. The Hon'ble Supreme Court has held as under:-

“40. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on

record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction.

41. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

42. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like

the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance.

43. In view of the proceeded analysis we allow the appeals, set aside the order passed by the High Court and restore that of the learned trial Judge. We direct the learned trial judge to proceed with the trial in accordance with the law.”

13. Hon'ble the Supreme Court in **V.N. Patil (Supra)** while affirming the judgment of the trial Court in para 21 of the judgment, has recorded the finding that Doctor by name Bhimappa Havanur having stated to have conducted the first postmortem at Bowring Hospital in Behgaluru, has turned hostile to the prosecution and the second postmortem conducted on body of the deceased, therefore, the witness doctor, who conducted second postmortem along with the concerned doctor, were necessary to throw light on the case, but, this is not the situation in the present case.
14. In the instant case, witnesses have been examined, cross-examined and credibility of the witnesses have also been tested before the trial court, therefore, the present petition filed by the petitioner for further cross-examination of the witnesses PW-1 & PW-5 seems to be an after thought story of defence to prolong the trial . Even otherwise, it is well settled by Hon'ble the Supreme Court that lacuna cannot be fulfilled in the garb of power conferred under Section 311 of the Cr.P.C., therefore, the trial court as well as the Revisional Court have not committed any irregularity or illegality in passing the orders, warranting interference by this Court.
15. In view of the above, the instant petition is liable to be and is hereby dismissed at motion stage itself.

Sd/-
(Narendra Kumar Vyas)
Judge