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

% Delivered on : 15th September 2021

+ **CRL.M.C. 2107/2021 and CRL.M.A.No.14182/2021**

SUSHIL ANSAL

..... Petitioner

Through : Mr.N.Hariharan, Sr. Advocate
with Mr.Tanveer Ahmed Mir,
Mr.Dhruv Gupta, Mr.Kartik Venu,
Mr.Saud Khan and Mr.Shivaz
Berry, Advocates.

versus

STATE OF NCT DELHI

..... Respondent

Through : Mr.Dayan Krishnan, Sr. Advocate
with Ms.Nandita Rao, ASC
Ms.Akashi Lodha and Ms.Gayatri
Virmani, Advocates for the State.
Mr.Vikas Pahwa, Sr. Advocate
with Ms.Raavi Sharma, Advocate
for complainant.
Smt.Neelam Krishnamoorthy in
person.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. (Through Video Conferencing)

1. This petition challenges the impugned order dated 02.09.2021 passed by the learned Trial Court in case FIR No.207/2016 registered at police station Tilak Marg titled *State vs Dinesh Chand Sharma* whereby an application of the petitioner under Section 311 Criminal Procedure Code (hereinafter referred as *Cr P C*) was dismissed.

2. It is the submission of the learned senior counsel for the petitioner that *PW38* Mr.Amit Roy, DCP is an important witness in the present

matter and the erstwhile learned counsel Mr.Siddharth Kashyap had chosen not to cross examine the said witness despite an opportunity being granted to him; but thereafter new counsel was appointed and after going through the record, he was of the view cross examination of PW38 is necessary, hence an application under Section 311 Cr P C was filed. Such application of the petitioner was dismissed by the learned Trial Court with the following reasoning:-

“Accused Sushil Ansal had been facing this trial for long. He had been represented by his counsel Sh. Siddhartha Kashyap till a new counsel had taken charge just recently at the time when final arguments are being addressed on behalf of the prosecution. It is pertinent to note that Sh. Siddhartha Kashyap is still his counsel as he is appearing for him along with the new counsel. Due opportunity to cross examine PW~38 was afforded to accused Sushil Ansal and a conscious decision was taken on his behalf to not to cross examine PW-38. The plea on behalf of the accused that he is entitled to a full opportunity to defend himself and accordingly seek further permission to cross examine PW-38 is baseless in view of the fact that the said full opportunity has already been granted to accused and availed by him. The plea of the applicant that the matter is pending for a considerable period of time and accused could not contemplate and consider that the matter require affirmative and positive cross examination of PW-38 appears to be baseless as pendency of matter for long rather provides ample time and opportunity to mull over the issue and take appropriate action.

The plea of the applicant that no prejudice would be caused to the prosecution is fallacious as affording further opportunity despite availing the same would. cause delay and thereby defeating the ends of justice. In judgement Shiv Kumar Yadav Vs GNCT (2016) 2 SCC 402, it was held by Hon'ble Supreme Court that :

"15 While advancement of justice remains the prime object a flaw, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent

particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in the court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross examination "

The change of counsel and the decision of the new counsel to cross examine any witness who was not cross examined by the previous counsel is no ground to exercise power u/s 311. CrPC for recalling the witness where due opportunity was afforded earlier.

Lastly this is a criminal trial and not a game where, if one party was afforded any opportunity for recalling any witness for valid reasons, the other party would ask for chance as a matter of right without any reason. Accordingly, considering the totality of the circumstances, this court is not inclined to exercise power u/s 311 CrPC to recall PW~38 as no justifiable grounds exists for the same. Application is accordingly dismissed."

3. It is the submission of the learned senior counsel for the petitioner initially the charge sheet was filed against Dinesh Chand Sharma, the Ahlmad of the Court against whom there were allegations of tempering and missing of the Court record, but later on supplementary charge sheets was filed. The second supplementary charge sheet was filed by DCP Amit Roy (PW38) but the petitioner was never arrayed as an accused by him and it was only in third supplementary charge sheet prepared and filed by Inspector R.S. Chauhan, the petitioner herein was summoned as an accused. Investigating Officer Inspector R S Chauhan who had charge sheeted the petitioner has since expired, hence it is argued PW38 is the

only Investigating Officer, who needs to be cross examined as to the seizure of such tempered documents and qua conspiracy. It is also submitted if the petitioner is allowed to cross examine PW38, it shall not cause any prejudice to the prosecution. It is further argued PW38 is a material witness as various documents relating to the petitioner were seized by him and even otherwise it is the duty casted upon the Court to safeguard the accused and allow him to examine and cross-examine the witnesses *per* Section 165 of the Indian Evidence Act. It is also submitted petitioner is 84 years of age and could not properly comprehend as to if the cross examination of PW38 was essential for the just decision of the case.

4. To buttress his arguments, the learned senior counsel for the petitioner has referred to *Rajaram Prasad Yadav vs State of Bihar* (2013) 14 SCC 461 which relates to the power of the Court under Section 311 Cr P C and its para No.17 is as under:-

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1 Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2 xxx

17.3 If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

17.4 The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5 to 17.14 xxx”

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5. It is thus argued the petitioner need an opportunity of only a day to cross examine PW38 so that entire facts be brought before the Court for *just decision* of the case. It is submitted there are charges of conspiracy against the petitioner besides other offence and he needs to rebut such charges by cross examining this witness.

6. The learned senior counsel for the petitioner has referred to an order dated 16.03.2021 in *Anoop Singh vs State* CrI.M.C.No.865/2021 wherein this Court had sustained the order dated 06.03.2021 passed by the learned Chief Metropolitan Magistrate, Patiala House Courts, Delhi in the present FIR allowing an application under Section 311 Cr P C to put certain documents, being formal in nature, to PW39. Hence, it is argued such an order be also passed in this petition too; moreso when admittedly PW39 was never cross examined on behalf of the petitioner by his earlier learned counsel.

7. The learned senior counsel for the State submitted the argument of the petitioner is nothing but a ploy to further delay the matter. He argued PW38 was examined in detail and his examination rather continued for 15 months running into 27 pages. He was cross examined by each accused except the present petitioner, to whom also an opportunity was granted, but his learned counsel Mr.Siddharth Kashyap made a *conscious decision* by choosing not to cross examine PW38.

8. Looking on the aspect of delay I may say though the present FIR was registered in the year 2006, yet the petitioner was summoned on 15.02.2008 on filing of 3rd supplementary chargesheet, which order dated

15.02.2008 was though challenged, but his revision petition was dismissed on 03.09.2009. The matter was then listed for framing of charge yet it could not be framed till the year 2014. Yet again revision was filed against charge but on 12.05.2017 such revision petition was also dismissed. On 05.03.2018 in W.P.(Crl) No.243/2018 a direction was rather issued to the learned Trial Court for expeditious trial and to pronounce the judgment by 30.11.2018. Admittedly, it was not done. Yet again on 04.12.2018 another direction was issued in that very petition to fix three dates of hearing per week and to conduct the trial in a time-bound manner. Per order dated 06.02.2020 passed by this Court in WP(Crl) No.243/2018 the matter is being monitored by this Court. In the light of above facts, we need to see the intention to file such application under Section 311 Cr P C at a deeply belated stage.

9. Some more dates are relevant. Admittedly, the prosecution evidence was closed on 06.04.2021. Defence evidence was closed on 25.08.2021; and final arguments started w.e.f. 27.08.2021. The prosecution argued the matter on 27.08.2021, 31.08.2021, 02.09.2021 and 03.09.2021 and thereafter the defence arguments of accused namely Dinesh Chand Sharma and other two accused started on 04.09.2021, 06.09.2021, 07.09.2021 and 08.09.2021 and matter is still being argued. It was when the final arguments had started, this application was moved.

10. To appreciate the concern of the petitioner, one needs to see as to what is the cause for the petitioner to move this application under Section 311 Cr P C. The petitioner has filed an application to cross-examine the Investigating Officer on specific allegations of conspiracy *by putting*

certain suggestions and to bring his attention to various material in the forms of statements under Section 161 Cr PC recorded by the main Investigating Officer and towards various necessary documents to be collected or deliberately omitted from being placed on record.

11. Needless to say, the power under Section 311 Cr PC is to be exercised for *strong and valid reasons*. One cannot claim any parity in deciding of an application under Section 311 Cr PC, hence order dated 16.03.2021 of this court in CrI.M.C.865/2021 is of no use to the petitioner herein. Even otherwise CrI.M.C.865/2021 notes the said application under Section 311 Cr PC. was moved when the prosecution evidence was still going on and it was admittedly prior to closure of prosecution evidence, but, whereas the present application is filed when final arguments had started. It was at this stage, a new counsel was appointed in the matter and he thought of cross-examining the Investigating Officer PW38 by putting him certain suggestions, hence prayer to recall him.

12. Admittedly, PW38 on the basis of documents filed/seized by him never considered the petitioner an accused and probably of this reason, the erstwhile counsel did not prefer to cross examine him. It appeared to be a *conscious decision* of the learned counsel for the petitioner, considering the nature of evidence against him. Not to repeat, his counsel Mr.Siddharth Kashyap did not cross examine as many as 18 witnesses viz., he rather adopted the cross examination by other counsels qua PW7, PW30 and PW32 and preferred not to cross examine PW3, PW4, PW5, PW9, PW12, PW15, PW18, PW22, PW34, PW35, PW36, PW37, PW38,

PW39 and PW40. Thus, to recall PW38 to put suggestions to him as his earlier learned counsel failed to do so cannot be considered a valid ground for exercise of discretion under Section 311 Cr P C, especially, in the wake of delay referred to above. Further no necessary documents as alleged in para 10 above were brought in defence evidence either by the petitioner.

13. In *State (NCT of Delhi) vs Shiv Kumar Yadav & Another* (2016)2 SCC 402 the Court held as follows:-

“11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.”

14. In *State of Haryana vs Ram Mehar* (2016) 8 SCC 136 the Court has held:-

“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.

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. xxx Hence, we reiterate the necessity of doctrine of balance.”

15. In *Girish vs State of UP* 2020 SCC OnLine All 1063 and in *Veerendradas Bairagi vs Shreekant Bairagi* 2019 SCC OnLine MP 7006 the Court held the subsequently engaged counsel cannot seek one more opportunity as a matter of right to further delay the matters. Rather the court held :-

“9. In the present case, it appears from the application filed under section 311, Cr.P.C. that request for re-

examination has been made solely on the ground that Senior Counsel has been engaged in place of a Junior Counsel as the Junior Counsel, according to the petitioner, has not conducted the cross-examination of witnesses in an effective manner. However, in the light of the legal position, as discussed above, it is certainly not within the scope of section 311 Cr.P.C. to countenance such a prayer. No illegality or perversity has been committed by the trial Court in passing the impugned order.”

16. Thus the consistent view of this Court is a mere change of counsel would not suffice to recall witness to put certain suggestions in the manner, the new counsel desires. The petitioner had engaged earlier counsel of his choice. He made a decision not to cross-examine, not one but 18 witnesses, probably, because the petitioner is facing charge of conspiracy only, and hence such decision viz *not to cross-examine 18 witnesses* cannot be said to an inadvertent act but may be a part of his strategy. Since considerable delay has taken place, the plight of victim, also cannot be ignored. The petition being devoid of merits is thus dismissed. Pending application, if any, also stands disposed of.

YOGESH KHANNA, J.

SEPTEMBER 15, 2021

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