

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No. 3010 of 2022

1. Gunanidhi Naik

2. Sachidananda Naik

....

Petitioners

Mr. A.K. Nath , Advocate

Versus

State of Odisha (Vigilance)

....

Opposite Parties

Mr. N. Moharana, ASC

CORAM:

JUSTICE SAVITRI RATHO

ORDER

10.11.2022

Order No.

01.

(Through hybrid mode)

1. This application under Section 482 Cr.P.C. has been filed challenging the order dated 21.09.2022 vide Annexure-1 rejecting the application of the petitioners filed under Section 311 of the Cr.P.C., to recall P.W.1 for cross-examination.

2. Learned counsel for the petitioners submits that P.W.1 had been examined on 02.03.2020 , but could not be cross-examined on that day as learned counsel for the petitioners was ill.

3. Mr. Moharana, learned Additional Standing Counsel (Vigilance) opposes the application submitting that the counsel for the petitioners had declined to cross examine the witness when he was examined on 02.03.2020 and the application under section – 311 Cr.P.C. had been filed after a delay of two years and no reasons for filing the petition after such a long delay were cited in the application nor were the questions which were proposed to be asked to P.W.1 mentioned in the application. As it

was apparent that the application had been filed only to protract the trial, the same had been rightly rejected.

4. Perusal of the petition under Section 311 of Cr.P.C. which is Annexure-2 to this application reveals that no reasons have been cited for the delay in filing the application. It has been averred in the petition that there are serious contradictions have been noticed in the statement of the said witness in his statement recorded during investigation and his evidence in court for which the accused wanted to put some material relevant questions to confront him but the questions proposed to be asked to P.W.1 had not been mentioned in the petition filed under Section 311 of Cr.P.C. Although Section – 311 Cr.P.C., does not mandate that the questions proposed to be asked to a witness sought to be recalled, should be mentioned in the application, but giving a list of such questions would enable the Court to decide if the questions are relevant or frivolous and if failure to ask such questions to the witness would prejudice the defence. Valuable time of the court would also be saved as it would be able to cull out the irrelevant and unnecessary questions and confining the cross examination to relevant questions only.

5. At this juncture, it would be apposite to refer to the provisions of Section - 311 Cr.P.C. and Section 138 of the Evidence Act and to some of the decisions of the Supreme Court on this point.

Section 311, Code of Criminal Procedure

*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.

Section 138, Evidence Act

Order of examinations- witnesses shall be first examined-in- chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re- examination, the adverse party may further cross-examine upon that matter.

From a careful reading of the provision of Section – 311 of the Cr.P.C., it is apparent that the trial court has been given wide power for recalling a witness for cross examination or re examination, provided the Court feels it is necessary for a just decision. This power is available to the Court at any stage in any inquiry or trial or other proceeding. The only requirement is that it must be necessary for a just decision. Therefore such power has to be necessarily exercised judicially and with extreme care and caution.

Section 138 of the Evidence Act, prescribes the order and manner of examination of and re-examination of a witness and is therefore

relevant while considering an application under Section – 311 of the Cr.P.C.

6. On the question of delay in filing an application under Section – 311 of the Cr.P.C, in the case of ***P. Sanjeeva Rao vs. State of Andhra Pradesh*** reported in ***(2012) 7 SCC 56 : AIR 2012 SC 2242***, the Supreme Court has held as follows:

...“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. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, 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.”

In the case of ***Natasha Singh vs. C.B.I.*** reported in ***(2013) 5 SCC 541***, the Supreme Court has considered the scope and object of Section – 311 Cr.P.C and held as follows :

“...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.”

In the case of ***Rajaram Prasad Yadav vs. State of Bihar*** reported in **(2013) 14 SCC 461**, the Supreme Court has formulated some principles to be borne in mind while dealing with applications under Section – 311 Cr.P.C. and held as follows:

“...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:

17.01 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?

17.02 The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.03 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.

17.04 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.

17.05 The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.06 The wide discretionary power should be exercised judiciously and not arbitrarily.

17.07 The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.08 The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.09 The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10 Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

17.11 The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12 The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13 The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14 The power 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

7. In the present case, the learned counsel for the petitioners has not been able to raise any tenable grounds for setting aside the impugned order. The application under Section – 311 Cr.P.C has been filed two years after P.W 1 had been examined and his cross examination declined

and the questions proposed to be asked to P.W.1 have not been mentioned in the petition. But considering the fact that in this case the accused is facing trial for commission of offences under Section 13(2) read with Section 13(1)(d)/7 of the Prevention of Corruption Act and after March, 2020 there was disruption in Court work as well as normal life for almost two years due to the Covid-19 pandemic, and keeping in mind the scope of Section – 311 of the Cr.P.C., and the decisions of the Supreme Court referred to above, I am of the view interest of justice would be served if liberty is granted to the petitionersto file a fresh application under Section- 311 Cr.P.C. mentioning the questions which he wants to put to PW-1. If such an application filed by the 25.11.2022, the same shall be considered by the learned trial court on its own merit and in accordance with law, without being prejudiced by the earlier order of rejection.

8. The CRLMC is disposed of with the aforesaid observation.
9. Urgent certified copy be granted on proper application.
10. Free copy of the order be handed to Mr. N.Moharana, learned Additional Standing Counsel (Vigilance).

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(Savitri Ratho)
Judge

Sangram