

THE HONOURABLE DR. JUSTICE D.NAGARJUN

CRIMINAL REVISION CASE No.502 of 2022

ORDER:

This Criminal Revision Case is filed to set aside the orders dated 19.04.2022 in Criminal Miscellaneous Petition No.120 of 2022 in C.C.No.7 of 2019, wherein the learned I Additional special Judge for trial of SPE and ACB Cases, Hyderabad has dismissed the petition filed by the prosecution under Section 311 of the Code of Criminal Procedure was dismissed.

2. The facts in brief as can be seen from record available before the Court are as under:

a) The State represented by Special Public Prosecutor for CID i.e., the petitioner-complainant has filed a petition under Section 311 of the Code of Criminal Procedure to recall PWs 12 to 14 contending that after the case was entrusted to her she found that when the witnesses were produced before the Court by the previous Special Public Prosecutor certain aspects in respect of procedure to be followed by the SSA, in respect of issuance of cheques and

disbursement of funds under SSA Scheme, specially for computerization of 1000 schools has not been elicited. It is further submitted that the main investigating officer (LW26), who has conducted entire investigation is dead. Though PW21, the Police Officer, who has filed charge sheet was examined, the procedures involved in sanction of funds and issuance of cheques, misappropriation in respect of SSA under computerization of 1000 schools could not be elicited, thus, prayed to recall and issue summons to PWs 12 to 14 in the interest of justice.

b) To the above said petition the respondent-accused No.4 has filed counter alleging that case is coming up for defence evidence and the petition filed by the prosecution is at belated stage and recalling the witnesses at this stage amounts to filling up lacunae by the prosecution and hence, prayed to dismiss the petition.

c) On hearing both sides, the trial Court has dismissed the petition on 19.04.2022 on the ground that the petitioner was filed with inordinate delay and also appears to have been intended to fill up lacunae and that change of

counsel or incompetence of earlier counsel is not a ground to recall a witnesses, who were already examined. Aggrieved by the same, the petitioner – complainant has filed this criminal revision case, on the following grounds:

- i) The procedure of withdrawal of the amount and other aspects pertaining to the official duties of the persons involved in the scheme, which is crucial to prove the case, was not elicited from the witness and without which the very purpose of trial would be defeated.
- ii) The main investigating officer (LW26), who conducted investigation died and the other investigating officer (PW21), who filed charge sheet has not deposed regarding the procedure involved in sanction of funds and issuance of cheques, misappropriation that took place in SSA scheme under computerization of 1000 schools, though the said material was collected during the course of investigation.
- iii) Delay in filing the petition is not the material but the material evidence is not placed before the Court through the witnesses.

3. Learned counsel for the Respondents/accused Nos. 3 and 4 have filed counter affidavit contending that the evidence of PWs 12 and 13 were recorded on 05.07.2013 and whereas the evidence of PW14 was recorded on 04.09.2017 and the application to recall these witnesses was filed nearly after 5 years from the date of closure of evidence of PW14 and after 9 years of closing the evidence of PWs 12 and 13, as such Criminal Miscellaneous Petition No.120 of 2022 in C.C.no.7 of 2015 is not maintainable and thereby the order passed by the trial Court is perfectly valid, just and unassailable. It is further submitted that the reasons assigned by the revision petitioner is not in consonance with the parameters to exercise the jurisdiction under Section 311 of the Code of Criminal Procedure. The ground that earlier counsel has not elicited any of the witnesses about the procedure of withdrawal of the amount and other aspects cannot be a ground that it is nothing but filling up lacunae. It is further submitted that the respondents retired from service long back and suffering with various health problems. The Honourable Supreme Court in catena of decisions opined that the

Court shall satisfy that to render just decision alone, the recall shall be allowed. But there are no warranting circumstances to recall the witnesses in the present case. The issue is relating to 2008 and even after lapse of 14 years, there is no finality in the above issue and on one issue or the other, the matter is being dragged by the prosecution and the respondents are suffering with mental agony and hardship and finally prayed to dismiss the present criminal revision case.

4. Heard Sri T.V. Ramana Rao, learned Additional Public Prosecutor for the Petitioner as well as Sri Ajay Kumar Nerella, learned counsel for the respondents-accused and perused the record.

5. Now the point for determination is:

“Whether the orders dated 19.04.2022 in Criminal Miscellaneous Petition No.120 of 2022 in C.C.No.7 of 2019 passed by the learned I Additional special Judge for trial of SPE and ACB Cases, Hyderabad, can be quashed under Section 482 of the Code of Criminal Procedure?

6. According to the learned Special Public Prosecutor for ACB after examining about 20 witnesses new Public Prosecutor was entrusted the case record recently and she has gone through the record and evidence placed before the court and realized that certain material and crucial points were not brought on record by PWs 12 to 14, who were supposed to explain about the SSA Scheme in computerization of 1000 schools. It is also submitted that the main investigating officer, who was supposed to speak about the procedure was no more and thereby PW21, who was produced as the investigating officer is not the main investigating officer and therefore, the procedure in respect of sanction of funds, issuance of cheques, duties of various officers, disbursement of funds under SSA Scheme, misappropriation that took place in SSA under computerization of 1000 schools has not been brought on record.

7. The trial Court on hearing both sides, has observed that the petition under Section 311 of the Code of Criminal Procedure was filed with an inordinate delay after

examination of PWs 12 to 14 and that the petition was filed to fill up lacunae. As rightly observed by the trial Court, there is inordinate delay in filing petition under Section 311 of the Code of Criminal Procedure after examination of PWs 12 to 14, who were sought to be recalled. However, it is settled legal proposition that even if there is delay in filing an application, if the reason is properly explained as to cause for the delay, then it cannot be a ground for dismissal of the petition. In the case on hand, the previous prosecutor, who has conducted the case allegedly could not elicit certain facts, through the witness, which are available on record. The new prosecutor on perusal of the case records including the depositions realized that certain facts in respect of SSA Scheme of computerization of 1000 schools and details in respect of giving cheques have not been brought on record. It is not the case of the respondents – accused that after new prosecutor has taken charge also there was inordinate delay.

8. On account of change of prosecutor only, new prosecutor could realize that certain facts, which are

already on record, were not placed before the Court, as such, it cannot be said that there is a delay in filing the petition. Hence, though there is delay in filing the petition from the date of examination of PWs 12 to 14, the delay is properly explained. Therefore, delay cannot be a ground for dismissal of the petition under Section 311 of the Code of Criminal Procedure.

9. The procedure of disbursement of funds in respect of computerization of 1000 schools is mentioned in the charge sheet. That part of evidence should have been elicited from PWs 12 to 14, who are Joint Director in Treasuries and Accounts Department (under suspension), IAS Officer (retired) and Assistant Accounts Officer in Family Welfare Department respectively. The prosecution is intending to produce the evidence in respect of the procedure ought to have been followed by the accused. In any case, the prosecution does not want to introduce any new facts, which are not on record. The prosecution is not intending to fill up lacunae as contended by the learned counsel for the accused.

10. It is to be noted that the Court has got ample powers to call for any witness for examination and re-examination in order to find out the truth. Similarly, the respondents – accused cannot take advantage of incompetence of the prosecution in escaping the liability, in case, if really the respondents – accused have committed the offence.

11. The Honourable Apex Court in **Godrej Pacific Tech. Ltd. vs. Computer Joint India Ltd.**¹, held as under:

“8. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code

¹ 2008 (3) R.C.R (Criminal) 897

and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of any inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

9. *As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the*

evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be 'filling of loopholes'. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

10. *The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own*

witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in Jamatraj Kewalji Govani v. State of Maharashtra [AIR 1968 SC 178 : (1967) 3 SCR 415].”

11. The above position was highlighted in Zahira Habibullah Sheikh and another v. State of Gujarat and others [(2006) 3 SCC 374].

12. In the background facts of the case we are of the view that the trial court ought to have permitted the prayer of the appellant. That being so, the rejection of the prayer by the trial court was not proper and the High Court should not have declined to interfere.”

12. In **Varsha Garg v. The State of Madhya Pradesh and others**², the Hon’ble Supreme Court held as under:

“41 Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on Swapan Kumar (supra), a two judge Bench

² 2022 Live Law (SC) 662

decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in Swapan Kumar (supra) observed:

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.¶ In the present appeal, the argument that the application was filed after the closure of the evidence of the prosecution is manifestly erroneous. As already noted above, the closure of the evidence of the prosecution took place after the application for the production of

the decoding register and for summoning of the witness under Section 311 was dismissed. Though the dismissal of the application and the closure of the prosecution evidence both took place on 13 November 2021, the application by the prosecution had been filed on 15 March 2021 nearly eight months earlier. As a matter of fact, another witness for the prosecution, Rajesh Kumar Singh, was also released after examination and cross-examination on the same day as recorded in the order dated 13 November 2021 of the trial court. 42 The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in Zahira Habibulla H. Sheikh (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:

43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of

justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.¶ (emphasis supplied) Further, in Zahira Habibullah Sheikh (5) (supra), the Court reiterated the extent of powers under Section 311 and held that:

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The

determinative factor is whether it is essential to the just decision of the case.

The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. (emphasis supplied) 43 The Court while reiterating the principle enunciated in Mohanlal Shamji Soni (supra) stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, any court, at any stage, or any enquiry or trial or other proceedings, any person and any such person clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary

steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

13. In **State represented by the Deputy Superintendent of Police v. Tr.N.Seenivasagan**³, wherein the Honourable Supreme Court held as under:

“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

³ 2021 (2) RCR (Criminal) 265 : AIR 2021 SC 2441

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 CrPC 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 CrPC 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.” (emphasis in original)”

15 In the present case, the prosecution has sought to produce a copy of the relevant document pertaining to the approval granted by the Board of TANGEDCO on the record and to have it marked as an exhibit in the evidence, for which purpose PWs 1 and 11 were sought to be recalled. In its applications, the prosecution noted that these witnesses were required to mark the relevant document, which was crucial for the decision of the case since the respondent had taken a defense that this document had been signed by the Chairman of TANGEDCO without the Board’s approval. In explaining the delay in filing the applications, the prosecution noted that it was due to the transfer of Special Public Prosecutor who was conducting the case.”

14. In **Seva Swarna Kumari @ Kumaramma and others v. The State of Andhra Pradesh represented by its Public Prosecutor**⁴, the High Court of Andhra Pradesh has held as under:

“11. The said reasoning of the learned Magistrate is not sustainable. In similar circumstances, in Crl.Petition No.6091 of 2020 on which reliance is placed, a learned Judge of this Court, set aside the order passed by the Trial Court in rejecting an application filed under Section 311 Cr.P.C., to recall the witnesses therein. In the said case, as the Senior Counsel was held up before the other Court and could not attend for cross examination of the prosecution witnesses, the evidence was closed. Seeking to recall the witnesses, a petition was filed and the same was dismissed. The learned Judge quashed the said order while holding, inter alia, as follows: “Cross examination of a witness in a criminal case is an important part of trial and it is only means to elicit truth from the witness to prove the innocence of the accused. If, such right is denied, the petitioners/accused will be put to serious loss

⁴ Criminal Petition No.4390 of 2022 dated 18.08.2022

and it amounts to denial of fair trial. If, it is purely on account of negligence of the accused, certainly such denial is justifiable. The witness was absent on several occasions as stated above and on account of absence of the witness P.W.17, cross examination could not be completed. Merely because he is an official witness, the Rules of the Court cannot be relaxed and he is on par with any other witness. Therefore, denial of an opportunity to cross-examine the witness would cause serious prejudice to the rights of the petitioners/accused. According to Section 311 Cr.P.C., 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 7 recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. Section 311 Cr.P.C contains two limbs. The first limb is discretion of the Court and the second limb does not confer any discretion and it is obligatory for the Court to summon, recall and re-examine a

witness, if the Court finds that the evidence of the proposed witness is necessary to decide the real controversy between the parties, effectively. But, here, the Trial Court denied the opportunity to cross-examine the witness and it is against the principles of fair trial, since, fair trial is a fundamental right guaranteed under Article 21 of the Constitution of India.” 12. This Court is of the considered opinion that the above said decision aptly applies to the facts of the present case. At this juncture, it may be appropriate to refer to some of the principles laid down by the Hon’ble Supreme Court in *AG v. Shiv Kumar Yadav and Others*³ which are to be kept in mind for exercising power under Section 311 Cr.P.C., and the relevant to the present context are: a) The exercise of widest discretionary power Under Section 311 Code of Criminal Procedure should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated; b) The wide discretionary power should be exercised judiciously and not arbitrarily; c) The object of Section 311 of Code of Civil Procedure

simultaneously imposes a duty on the court to determine the truth and to render a just decision.”

15. In view of the principle laid down in the above said authorities, it is evident that the trial Court ought to have given an opportunity for the prosecution to recall PWs 12 to 14 for further chief examination to prove the alleged offence against the respondents – accused.

16. Accordingly, the Criminal Petition is allowed and thereby orders dated 19.04.2022 in Criminal Miscellaneous Petition No.120 of 2022 in C.C.No.7 of 2019, wherein the learned I Additional special Judge for trial of SPE and ACB Cases, Hyderabad is hereby quashed. The trial Court is directed to permit the petitioner-complainant (prosecution) to recall PWs 12 to 14 and complete the evidence within three weeks from the date of receipt of the order. The trial Court shall proceed with the case, uninfluenced by the observations and comments made by this court in this order.

As a sequel, the miscellaneous Petitions, pending if any, shall stand closed.

Date: 20.01.2023
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DR. D.NAGARJUN, J