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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 02nd May, 2022

+ CRL.M.C. 1203/2022 & CrI.M.A. 5222/2022 (*stay*)

DR. PRADEEP DUTTA Petitioner

Through: Mr. Rahul Sharma, Ms. Jyoti
Dutt Sharma, Mr. C.K. Bhatt,
and Mr. Sparsh Chaudhary,
Advocates.

versus

STATE (NCT OF DELHI) & ORS Respondent

Through: Ms. Meenakshi Dahiya, APP
for the State with SI Vinod
Bhati, PS- Greater Kailash-I.
Mr. Rajiv Kumar Garg with
Mr. Aayush Agarwal,
Advocates for R-2 to 5-
Accused.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

The proceedings in the matter have been conducted through hybrid mode [physical and virtual hearing].

1. By way of the present petition under Section 482 of the Code of Criminal Procedure, 1973 [hereinafter, "CrPC"], the petitioner assails an order dated 04.12.2021, passed by the learned Metropolitan Magistrate (South East), Saket Courts, New Delhi [hereinafter,

“MM”] in proceedings arising out of FIR No. 34/2002, dated 04.02.2002, registered at Police Station Greater Kailash-I, under Sections 341, 323, 149 and 34 of the Indian Penal Code, 1860 [hereinafter, “IPC”].

2. The respondent Nos. 2 to 5 herein are the accused in the subject FIR, which was registered at the instance of the petitioner herein. By the impugned order dated 04.12.2021, the MM has rejected an application filed by the petitioner under Section 311 of the CrPC for summoning of two additional witnesses on behalf of the prosecution.

Facts

3. The petitioner and the respondent Nos. 2 to 5 were neighbours. The petitioner is a doctor by profession. The FIR concerns an incident which is alleged to have taken place on 30.01.2002 at 9:50 AM. The petitioner claims to have gone to the residence of the respondent Nos. 2 to 5 with a process server to serve summons upon them in connection with a writ petition filed by the petitioner’s mother, Mrs. Roma Dutta before this Court. The petitioner further states that the process server informed him that the addressees have refused service of summons, following which he was slapped and kicked by the respondent Nos. 2 to 5 and some other persons. His clothes and spectacles were damaged. He was thereafter dragged inside the premises of the respondent Nos. 2 to 5 and beaten up. He was also later pushed onto the driveway. The petitioner made further complaints in this regard to the police authorities on 30.01.2002, 04.02.2002 and 04.03.2002.

4. A cross-FIR [FIR No. 33/2002], dated 04.02.2002, was also registered in respect of the same incident against the petitioner under Sections 415 and 427 of the IPC, at the instance of the respondent Nos. 2 to 5 herein.

5. Chargesheets have been filed in both the FIRs, and trials are in progress. In the course of the trial arising out of FIR No. 33/2002, the petitioner examined defence witness, including DW-2- Hasib Akhtar [hereinafter, "Akhtar"] and DW-3-Bijender Chauhan [hereinafter, "Chauhan"]. Both of them were petitioner's assistants, when the alleged incident took place. They deposed as to their presence at the venue, when the incident in question took place, and gave details thereof in their respective testimonies.

6. In FIR No. 34/2002, the petitioner, his wife [Mrs. Parswati Dutta], and his daughter [Ms. Esha Dutta], have been examined as prosecution witnesses [PW-1, PW-2 and PW-3 respectively]. The petitioner [PW-1], during his examination in chief, on 24.07.2009, deposed that he heard the voice of his wife and two assistants when he was in the premises of the respondent Nos. 2 to 5. He named Chauhan and Akhtar as the two assistants in question. Mrs. Parswati Dutta [PW-2] deposed on 24.07.2009 that she was informed about the incident by Akhtar and Chauhan. Ms. Esha Dutta [PW-3] has also deposed on 28.11.2017 to the effect that Akhtar and Chauhan went alongwith her mother to the alleged venue of the incident to help her father.

7. During the course of trial, the petitioner moved an application under Section 311 of the CrPC, dated 24.09.2016, in proceedings arising out of FIR No. 34/2002, seeking summoning of three additional prosecution witnesses, namely, his mother Mrs. Roma Dutta, Chauhan and Akhtar. In support of the application, as far as Akhtar and Chauhan were concerned, the petitioner contended that the Investigating Officer [hereinafter, “IO”] had not made them witnesses in the chargesheet deliberately, although they were eye witnesses to the incident in question. The application was rejected by an order dated 30.11.2016, wherein the MM noted that the application was not forwarded by the learned Additional Public Prosecutor [hereinafter, “Prosecutor”] for the State.

8. The petitioner thereafter made an application under Section 302 of the CrPC, seeking permission to appoint his own advocate, to assist the Prosecutor in conducting the trial. This application of the petitioner was allowed by the MM *vide* an order dated 01.11.2017 noting that, in fact, it was an application under Section 301(2) of the CrPC, and that the Prosecutor had not raised any objection against the assistance which may be given by the complainant, through his counsel.

9. On 30.03.2019, in the course of examination of the IO, the MM deferred further examination, noting the apprehension of the Prosecution that the witness was intentionally deposing falsely on some consideration being received from the respondent Nos. 2 to 5- herein.

10. The petitioner thereafter filed a second application under Section 311 of the CrPC for summoning of Akhtar and Chauhan as prosecution witnesses. This application was filed on 12.11.2021, which was, in fact, also endorsed by the Prosecutor on behalf of the State.

11. The application has been rejected by the MM vide the impugned order dated 04.12.2021, with the following observations:-

“As is reflected from the language of the above said provision it is obligatory on the part of the court to summon the witness in case his evidence appears to be essential for just decision of the case. The power is circumscribed by the principle that the evidence to be obtained must be essential for the just decision of the case.

In the present case the allegations are to the effect that the accused persons have in furtherance of their common intention wrongfully restrained the complainant and have voluntarily caused hurt to the complainant.

To prove these allegations the prosecution has examined the complainant as PW1, his wife as PW2 and his daughter as PW3. All of these witnesses have deposed regarding the incident and therefore the testimony of the proposed witnesses, in view of this court, is not necessary for the just decision of the case. Even otherwise the application has been made with a significant delay of about four years and if allowed, the same shall cause grave prejudice to the accused persons by violating their right of expeditious trial. It is also relevant to mention that the case in this court is pending since 11.05.2004 and this further precludes the court from granting the relief sought.

Accordingly, the instant application is dismissed.”

Submissions

12. Mr. Rahul Sharma, learned counsel for the petitioner, submits that the examination of the aforesaid witnesses is required as they were eye witnesses to the said incident. He submits that, although the names of these witnesses were not included in the list of the witnesses filed by the prosecution, their evidence is essential for the adjudication of the case, and that there is no bar under Section 311 of the CrPC to the summoning of additional witnesses in such an eventuality.

13. Mr. Sharma assails the finding of the MM as to delay by reference to details of the examination and cross-examination of the prosecution witnesses in the present case, as enumerated in paragraph 2(xi) of the petition. It is evident therefrom that the petitioner (PW-1) was examined-in-chief on 24.07.2009 and cross-examined only on 23.05.2015, whereas his wife (PW-2) was also examined-in-chief on 24.07.2009 and cross-examined on 04.05.2016. The petitioner's daughter (PW-3) was examined-in-chief on 28.11.2017 and cross-examined on 30.01.2018. As far as the other prosecution witnesses are concerned, they were examined and cross-examined on the same date. Mr. Sharma submits that, in such circumstances, no part of the delay in adjudication of the case can be attributed to the petitioner and, in fact, it is at the instance of respondent Nos. 2 to 5 that the trial is getting delayed.

14. Ms. Meenakshi Dahiya, learned Additional Public Prosecutor for the State, supports the case of the petitioner, and reiterates that the application dated 12.11.2021, on which the impugned order was passed, was duly endorsed by the Prosecutor before the MM also. She

draws my attention to the fact that the proposed witnesses were named by the petitioner in his examination in chief as far back as in 2009. The only caveat added by Ms. Dahiya is that the proposed witnesses be summoned as prosecution witnesses for examination by the Prosecutor, and that the petitioner's counsel would not ordinarily be permitted to examine or cross-examine the witnesses.

15. Mr. R.K. Garg, the learned counsel for the respondent Nos. 2 to 5- accused, in contrast, opposes the petition on the following grounds:-

A. Mr. Garg submits that the subject application, which was filed in 2021 i.e., 19 years after the registration of the FIR, and around 18 years after the filing of the chargesheet, is grossly delayed.

B. He submits that the present application at the instance of the complainant is not maintainable. Although the petitioner was granted permission to assist the prosecution, Mr. Garg submits that the present application for summoning of additional witnesses could not have been filed by the petitioner. In support of this submission, he relies upon the judgment of the Supreme Court in *Rekha Murarka vs. State of West Bengal and Anr*¹.

C. Mr. Garg emphasises that the proposed prosecution witnesses were not named by the petitioner in his complaint to the police authorities, nor in the FIR, which was registered by the police. He also submits that they have not been named in the chargesheet as witnesses.

¹ (2020) 2 SCC 474

D. Mr. Garg further submits that the petitioner's first application under Section 311 of the CrPC, having been dismissed by the MM *vide* an order dated 30.11.2016, the present application was not maintainable. He has handed over a copy of the application of the petitioner dated 12.11.2021, to demonstrate that the petitioner has failed to disclose the fact that he had unsuccessfully filed an application for the same purpose on an earlier occasion also.

E. Mr. Garg relies upon the order of the Mysore High Court in *State of Mysore vs. A.G.Ramaswamy*² to submit that recourse to Section 311 of the CrPC should not be permitted to fill a lacuna in the prosecution case.

16. On the basis of these contentions, Mr. Garg submits that, the order of the MM does not display any perversity, much less abuse of process of the court, warranting interference of this Court under Section 482 of the CrPC.

Analysis

A. Maintainability of the application at the instance of the victim/complainant.

17. The first question to be addressed is as to whether an application under Section 311 of the CrPC could, in the facts and circumstances noted above, have been maintained by the petitioner. In this connection, it may be noted that the petitioner had been permitted by the order of the MM dated 01.11.2017 to assist the prosecution in conduct of the case. The provision of Section 301 of the CrPC, which

² 1967 SCC OnLine Kar 143

was rightly invoked by the MM in place of Section 302 mentioned by the petitioner, reads as follows:-

“301. Appearance by Public Prosecutors.

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”

18. The role assigned to the counsel for the victim has been elaborately discussed in the judgment of the Supreme Court in *Rekha Murarka*³, cited by Mr. Garg. While the role of the independent Public Prosecutor has been emphasised, the Court also elaborated upon the role of the counsel for the victim to render assistance to the prosecution and observed as follows:-

“11. In light of this, we now proceed to consider the extent to which such assistance can be accorded. As mentioned supra, the learned Senior Counsel for the appellant has argued that there may be instances where the Public Prosecutor may fail to perform his functions properly, whether deliberately or due to oversight, which may obstruct justice instead of furthering it. To meet the ends of justice in such cases, he submitted that the role of the victim’s counsel should not be limited to filing of written arguments as provided with respect to pleaders

³ Supra (Note 1)

engaged by private parties under Section 301(2). Instead, it should extend to making oral arguments and examining witnesses as well. On a perusal of the arguments advanced and the decisions relied on by both the parties, we find that such a broad mandate for the victim's counsel cannot be given effect to, as it is not rooted in the text of CrPC.

11.1. The use of the term “assist” in the proviso to Section 24(8) is crucial, and implies that the victim’s counsel is only intended to have a secondary role qua the Public Prosecutor. This is supported by the fact that the original Amendment Bill to CrPC had used the words “coordinate with the prosecution”. However, a change was later proposed and in the finally adopted version, the words “coordinate with” were substituted by “assist”. **This change is reflective of an intention to only assign a supportive role to the victim’s counsel, which would also be in consonance with the limited role envisaged for pleaders instructed by private persons under Section 301(2). In our considered opinion, a mandate that allows the victim’s counsel to make oral arguments and cross-examine witnesses goes beyond a mere assistive role, and constitutes a parallel prosecution proceeding by itself.** Given the primacy accorded to the Public Prosecutor in conducting a trial, as evident from Sections 225 and 301(2), permitting such a free hand would go against the scheme envisaged under CrPC.

11.2. In some instances, such a wide array of functions may also have adverse consequences on the fairness of a trial. For instance, there may be a case where the Public Prosecutor may make a strategic call to examine some witnesses and leave out others. If the victim’s counsel insists upon examining any of the left-out witnesses, it is possible that the evidence so brought forth may weaken the prosecution case. If given a free hand, in some instances, the trial may even end up becoming a vindictive battle between the victim’s counsel and the accused, which may further impact the safeguards put in

place for the accused in criminal trials. These lapses may be aggravated by a lack of advocacy experience on the part of the victim's counsel. In contrast, such dangers would not arise in the case of a Public Prosecutor, who is required to have considerable experience in the practice of law, and act as an independent officer of the court. Thus, it is important to appreciate why the role of a victim's counsel is made subject to the instructions of the Public Prosecutor, who occupies a prime position by virtue of the increased responsibilities shouldered by him with respect to the conduct of a criminal trial.

11.3. At the same time, the realities of criminal prosecutions, as they are conducted today, cannot be ignored. There is no denying that Public Prosecutors are often overworked. In certain places, there may be a single Public Prosecutor conducting trials in over two-three courts. Thus, the possibility of them missing out on certain aspects of the case cannot be ignored or discounted. **A victim-centric approach that allows for greater participation of the victim in the conduct of the trial can go a long way in plugging such gaps.** To this extent, we agree with the submission made by the learned Senior Counsel for the appellant that the introduction of the proviso to Section 24(8) acts as a safety valve, inasmuch as the victim's counsel can make up for any oversights or deficiencies in the prosecution case. Further, to ensure that the right of appeal accorded to a victim under the proviso to Section 372 CrPC is a not rendered meaningless due to the errors of the Public Prosecutor at the trial stage itself, **we find that some significant role should be given to the victim's counsel while assisting the prosecution. However, while doing so, the balance inherent in the scheme of CrPC should not be tampered with, and the prime role accorded to the Public Prosecutor should not be diluted.**

11.4. In this regard, given that the modalities of each case are different, we find that **the extent of**

assistance and the manner of giving it would depend on the facts and circumstances of each case. Though we cannot detail and discuss all possible scenarios that may arise during a criminal prosecution, we find that a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross-examine witnesses. As stated in Section 301(2), the private party's pleader is subject to the directions of the Public Prosecutor. In our considered opinion, the same principle should apply to the victim's counsel under the proviso to Section 24(8), as it adequately ensures that the interests of the victim are represented. If the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the Public Prosecutor, he may route any questions or points through the Public Prosecutor himself. This would not only preserve the paramount position of the Public Prosecutor under the scheme of CrPC, but also ensure that there is no inconsistency between the case advanced by the Public Prosecutor and the victim's counsel.

11.5. However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channelling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 CrPC or Section 165 of the Evidence Act, 1872. In this regard, we agree with the observations made by the Tripura High Court in *Uma Saha v. State of Tripura* that the victim's

counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the court or the prosecution, but not putting them by himself.”⁴

19. Applying the aforesaid principles to the facts of the present case, it is noteworthy that the application made by the petitioner under Section 311 of the CrPC was, in fact, endorsed by the Prosecutor also. Emphasis has been laid by Mr. Garg on the limitation presented in the aforesaid judgment that the victim’s counsel must have a secondary role of “*assistance*” to the Public Prosecutor. Such a supportive role is not inconsistent with the filing of an application by the victim’s counsel with the concurrence, or endorsement, of the Public Prosecutor. The apprehension expressed by the Supreme Court in *Rekha Murarka*⁵, with regard to a free hand being given to the victim’s counsel, does not arise in a situation where the Public Prosecutor has also accepted the contention of the victim’s counsel. The present case, to this extent, fits in with the role of the victim’s counsel as a whole, as laid down in *Rekha Murarka*. I, therefore, do not accept Mr. Garg’s contention that the application was not maintainable on this ground.

20. The Supreme Court, in its recent judgment in *Jagjeet Singh & Ors. vs. Ashish Mishra @ Monu & Anr.*⁶, has emphasised the rights of the victims in the context of the evolving jurisprudence in this area. The Court has held that the rights of the victim under the amended CrPC are “*totally independent, incomparable and are not accessory or*

⁴ Emphasis supplied.

⁵ Supra (Note 1) [paragraph 11.2]

⁶ CrI.A. 632/2022, decided on 18.04.2022

auxiliary to those of the State under the CrPC”⁷. In view of the fact that the application filed by the counsel for the petitioner in the present case was, in any event, endorsed by the prosecution, it is not necessary to consider whether such an application would have been maintainable in the absence of such consent/endorsement.

B. Delay.

21. Turning now to the ground of delay, the chronology relating to the conduct of the trial has been set out in paragraph 13 hereinabove. These facts are not disputed by Mr. Garg. They reveal that the delay cannot be attributed to the petitioner. The examination-in-chief of the petitioner (PW-1), which was recorded on 24.07.2009, shows that he had deposed at that stage itself as to the presence of Akhtar and Chauhan at the place of occurrence of the alleged incident. The petitioner’s wife (PW-2), in her cross examination on 04.05.2016, also specifically stated that these two persons reached the spot. Similar evidence has also been led by the petitioner’s daughter (PW-3) in her examination-in-chief on 28.11.2017. The petitioner’s application seeking to include them as witnesses cannot, therefore, said to be entirely by way of an afterthought.

22. In any event, while dealing with the scope of Section 311 of the CrPC, the Supreme Court, in a number of judgments, has made it clear that delay itself cannot be a ground for dismissal of the application. Reference in this connection may be made to the judgment of the

⁷ Refer paragraph 23.

Supreme Court in *Manju Devi vs. State of Rajasthan and Anr*⁸, which held as follows:-

“13. Though it is expected that the trial of a sessions case should proceed with reasonable expedition and pendency of such a matter for about 8-9 years is not desirable but then, the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness.”

23. In the present case, it may be noted that despite the delay, defence evidence has not yet commenced.

24. I am, therefore, not inclined to accept Mr. Garg’s submission on this ground.

C. Application of Principle of Section 311 of the CrPC.

25. This brings us to the question of whether, in the facts and circumstances of the present case, the proposed witnesses are liable to be summoned in exercise of power under Section 311 of the CrPC.

26. Section 311 of the CrPC reads as follows:-

“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.”

⁸ (2019) 6 SCC 203

27. The scope of Section 311 of the CrPC has been considered by the Supreme Court *inter alia* in *Natasha Singh vs. CBI (State)*⁹, wherein the Court, after reference to earlier authorities, stated the principle in the following terms:-

“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 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

⁹ (2013) 5 SCC 741

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.”¹⁰

28. A more detailed enumeration of these principles can be found in the judgment of the Supreme Court in *Rajaram Prasad Yadav vs. State of Bihar and Anr*¹¹, which held as follows:-

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC 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. **The exercise of the widest discretionary power under Section 311 CrPC should ensure that the**

¹⁰ Emphasis supplied.

¹¹ (2013) 14 SCC 461

judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

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 CrPC 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. 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.

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

17.7. 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.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is a 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 safeguard, 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 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 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.**¹²

29. More recently, the Supreme Court has had the occasion to deal with Section 311 of the CrPC, in *Manju Devi*¹³, and in *State Represented by The Deputy Superintendent of Police vs. Tr. N.*

¹² Emphasis supplied.

¹³ Supra (Note 8)

*Seenivasagan*¹⁴, as well as in *V.N. Patil vs. K Niranjan Kumar and Ors*¹⁵.

30. In *Manju Devi*¹⁶, the Court emphasised that provisions such as Section 311 of the CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the records straight and to clear any ambiguity insofar as the evidence is concerned, as also to ensure that no prejudice is caused to anyone. In *Tr. N. Seenivasagan*¹⁷, the Court referred to *Manju Devi*, and held that the true test is whether it appears to the Court that the evidence of the person sought to be recalled is essential to the just decision of the case.

31. In *V.N. Patil*¹⁸, the Supreme Court was concerned with a case where the Trial Court had allowed an application of the prosecution under Section 311 of the CrPC, although the proposed witnesses had not been examined by the Investigating Officer during the course of the investigation nor cited as prosecution witnesses in the final report submitted to the Court. The High Court had reversed the decision of the Trial Court. The Supreme Court noted the judgment of the Trial Court to the effect that no hardship could be caused to the accused since the witnesses and the documents intended to be summoned, would be subjected to cross-examination and testification as per the provisions of the CrPC. The Court recorded that the object of Section 311 of the CrPC is to avoid a failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving

¹⁴ 2021 SCC Online SC 212

¹⁵ (2021) 3 SCC 661

¹⁶ Supra (Note 8)

¹⁷ Supra (Note 14)

¹⁸ Supra (Note 15)

ambiguity in the witnesses from either side and that the provision strengthens the arms of the Court in its effort to unearth the truth by procedure sanctioned to law. On these grounds, the Supreme Court, in fact, affirmed the judgment of the Trial Court and reversed the judgment of the High Court to the contrary.

32. Applying these principles to the present case, I am of the view that the subject application under Section 311 of the CrPC ought to have been allowed in the facts and circumstances of the present case. The evidence thus far recorded before the MM suggests that the proposed witnesses were eye witnesses to the alleged incident in question. They have, in fact, been examined as defence witnesses in the cross FIR registered at the instance of the respondent Nos. 2 to 5 herein against the petitioner. The MM, in the impugned order dated 04.12.2021, has come to the conclusion that the evidence of the proposed witnesses is not essential, as the Court has before it the evidence of the petitioner, his wife, and his daughter, who were also stated to be eye witnesses. The petitioner's daughter, however, was not present on the spot. The petitioner is himself the victim, and the evidence of the other eye witnesses would be required to examine the veracity of the evidence of the petitioner and his wife, even though the proposed witnesses are also employees of the petitioner.

33. In these circumstances, the evidence of the proposed witnesses cannot be said to be entirely unnecessary or superfluous. As observed by the Supreme Court in *Rajaram Prasad Yadav*¹⁹, it is not necessary for the evidence to be essential, in the sense that judgment cannot be

¹⁹ Supra (Note 11) [paragraph 17.9]

pronounced without it, but for it to be required to avoid a failure of justice. Mr. Garg has not identified any particular lacuna in the prosecution case, which is sought to be filled in by calling the additional witnesses. The defence evidence has not yet commenced and, therefore, no insurmountable prejudice would be caused to the respondent Nos. 2 to 5, by summoning of the proposed witnesses.

34. For the aforesaid reasons, I am of the view that the principles laid down by the Supreme Court in the abovementioned judgments, apply to the present case, as the evidence of the proposed witnesses would enable the court to determine the true position on appropriate proof. The case satisfies the test indicated by the Supreme Court in *Natasha Singh*²⁰, i.e. that the evidence to be tendered by the proposed witnesses would be “*germane to the issue involved*”²¹.

35. Mr. Garg’s submission that the evidence of Chauhan and Akhtar cannot be adduced as they were not named in the FIR or in the chargesheet is also unpersuasive. As noted above, in its recent decision in *V.N. Patil*²², the Supreme Court was faced with a similar argument²³. The Court, however, having regard to the objective of Section 311 of the CrPC, permitted the witness to be summoned. In doing so, the Supreme Court reversed the view of the High Court to the contrary, and restored the directions of the Trial Court.

36. The issue has also been considered by the High Courts of Himachal Pradesh and Orissa. In *Kewal Gupta vs. The State of*

²⁰ Supra (Note 9)

²¹ Refer paragraph 15

²² Supra (Note 15)

²³ Refer paragraph 7

Himachal Pradesh²⁴, the High Court of Himachal Pradesh recorded the following submissions of the counsel:-

“3. Shri Vijay Pandit, learned counsel appearing for the petitioner, contends that the names of these persons do not find mention in the list of witnesses appended with the charge sheet submitted before the trial Court by the prosecution under S. 173 of the Code of Criminal Procedure. Further, in case they were important witnesses, more so eye witnesses to the occurrence, the Investigating Officer should have taken care to record their statements under S. 161 of the Code of Criminal Procedure. Therefore, the learned counsel urges that in view of the failure of the prosecution on both these counts, it is not legally permissible to bring them forward for the first time and examine as prosecution witnesses. In the alternative, even if they are considered to be necessary, the trial Court should have exercised this power after seeking corroboration of the statement of Rakesh Kumar (P.W. 1).”

The High Court dealt with this submission as follows:-

“8. These witnesses have been shown to be eye witnesses of the occurrence. Normally, the prosecution must associate and examine all the eye witnesses but where it has failed to examine anyone or none, the Court can, in the interest of justice, examine such witnesses under this section. The contention of the learned counsel for the accused that only those witnesses can be examined whose statements have been recorded by the police under S. 161 of the Code of Criminal Procedure and find mention in the list of witnesses submitted with the challan under S. 173 of the Code, if accepted, will render the provisions of S. 311 of the Code of Criminal Procedure nugatory. These provisions, namely, Ss. 161, 173 and 311 of the Code of

²⁴ (1989) SCC OnLine HP 77

Criminal Procedure, have got different object, scope and operate in different spheres. The contention of the learned counsel for the accused is, therefore, completely divorced from the object, scope, tenor and spirit of these provisions; hence liable to be rejected."²⁵

37. The Orissa High Court, in *Karam Chand Mukhi and Others vs. Santosh Pradhan and Another*²⁶, held in the following terms:-

"12. In course of an investigation and submission of Pinal Form (charge-sheet), there is chance of non-mentioning of the names of the material witnesses. It may be due to accidental slip, non-availability of the relevant clue and therefore non-examination of such persons in the course of the investigation or due to intentional action of the investigating agency either to show a favour to the accused or disfavour to the complainant/victim. In such a case it is the duty of the prosecution to bring on record the relevant facts and circumstances and to apply to the Court for due consideration of invoking the power under Section 311 of the Code and to examine such persons as witnesses. The provision in Section 311 of the Code emphasises on the principle of providing substantial justice to the parties. In that context 'parties' means both accused and the complainant. Neither category of the persons are to be excluded while considering the question of advancement of substantial justice. If the prosecution conducted by the learned prosecutor fails to bring on record and to the notice of the Court the relevant facts in support of the motion to examine additional witnesses, then the in- formant/complainant may bring it to the notice of the Court either by providing appropriate instruction to the learned prosecutor and in the event of his unwillingness by filing appropriate application supported by affidavit and putting forth the

²⁵ Emphasis supplied.

²⁶ (2004) SCC OnLine Ori 300

*relevant contention for due consideration of the trial Court. Even when the prosecution or the informant/complainant or both fail in making such motion, but it comes to the notice of the trial Court that some relevant witnesses have been omitted in the list of witnesses submitted by the prosecution though there are ample circumstances available on record necessitating their examination for a proper and truthful decision of the matter in the case, then by recording the reason thereof, i.e., by making a speaking order **the trial Court can suo motu examine such witnesses. That is the amplitude/arena of jurisdiction vested in a Court under Section 311 of the Code.** It is not to be circumvented or curtailed by any narrow interpretation.”²⁷*

38. The judgment of the Mysore High Court in *A.G. Ramaswamy*²⁸ cited by Mr. Garg, also does not persuade me to a contrary conclusion. In that case, the Court held that the power under Section 540 of the Code of Criminal Procedure, 1898 [corresponding with Section 311 of the 1973 CrPC], could not have been exercised, recording that no reasons were given as to why the witnesses were required to be examined. The Court came to the view that the application in that case was intended to fill a gap in the prosecution’s case. In the present case, for the reasons stated above, I have come to a different conclusion on both these issues.

39. For the aforesaid reasons, I am of the view that the evidence of the proposed witnesses in the present case ought to have been permitted, being essential to the just decision of the case.

²⁷ Emphasis supplied.

²⁸ Supra (Note 2)

Conclusion

40. The petition is, therefore, allowed, and the impugned order of the MM dated 04.12.2021 is set aside. The application dated 12.11.2021, filed by the petitioner, under Section 311 of the CrPC [with the endorsement of the prosecution] is allowed, and the MM is directed to summon the persons named in paragraph 16 of the said application as prosecution witnesses.

41. It is made clear that the proposed witnesses will be called as prosecution witnesses, and the role of the counsel for the petitioner will be limited to the role permitted in law with regard to any other prosecution witness. The said witnesses will also naturally be subject to cross examination by the respondent Nos. 2 to 5- accused.

42. The petition, alongwith the pending application, stands disposed of in these terms.

MAY 02, 2022
'Pv/Bp/Fmm'

PRATEEK JALAN, J.