



\$~35

* IN THE HIGH COURT OF DELHI AT NEWDELHI

*Reserved on: July 14, 2022**Decided on: August 31, 2022*+ CRL.M.C. 3559/2019

UMESH YADAV

..... Petitioner

Through: Mr. Nitesh Kumar Singh,
Advocate.

V

STATE

.... Respondent

Through: Mr. Ashok Kr. Garg, APP
for State with SI Neelam,
P.S. Timar Pur.

%

CORAM:**HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN****JUDGMENT**

1. The present petition is filed under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as "Cr.P.C.") against the impugned order dated 16.02.2019 passed by the court of Ms. Sonam Singh, MM (Mahila Court) Central, Tis Hazari, New Delhi (hereinafter referred as "Trial Court") in case titled as **State V Umesh Yadav** arising out of FIR bearing No. 0011/2014 registered at P.S. Timarpur under sections 354/354A/323/506 Indian Penal Code, 1860 (hereinafter referred as "IPC").



2. The perusal of FIR bearing No. 0011/2014 dated 11.01.2014 reflects that it was registered under sections 354/354A/323/506 IPC on the basis of the complaint made by the complainant “P” pertaining to the incident happened on 11.01.2014. After completion of investigation, the charge-sheet was filed under sections 354/354A/323/506 IPC and the trial was stated to be pending in the Court of Ms. Deepika Singh, MM, Tis Hazari Courts/Successor Court.

3. The petitioner during the trial filed an application under section 311 Cr.P.C. for recalling PW-1 i.e. the complainant “P” and PW-7 “IO SI Surender” who was the Investigating Officer for their further cross-examination. It was mentioned in the application that the petitioner preferred an RTI application dated 27.07.2016 seeking details of the calls made from mobile bearing number 8750119038 phone belonging to the complainant/PW-1 “P” made between 10.01.2014 and 11.01.2014. Thereafter, the petitioner received an Intimation from the RTI Cell vide letter dated 19.08.2016 which was lost by the petitioner. The petitioner also changed his counsel to whom he apprised about misplacing of the letter dated 19.08.2016.



Thereafter the petitioner filed another RTI application on 30.07.2018 seeking necessary information and in pursuance of said application, a response dated 28.08.2018 was sent to the petitioner. It is further stated by the petitioner that upon perusal of response dated 28.08.2018, it is reflected that no PCR call was made by the complainant/PW-1 "P" against the petitioner. On the basis of these letters/responses, the petitioner prayed for recalling of PW-1 and PW-7 for their further cross-examination to ensure the fair trial.

4. The application under section 311 Cr.P.C. filed by the petitioner was dismissed vide order dated 16.02.2019 by the Court of Ms. Sonam Singh, MM, Mahila Court-02, Central District, Tis Hazari Court by observing:-

Perusal of record reveals that the complainant was cross examined at length on 25.01.2016 and PW -7 IO SI Surender was cross-examined also at length on 19.09.2018. Hence, it is apparent that the accused has been given ample opportunities to cross examine the complainant and IO. The accused had knowledge of the alleged PCR calls, since 27.07.2016, when he made the first RTI application yet till 05.11.2018, no application under section 311 Cr.P.C. was filed. The present application which has been filed after more than two years, is devoid of merits. Only because, the record/documents of the accused were lost, or are contradictory to previous response, it cannot be a ground to scuttle



the procedure of the court by recalling the witnesses. It is settled law that the court can exercise its power under Section 311 Cr. PC only for strong and valid reasons and the said power is to be exercised with great caution and circumspection. Allowing the said application, which has been moved at the stage of statement of accused u/s 313 Cr.PC, would derail the entire trial. Hence, in view of the aforesaid discussion, the aforesaid application stands dismissed. Application is disposed off accordingly.

5. The petitioner being aggrieved, filed the present petition and challenged the impugned order on the grounds that the impugned order is contrary to the facts and law and it is passed without appreciating the facts and circumstances of the case. The trial Court has not appreciated the provision under section 311 Cr.P.C. in the right perspective and is against the law as settled down by the superior courts. The impugned order is based on conjecture and surmises. It was prayed that the impugned order be set aside. The counsel for the petitioner argued on the facts and law as stated in the petition.

6. Section 311 Cr.P.C. deals with the power of the Court to summon material witness. It reads as under:-

311. 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.

7. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in **Vijay Kumar V State of Uttar Pradesh and Another** 2011(8) SCC 136.

“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason.”

8. This principle has been further reiterated in **Mannan Shaikh and Others V State of West Bengal and Another** 2014(13) SCC 959 and thereafter in **Ratanlal Vs. Prahlad Jat and Others** 2017(9) SCC 340 and **Swapan Kumar Chatterjee Vs. Central Bureau of**



Investigation 2019(14) SCC 328. The relevant paras of Swapan

Kumar Chatterjee are as under:-

“10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and reexamine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and reexamine any such person if his evidence appears to be essential to the just decision of the case.

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 vide 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.”

9. It was observed in **Manju Devi V State of Rajasthan, (2019)**
6 SCC 203 that the length/duration of the case cannot displace the
basic requirement of ensuring the just decision after taking all the



necessary and material evidence on record. It was observed as under:-

An application under Section 311 could not be rejected on the sole ground that the case had been pending for an inordinate amount of time (ten years there). Rather, it noted that “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”.

“10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the court thereunder have been explained by this Court in several decisions [Vide Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595; Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 : 2004 SCC (Cri) 999; Mina Lalita Barua v. State of Orissa, (2013) 16 SCC 173 : (2014) 6 SCC (Cri) 218; Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256 and Natasha Singh v. CBI, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828] . In Natasha Singh v. CBI [Natasha Singh v. CBI, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828] , though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under: (SCC pp. 746 & 748-49, paras 8 &15)

“8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at “any stage” of “any enquiry”, or “trial”, or “any other proceedings” under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has



already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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 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)”**

10. It was also observed in **State Represented By The Deputy Superintendent Of Police V TR. N. Seenivasagan** in Criminal Appeal Nos. 231-232 of 2021 decided on 01.03.2021 by the Hon’ble Supreme Court that the true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case.

11. In **V.N. Patil V K. Niranjan Kumar & Ors.** in Criminal Appeal No. 267/2021 decided on 04.03.2021 by the Hon’ble Supreme Court, it was held as under:-

15. The object underlying Section 311 CrPC 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 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 the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said “wider the



power, greater is the necessity of caution while exercise of judicious discretion.”

12. It is the duty of the Court to discover the truth and truth is the foundation of the justice. Section 311 Cr.P.C. is one of the provisions which assist the Court in the discovery of the truth. It is true that the power under section 311 Cr.P.C. has to be exercised judiciously for strong and valid reason with caution to meet the ends of justice. Simultaneously, the Court has the duty to give opportunity to the accused to take necessary/appropriate defence and also to preserve his right of fair trial.

13. The trial Court rejected the application only on the ground that the complainant/PW-1 “P” was cross-examined on 25.01.2016 and PW-7 “IO SI Surender” was cross-examined on 19.09.2018 and as such, the petitioner was already given ample opportunity to cross-examine the complainant/PW-1 “P” and PW-7 “IO SI Surender”. The accused was having the knowledge of alleged PCR calls since 27.07.2016 when he made the first RTI application on 05.11.2018. The present application which has been filed after more than two years was devoid of merits.



14. The above reasons given by the trial Court does not appeal to be the reason even if the complainant/PW-1 “P” and PW-7 “IO SI Surender” have already been examined at length but nothing should prevent the trial Court to give further opportunity to the petitioner to take his defence and his right to fair trial cannot be compromised. After considering all facts and in the interest of justice, the petitioner is allowed to further cross-examine the complainant/PW-1 “P” and PW-7 “IO SI Surender” on the date fixed by the trial Court without any further adjournment. The impugned order dated 16.02.2019 is accordingly set aside.

15. The present petition alongwith pending applications, if any, stands disposed of.

16. The petitioner is directed to appear before the concerned trial Court on the date, as already fixed for further directions.

SUDHIR KUMAR JAIN
(JUDGE)

AUGUST 31, 2022
N/KG