



. * IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 17.04.2023

Pronounced on : 04.09.2023

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CRL.REV.P. 419/2023

MOHD HASAN@NANHE

..... Petitioner

Through: Mr. Salim Malik, Advocate (through
video conferencing).

versus

STATE

..... Respondent

Through: Ms. Priyanka Dalal, APP for the State
with SI Suresh Kumar, PS New
Usmanpur.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. The present petition under Sections 397/399/401 Cr.P.C. has been filed by the petitioner, namely, Mohd Hasan @Nanhe, with the following prayers:

"(a) call for the record of Ld. Trial Court;

(b) set aside the impugned order dated 31.03.2023 in FIR no 854/2015 PS New Usmanpur U/S 302/201 IPC passed by Shri Pankaj Arora, Ld. ASJ, Karkardooma Courts, Delhi;

(c) Pass any other reliefs), which this Hon'ble Court may deem fit and proper, under the facts and circumstances of the case, in favour of the petitioner."



2. Briefly stated, the facts of the case are that on 16.08.2015, the present FIR No. 854/2015 was got registered at New Usmanpur under Sections 302/201 IPC against an unknown person and the dead body was preserved for identification.

3. Vide impugned Order dated 31.03.2023, Ld. ASJ dismissed the application under Section 311 Cr.P.C. filed by the petitioner for recalling PW-8 Mohd. Kasim for his further cross-examination on the ground that PW-8 Mohd. Kasim had already appeared before the court on two dates for the purpose of recording of his evidence and the witness was duly cross-examined by Sh. Gaurav Vashishth, Ld. Amicus Curiae on 08.03.2018. Furthermore, since the present case is pending since the year 2016, it was observed that under these circumstances, no further opportunity can be granted to the accused to further cross-examine PW-8 Mohd. Kasim and thus, the application was dismissed.

4. The petitioner has assailed the order dated 31.03.2023 passed by the Ld. ASJ, Karkardooma Courts, in FIR No. 854/2015 under Sections 302/201 IPC registered at PS New Usmanpur.

5. I have heard the Ld. counsel for the petitioner, Ld. APP for the State and perused the records of the case.

6. It is vehemently urged by the Ld. counsel for the petitioner that the petitioner has been falsely implicated in this case at the instance of complainant and is in judicial custody since 28.08.2015. He further submitted that the impugned order has been challenged by the petitioner as though the PW-8, namely, Mohd Kasim was examined by the Ld. Amicus Curiae but he failed to cross-examine the witness PW-8 properly as he has



not been cross-examined on certain material aspects and therefore, the petitioner wishes to recall PW-8 Mohd. Kasim for his further cross-examination

7. On the other hand, it is submitted by the Ld. APP for the State that the foundation of the revision petition which has been filed by the present petitioner in itself seems quavery as an order passed by the Ld. ASJ under Section 311 Cr.P.C. is an interlocutory order and the same cannot be challenged by filing a revision petition. Ld. APP for the State in support of her contention has also placed reliance upon the judgment of the Hon'ble Supreme Court in *Sethuraman vs. Rajamanickam* [2009 (5) SCC 153] wherein, it was categorically held that the order under Section 311 Cr.P.C. is purely an interlocutory order and accordingly, the present revision petition is not maintainable.

8. In my considered view, the contention of Ld. APP for the State that no revision petition is maintainable in light of the judgment in the matter of *Sethuraman* (*supra*) has force in it. The relevant portion of the abovementioned judgment is reproduced hereunder:

“5.....Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application u/s 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred u/s 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e. one on the



application u/s 91 Cr.P.C. for production of documents and other on the application u/s 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, u/s 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed.”

9. Reliance can also be placed upon ***B.B. Lal Aggarwal vs. The State Govt of Delhi &Anr. (Crl. M.C. 953/2022, Judgment dated 04.04.2022)*** decided by the coordinate bench of this court, wherein, it was observed that no revision lies against an interlocutory order.

10. The intent of section 311 Cr.P.C. is to empower the court to make a fair evaluation at every instance. The court has been entrusted with this authority so that justice be administered without being constrained by the specifics of the legislation. It makes no difference whether a witness has been cross-examined by the party seeking to recall them or whether all of the evidence has been closed or not. The question for the court is whether calling back such a witness and presenting evidence is necessary for a fair resolution of the case. This alone demonstrates how the preceding ruling on the application under Section 311 Cr.P.C. cannot be regarded as final. The court may permit a witness to be summoned if, at a later stage, it determines that recalling the witness was required for a just resolution of the matter.

11. It is trite law that an order passed under Section 311 Cr.P.C. is purely an interlocutory order and a revision against an interlocutory order is clearly barred under Section 397(2) Cr.P.C. Therefore, the present revision petition filed against order dated 31.03.2023 passed by the Ld. ASJ dismissing the application under Section 311 Cr.P.C, is thus, not maintainable.



12. Going further, the main ground sought by the petitioner for recalling of PW-8 namely, Mohd Kasim is that PW-8 has not been properly cross-examined on certain material aspects by the Ld. Amicus Curiae.

13. For proper adjudication, it is necessary to look into the impugned order dated 31.03.2023 passed by learned ASJ which reads as follows:

"One application u/s 311 Cr.P.C for recalling PW-8 Mohd. Kasim for his further cross-examination has been moved on behalf of accused. The same is strongly opposed by Ld. Addl. PP for State.

Perusal of record reveals that PW-8 Mohd. Kasim has already appeared before the court on two dates for the purpose of recording of his evidence. The witness was crossexamined by Sh. Gaurav Vashishth, Ld. Amicus Curiae on 08.03.2018. No NOC of Ld. Amicus Curiae, Sh. Gaurav Vashishth has been placed on record.

The present case is pending since the year 2016. Under these circumstances, no further opportunity can be granted to the accused to further cross-examine PW-8 Mohd. Kasim.

Application stands dismissed.

One last and final opportunity is granted to the accused to address final arguments.

Put up for final arguments on 19.04.2023."

14. From an overview of the material on record, it is borne out that sufficient opportunity to cross-examine the prosecution witness who is sought to be recalled at this stage was available to the petitioner and has been availed by him. PW-8, namely, Mohd Kasim was cross-examined by the Ld. Amicus Curiae on 08.03.2018, however, the application under Section 311 Cr.P.C. for recalling of PW-8 has been moved by the petitioner on 31.03.2023 i.e., after five years of his examination.



15. The Hon'ble Supreme Court has time and again cautioned that witnesses cannot be allowed to be recalled in a routine manner merely on the ground that the cross-examination was not properly conducted. Reliance can be placed upon *State (NCT of Delhi) vs. Shiv Kumar Yadav & Anr. [(2016) 2 SCC 402]* wherein it was observed as under:

"...witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

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27. ...Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. ...Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

16. In the present case, though it has been averred that proper cross-examination of the witness has not taken place, however, there is nothing on record to indicate that the said witness was not cross-examined or due opportunities have not been afforded to the counsel for petitioner and now, after nearly six years of PW-8 having been cross-examined by the Ld. Amicus Curiae, the petitioner is taking frivolous contentions for recalling of



PW-8 only because of change of counsel which took place around March, 2023. This certainly is not permissible. Therefore, in my considered opinion, the lower court vide its reasoned order dated 31.03.2023 has rightly rejected the application of the petitioner under Section 311 Cr.P.C. which certainly is not a bonafide application.

17. Accordingly, in view of the discussions mentioned hereinabove, I find no infirmity in the impugned order dated 31.03.2023 and consequently, the present petition is dismissed.

18. Nothing stated hereinabove shall tantamount to the expression of any opinion on the merits of this case.

RAJNISH BHATNAGAR, J

SEPTEMBER 04, 2023/_p