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* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Date of decision: 26.02.2024***+ **CRL.M.C. 1941/2022 & CRL.M.A. 8266/2022****KASIM**

..... Petitioner

Through: Mr.R.K. Sonkiya, Adv.

versus

STATE NCT OF DELHI AND ORS

..... Respondents

Through: Mr.Aman Usman, APP with SI
Brham Prakash, PS Sarita
Vihar.Mr.Rakesh Kumar &
Ms.Roshni Patil, Advs. for R-2.**CORAM:****HON'BLE MR. JUSTICE NAVIN CHAWLA****NAVIN CHAWLA, J. (ORAL)**

1. This petition has been filed challenging the order dated 09.12.2021 passed by the learned Metropolitan Magistrate-05, South-East District, Saket Courts, New Delhi (hereinafter referred to as the 'Trial Court') in Criminal Case No. 105/2/2014 89820/2016 titled *State v. Nikesh Bidhuri & Ors.*, dismissing the application filed by the petitioner herein under Section 311 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.').



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2. It is the case of the petitioner that on 26.02.2014, at about 11:30 AM, officials of BSES came to the house of his maternal uncle to fix an electricity meter. As they were about to leave, three persons, including respondent no.2 herein, started to abuse the petitioner while they were standing outside. As he opened the gate, respondent no.2 attacked him with an iron rod and he suffered injuries on his left eye. Based on the complaint made by the uncle of the petitioner, FIR No.156/2014 was thereafter registered at Police Station: Sarita Vihar, South-East District, Delhi under Sections 323/341/34 of the Indian Penal Code, 1860 (in short, 'IPC'). The above criminal case is registered on the resultant final report filed by the Police.

3. In the said case, the petitioner, on 17.09.2016, was examined as PW-5 before the learned Trial Court. As his deposition was not in terms of the case of the prosecution and he had failed to identify the respondent no.2 in Court, he was cross-examined by the learned Public Prosecutor. His statement was further recorded on 18.03.2017 and 03.01.2018.

4. The trial was later fixed for final arguments, when on 08.08.2019, the petitioner filed an application under Section 311 of the Cr.P.C., praying that he be recalled as a witness for his further examination. In the application, he stated that he received threats on 17.09.2016 from the respondent no.2 that if he deposed against respondent no.2 or identifies him in the Court, then he would face dire consequences. In the application, it was further stated that on 18.03.2017 as well, the counsel of



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the respondent no.2 along with the respondent no.2 again threatened the petitioner and pressurized him to state that it was a wooden rod instead of the iron rod which was used in the attack.

5. This application came to be allowed by the learned Trial Court vide its order dated 27.03.2021, however, without giving any reason for the same.

6. The said order of the learned Trial Court was challenged by the respondent no.2 herein before this Court by way of a petition, being CRL.M.C. 2096/2021, titled **Nikesh Bidhuri & Ors. v. State of NCT of Delhi & Ors.**. This Court, by its Order dated 15.11.2021, was pleased to set aside the order dated 27.03.2021 of the learned Trial Court as it did not disclose any reason for allowing the application filed by the petitioner herein, and remanded the adjudication of the application back to the learned Trial Court to decide on the same afresh with reasons and in accordance with law. I may quote from the order, as under:

“10. This Court is of the opinion that an application under Section 311 Cr.P.C. is maintainable at any stage of the proceedings, but to allow such an application at the stage which the proceedings were at in the present case, cogent reasons needed to be stated as recalling of a witness was permitted. The learned Metropolitan Magistrate failed to record any reason whatsoever for arriving at the decision, making it difficult for this Court, besides the affected party, to understand what weighed with the Court while taking the particular view.



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11. Keeping in view the aforesaid, the impugned order is set aside and the matter is remanded back to the concerned Court to decide the application afresh with reasons and in accordance with law.”

7. On such remand, the learned Trial Court, by way of the Impugned Order, has dismissed the application filed by the petitioner herein under Section 311 of the Cr.P.C. seeking his recall as a witness, by observing as under:-

“Perusal of documents i.e. DD no. 22B dt. 28.09.2017 reveals that the applicant had made a complaint that all three accused persons went to his house on 20.09.2017 and threatened him. First and foremost, the said document does not mention that the witness was threatened by the accused Rajesh on 17.09.2016 outside the court or on 18.03.2017 by the accused and his counsel both and merely mentions about the incident of threatening of all the accused on 20.09.2017. Hence, it is clear that witness lodged no complaint before the police or bring the same to the notice of the court on any occasion and has filed this application at much belated stage when matter was listed for final arguments. Secondly, in the aforesaid document, it is clearly mentioned that all the three accused persons threatened the applicant but in the court deposition, the applicant merely could not identify the accused Rajesh and he has correctly identified the accused Sudesh and Nikesh. On being asked by witness regarding the same, he merely stated that as he was threatened only by the accused Rajesh on 17.09.2016, so for this reason, he did not identify him in the court, however, the same appears to be an afterthought.

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In the present case, it appears that the complainant at the time of arguments would have noticed that the testimony of PW-5 Kasim might have potential to weak the prosecution case in so far as the identification of the accused Rajesh, case property is concerned and therefore, he chose to move the application u/s 311 Cr.PC at belated stage for his re-examination qua this limited purpose which certainly cannot be allowed by the court as it would amount to defeating the very purpose of justice. In view of the same, the application u/s 311 Cr.PC is hereby dismissed.”

8. Aggrieved of the above order of the learned Trial Court, the same has been challenged by the petitioner by way of the present petition.

9. The learned counsel for the petitioner submits that the learned Trial Court, in its Impugned Order, has, in fact, reviewed its earlier order dated 27.03.2021. He submits that the learned Trial Court does not have the power to review its earlier order. He submits that this Court had merely remanded the matter back to the learned Trial Court to give reasons for allowing the application filed by the petitioner and not to review the said order.

10. He further submits that in the present case, the petitioner had been threatened *inter alia* by the respondent no.2 not to identify him during the course of the trial. It was due to such threats that the petitioner could not truthfully depose before the learned Trial Court on the earlier dates. He submits that the



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complaint in this regard was also filed with the Police on 28.09.2017, however, no action was taken thereon.

11. He submits that the purpose of Section 311 of the Cr.P.C. is to discover the truth without being bogged down with the stringent procedure of law. In support, he places reliance on the judgment of the Punjab and Haryana High Court in *Sonia v. State of Haryana & Ors.*, (judgment dated 09.01.2017 in Crl.Misc.M. 44082/2016); and of the High Court of Judicature at Allahabad in *Januki Prasad @ Janki Prasad v. State of U.P.*, Neutral Citation no.2019:AHC:124596.

12. On the other hand, the learned APP points out that the present petition would not be maintainable as being filed at the hands of only a witness to a criminal case. He submits that the witness cannot claim that he be recalled to give further testimony in a trial before a Criminal Court.

13. The learned counsel for the respondent no.2 submits that the present petition is a gross abuse of process of the Court. He submits that though the petitioner was examined on three dates, spanning from 17.09.2016 to 03.01.2018, he filed the application seeking his recall as a witness only on 08.08.2019. He submits that there are other litigations also pending between the respondent no.2 and the uncle of the petitioner, this petition is, therefore, only an abuse of the process of the Court. He also joins in the submission made by the learned APP submitting that the present petition is not maintainable.



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14. I have considered the submissions made by the learned counsels for the parties.

15. As is evident from the above narrations of facts, the petitioner was examined as a witness on 17.09.2016. He was also cross-examined by the learned APP appearing before the learned Trial Court. His cross-examination was then recorded on 18.03.2017, and finally concluded on 03.01.2018, that is, spanning a period spanning almost one year and three months. He did not make a complaint before the learned Trial Court that he was being pressurized in any manner by the accused persons, including the respondent no.2. He, in fact, had filed a complaint on 28.09.2017 with the Police alleging threat, however, not mentioning any threat received earlier. The evidence was, in fact, concluded only later to the said complaint, however, still no complaint was made by the petitioner to the learned Trial Court. It appears that, only as an afterthought, on 08.08.2019, that is, after 16 months of the closure of his evidence, that he filed an application making vague averments of threats being given by the respondent no.2.

16. The submission of the learned counsel for the respondent no.2 that there are other litigations also pending between the uncle of the petitioner and the respondent no.2 has also not been refuted by the learned counsel for the petitioner.

17. In *Rajaram Prasad Yadav v. State of Bihar*, (2013) 14 SCC 461, the Supreme Court in similar set of facts has held as under:



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“20. In that scenario, the second respondent filed the present application under Section 311 CrPC on 24-8-2007 i.e. nearly after five months after his examination by the trial court. While filing the said application, the second respondent claimed that his evidence tendered on 16-3-2007, was not out of his own free will and volition, but due to threat and coercion at the instance of the accused persons, including the appellant. It was contended on behalf of the second respondent that the accused persons posed a threat by going to the extent of eliminating him and that such threat was meted out to him on 15-3-2007, when he was kidnapped from his wheat field by the accused, along with two unknown persons.

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23. We find that the factors noted by the trial court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 CrPC. We do not find any bona fides in the application of the second respondent, while seeking the permission of the court under Section 311 CrPC for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30-5-2007, which resulted in the registration of the FIR in Khizersarai Police Station Case No. 78 of 2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 CrPC, by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused, as rightly noted by the court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned



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trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the court below in his evidence as appreciated by the court below was in the proper perspective, while rejecting the application of the respondents filed under Section 311 CrPC. In our considered opinion, the trial court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial court.”

18. The purpose of Section 311 Cr.P.C. is not to reopen the trial, but is to ensure that the Court can recall a witness and re-examine the witness if the evidence of such witness appears to be essential for the just decision of the case. Reference can be made to the judgment of the Supreme Court in ***Harendra Rai v. State of Bihar***, 2023 SCC OnLine SC 1023. In ***Ratanlal v. Prahlad Jat***, (2017) 9 SCC 340, the Supreme Court has held as under:

“17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view



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of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

18. *In Vijay Kumar v. State of U.P. (2011) 8 SCC 136, this Court while explaining scope and ambit of Section 311 has held as under:*

“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 [CrPC] 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.”

19. *In Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374, this Court has considered the concept underlying under Section 311 as under:*

“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



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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.”

20. *In State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402, it was held thus:*

“... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. 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, there is no ground to justify the recall of witnesses already examined.”

21. *The delay in filing the application is one of the important factors which has to be explained in the application. In Umar*



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Mohammad v. State of Rajasthan (2007) 14 SCC 711, this Court has held as under:

“38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed.”

19. In **Swapan Kumar Chatterjee v. CBI**, (2019) 14 SCC 328, the Supreme Court has held as under:

“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



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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."

20. The above view in ***Ratanlal*** (Supra) and ***Swapan Kumar Chatterjee*** (Supra) has been reiterated by the Supreme Court in ***Satbir Singh v. State of Haryana***, 2023 SCC OnLine SC 1086.

21. Keeping in view the above principles and the facts of the present case, in my view, no fault can be found in the Impugned Order. The application of the petitioner has been rightly dismissed by the learned Trial Court.

22. The submission of the petitioner that the Impugned Order amounts to review of the earlier order dated 27.03.2021 passed by the learned Trial Court, also cannot be accepted. As noted herein above, this Court had set aside the order dated 27.03.2021 passed by the learned Trial Court, and directed the learned Trial Court to decide the application filed by the petitioner afresh in accordance with law and with reasons. The order dated 27.03.2021 having been set aside, the question of reviewing the same does not arise. The remand was not confined to only giving reasons for the order dated 27.03.2021



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passed by the learned Trial Court, but to decide the application filed by the petitioner afresh.

23. Accordingly, I find no merit in the present petition. The same is dismissed. The pending application is also disposed of as infructuous.

NAVIN CHAWLA, J

FEBRUARY 26, 2024/rv/AS

Click here to check corrigendum, if any