



2024:DHC:4855



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01st July, 2024

+ **CRL.REV.P. 692/2023**

DEEPAK & ANR.

..... Applicants

versus

STATE NCT OF DELHI & ANR.

..... Respondents

Advocates who appeared in this case:

For the Applicant :Mr. Joginder Tuli & Ms.Joshini Tuli, Advs.
with revisionists present through VC

For the Respondent :Mr. Utkarsh, APP for the State
SI Ram Kishan, PS- Neb Sarai
Mr. R.S. Kaushik & Mr. B. Sengupta, Advs.
for R2

**CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN**

JUDGMENT

1. The present petition is filed under Sections 397/401 of the Code of Criminal Procedure, 1973 ('CrPC'), read with Section 482 of CrPC, challenging the order dated 20.04.2023 (hereafter '**impugned order**'), passed by the learned Additional Sessions Judge, Saket Courts, New Delhi (hereafter '**ASJ**') in FIR No. 1516/2015, filed under Sections 354/354B/323/509/34 of the Indian Penal Code, 1860 ('**IPC**') registered at Police Station Neb Sarai, New Delhi.

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2. The learned ASJ, by way of the impugned order has allowed an application moved by the complainant/Respondent No.2 under Section 311 of CrPC and under Section 302 read with Section 24(8) of CrPC, to recall and conduct further cross examination of the DW1 i.e. Indu / Petitioner No.2, and to take on record two documents – Complaint dated 18.11.1998, given by the husband of Petitioner No. 2, and also a copy of the order dated 13.12.2010, passed in a succession petition, filed by the petitioners, under Section 372 of Indian Succession Act.

Factual Matrix:

3. It is averred that the present dispute emanated within the family, in regard to the partition of the property. The Petitioner No. 2, Indu, is the sister in law (*Bhabhi*) of Respondent No. 2. It is alleged that the Petitioner No. 2, along with her son, Petitioner No. 1, on 21.10.2015, came to the house of Respondent No. 2 and started fighting with the father of Respondent No. 2, regarding the partition of property and when Respondent No. 2 came in between to save her father, she was beaten along with her mother by the petitioners.

4. The aforesaid incident led to the filing of cross FIRs – FIR No. 1515/2015 filed by the petitioners against Respondent No. 2, and the present FIR being FIR No. 1516/2015, filed by Respondent No. 2 against the petitioners. The chargesheet in the present FIR was filed on the 05.12.2016, before the learned Metropolitan Magistrate (hereafter '**MM**') / Trial Court.

5. On 23.08.2019, the prosecution evidence was concluded before the learned MM, and the statement of the petitioners under Section



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313 of CrPC was recorded on 27.11.2019. On 16.12.2019, Petitioner No. 2, moved an application under Section 315 of CrPC before the learned MM to be examined as a defense witness, and on the same day, Petitioner No. 2 was cross examined as DW-1 by the learned Additional Public Prosecutor (hereafter '**APP**').

6. The learned MM, by order dated 16.12.2019, declined the request made by the learned counsel for Respondent No. 2 to cross examine the Petitioner No.2 and further also discharged Petitioner No. 2 / DW1. The Respondent No. 2 challenged the said order, by way of a Revision Petition – 06/20, which was dismissed by the learned ASJ, on 14.01.2020.

7. Respondent No. 2, filed two applications on 24.01.2020 under Section 302 read with Section 24(8) of CrPC to recall and conduct further cross examination of Petitioner No.2 and under Section 311 of CrPC, to take on record additional documents.

8. The present case being SC No.117/2020 was transferred to the Court of learned ASJ by order dated 24.02.2020.

9. The applications under Section 302 read with Section 24(8) of CrPC to recall and conduct further cross examination of Petitioner No.2 and under Section 311 of CrPC were partly allowed by the learned ASJ, by way of the impugned order.

10. The learned counsel for the petitioners / accused persons, submitted that the learned ASJ, by way of the impugned order has failed to appreciate that the trial was at a belated stage, and has permitted the Respondent No.2 to fill in the lacunae in the prosecution



case by recalling and cross examining the witness, after the lapse of 4 years from the conclusion of statement of accused under Section 313 of CrPC.

11. She submitted that the documents placed along with the application under Sections 302 and 311 of CrPC, are not relevant or necessary in the present case since they pertain to facts much prior to the registration of the present FIR and they do not even depict any family dispute related to the property. It was submitted that the two documents were sought to be placed on record. First was a complaint made by the husband of Petitioner No. 2 and second, an order dated 13.12.2010, in a succession case. She further submitted that both of these documents are 15-20 years old, and Respondent No. 2 has failed to bring on record these documents then, despite being in possession of the same throughout, and the Trial Court, without any reason, permitted the same to be brought on record at the fag end of the trial. Reliance is placed on the decision of this Court in ***Suresh v. Manisha: Crl. M.C. No. 104/2022***, to contend that such documents ought not to be permitted to be taken on record at the stage of final arguments.

12. She submitted that the aid of Section 311 of CrPC, should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused



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or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side Reliance in this regard is placed in the decision of Apex Court in case of *Mohanlal Shamji Soni v. Union of India and Anr*, AIR 1991 SC 1346.

13. She submitted that the cross examination of Petitioner No. 2 was already concluded by the learned APP, on 16.12.2019, and the request made by the learned counsel for Respondent No. 2, to give him an opportunity to cross examine DW1, was declined by the learned MM, on the same day. She further submitted that the learned ASJ by an order dated 14.01.2020, had already dismissed the revision petition filed by Respondent No. 2, challenging the order dated 16.12.2019, which was never challenged and therefore and attained finality.

14. She submitted that the learned APP on 08.12.2022, had categorically stated that the cross examination of DW1 was concluded, and there was no need to further cross examine, however the newly appointed learned APP on 07.03.2023, forwarded both the applications of Respondent No. 2, to the learned ASJ for consideration.

15. The learned counsel for the petitioners submitted that allowing the applications by way of the impugned order, would amount to review of the order dated 14.01.2020, which is impermissible in the eyes of law.

16. The learned counsel for the complainant / Respondent No. 2, submitted that the revision petition is liable to be rejected on the



ground that the applications filed by Respondent No. 2, were rightly allowed by the learned ASJ, by way of the impugned order, as it would further the ends of justice, and would result into a fair trial.

17. He submitted that the complainant /Respondent No. 2, was taken by surprise on 16.12.2019, since the Petitioner No.2 had filed an application under Section 315 of CrPC, to be examined as a defence witness which was allowed and Petitioner No. 2 was cross examined by the learned APP, on the same day. The counsel for the complainant / Respondent No. 2 also sought permission to cross-examine the witness and his request was declined by the learned MM on 16.12.2019 itself.

18. He submitted that the request to cross examine Petitioner No. 2 was dismissed essentially for the reason that the learned counsel for Respondent No. 2 had not specifically moved any application for the same. The same was also duly recorded in the order dated 16.12.2019. He submitted that it was after the dismissal of the petitioner's request to cross examine the Petitioner No.2 *vide* order dated 16.12.2019 and thereafter by order dated 14.01.2020, that Respondent No. 2, had filed both the applications under Sections 302 and 311 of CrPC, on 24.01.2020.

19. The learned counsel submitted that allowing the application under Section 311 of CrPC, to take on record the documents, does not mean that the documents are deemed to be proved. They are just permitted in order to arrive at a just decision and in no manner would prejudice the petitioners. He submitted that Respondent No. 2, by



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placing on record the said documents, wanted to prove that there was a property dispute between the parties, and the alleged incident happened because of the said dispute. He submitted that these documents are, very much, relevant for the adjudication of the dispute and were rightly allowed by the learned ASJ to be taken on record.

20. He submitted that the second part of Section 311 of CrPC, does not allow for any discretion of the court, but it binds and compels the court to summon /recall / examine /re-examine a person if the fresh evidence to be obtained is essential to the just decision of the case. He relied upon *Mohanlal Shamji Soni v. Union of India and Anr*, AIR 1991 SC 1346.

21. He submitted that the learned ASJ by way of the impugned order has observed that no questions regarding the property dispute were asked by the learned APP from DW1. He further submitted that as per the proviso to Section 24(8) of CrPC, the court may permit the victim to engage an advocate of her choice to assist the prosecution.

22. He submitted that the Hon'ble Apex Court in *Amir Hamza Sheikh v. State of Maharashtra*, (2019) 8 SCC 387, has held that the victim has a right to participate in criminal proceedings viz. right to be impleaded, right to know, right to be heard and right to assist the court in pursuit of truth

Analysis

23. The FIR in the present case was registered alleging that the petitioners came to the house of Respondent No.2 and started fighting with the father of Respondent No.2 over the issue of distribution of



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property. It is an admitted case that the parties are related to each other.

24. The learned Trial Court on 16.12.2019, had allowed the application under Section 315 of Cr.P.C, and the Petitioner No.2 herein was examined. During the course of proceedings the learned Counsel for the Respondent No.2 / complainant made a request for supplying a copy of the application and thereafter sought permission to cross examine Petitioner No.2. The said request was declined by the learned Trial Court noting that no application with regards to the same is placed on record and the complainant is at liberty to assist the learned Prosecutor during the Course of examination. The learned Trial Court also noted the fact that the request made by the learned Counsel for Respondent No.2 was not endorsed by the learned Prosecutor.

25. By order dated 14.01.2020, the learned Sessions Court had dismissed the Revision petition against the order dated 16.12.2019, and rightly held that under the Scheme of Cr.P.C., the Complainant has no right to prosecute an accused and has no right to cross examine a defence witness. The learned Sessions Court also stated that the Complainant's / Victim's Counsel can only assist the prosecutor.

26. Thereafter on 24.01.2020, Respondent No.2 filed applications under Section 302 read with Section 24(8) of CrPC to recall and conduct further cross examination of Petitioner No.2 and under Section 311 of CrPC.

27. The case was transferred to the Court of learned Sessions Judge



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by order dated 24.02.2020 since the Cross FIR was pending Trial before the said Court and the applications filed by the Respondent No. 2 were kept pending.

28. The learned Prosecutor thereafter forwarded the applications under Section 302 read with 24 (8) and application under Section 311 of the Cr.P.C., on 07.03.2023 filed by Respondent No.2 and requested the learned Trial Court / Sessions Court that the Petitioner No.2 may be recalled for further cross examination.

29. The Hon'ble Apex Court in ***Rekha Muraraka v. State of West Bengal, (2020) 2 SCC 477***, held that 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 and if the Judge finds merit in them, he may take action accordingly by invoking his powers under section 311 of CrPC and Section 165 of the Indian Evidence Act.

30. During the course of arguments, the learned Counsel for the Respondent No.2 herein, had confined the prayer made in the application under Section 302 read with 24(8) of the Cr.P.C., only to the extent that the he may be permitted to cross examine the Petitioner No.2 through the learned Prosecutor.

31. The Hon'ble Apex Court in catena of judgements has held that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. A trial primarily aimed at ascertaining truth has to be fair to all concerned and includes the accused, the victims and society at large.



32. Section 311 of Cr.P.C reads as under:

“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.”

33. The object underlying Section 311 of the Cr.P.C is that there should 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.

34. The scope and object of Section 311 of the CrPC is to empower the court to ascertain the truth and make a fair judgment by uncovering all pertinent facts with proper evidence. It is crucial that this power is used judiciously, without whim or arbitrariness, as misuse could lead to undesirable outcomes. Section 311 of the Criminal Procedure Code should not be invoked solely to fill gaps in the prosecution's or defence's case, disadvantage the accused, or unfairly benefit the opposing party. Additionally, it should not be used to covertly initiate a retrial or alter the fundamental nature of the case against any party. The court may exercise this power only when the evidence a witness may provide is directly relevant to the issue at



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hand, ensuring both sides have a chance to respond.

35. It cannot be said that there is a delay on the part of the Respondent No.2 since the Respondent No.2 has been sincerely pursuing its case and availing its remedies. The revision petition filed by the Respondent No.2 challenging the order 16.12.2019 was dismissed on 14.01.2020, and the applications were filed without wasting much time on 24.01.2020.

36. It is also not in dispute that the application under Section 315 of Cr.P.C, preferred by the Petitioner No.2 was allowed the very same day and the examination was also concluded on the same day. The documents in question were not available with the Respondent No.2, on the said day and therefore the learned Prosecutor concluded the Cross examination of Petitioner No.2. The present applications were allowed by the learned Trial Court only after perusing the documents sought to be placed on record. The learned Prosecutor also made the request to recall the witness after going through the documents.

37. The learned Trial Court / Sessions Court in the impugned Order had observed that the Respondent No.2 sought to place on record a copy of a complainant and the order on Petition under Indian Succession Act to show that the present was a property dispute, since in the FIR the complainant had stated that the alleged incident arise out of property dispute and the parties are related to each other.

38. It is argued by the learned Counsel for the petitioner that the impugned order is in the nature of review. The oral request to cross



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examine the witness was refused by the learned Metropolitan Magistrate on 16.12.2019. It is not in dispute that a revision petition challenging the denial of oral request was dismissed by the learned ASJ by order dated 14.01.2020. It is, however, an admitted position that applications under Section 302 and 311 of the CrPC were filed for the first time on 24.01.2020. The impugned order was passed by the learned ASJ in those applications as per the procedure. There may be some overlap in the request made by the learned counsel for Respondent No. 2 orally and in the applications filed subsequently. However, the order passed by the learned ASJ disposing of the applications cannot be termed as reviewing the earlier order passed by the learned ASJ whereby revision petition challenging the denial of oral request was dismissed. Even otherwise on perusal of record, this Court is satisfied that in the interest of justice while exercising power under Section 482 of the CrPC, the applications in question deserves to be allowed.

39. This Court is of the opinion that the learned ASJ has rightly underscored the importance of bringing the additional documents on record and allowed the cross examination of the Petitioner No.2 with respect to the additional documents on account of the fact that the prosecutor had not posed any questions with respect to the property dispute.

40. The scope and object of Section 311 Cr.P.C., is to empower the court to uncover all relevant facts and gather sufficient evidence to reach a just conclusion in a case. It emphasizes the necessity of



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exercising this power judiciously, rather than arbitrarily, to avoid undesirable outcomes. Section 311 Cr.P.C should not be used to merely address gaps in the case, disadvantage the accused, or unfairly benefit the opposing party. Additionally, any additional evidence should not be accepted with the intention of initiating a retrial or altering the fundamental nature of the case against any party. This power should only be invoked when the evidence likely to be presented by a witness is directly pertinent to the issue at hand, and both parties should have an opportunity to respond.

41. The learned ASJ while passing the impugned order has specifically noted that the cross examination of DW-1 would show that no question with respect to property dispute was put to Respondent No.2 during the cross examination. It was rightly observed that it is the case of the complainant that alleged incident took place because of an alleged property dispute and the documents sought to be placed on record are relevant to facts of the present case.

42. In view of the above, this Court finds no infirmity with the impugned order and the present petition is dismissed.

AMIT MAHAJAN, J

JULY 01, 2024

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