



2024 : DHC : 2076



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13.03.2024

+ CRL.M.C. 6132/2022

MANISH JAIN @ MANISH KUMAR Petitioner
Through: Mr.Harish Kumar, Adv.

versus

STATE OF NCT OF DELHI Respondent
Through: Ms.Priyanka Dalal, APP

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

CRL.M.A. 24075/2022

1. For the reasons stated in the application, the same is allowed.

CRL.M.C. 6132/2022

2. This petition has been filed under Section 482 of the Criminal Procedure Code, 1973 (in short, 'Cr.P.C.') read with Article 227 of the Constitution of India, challenging the order dated 08.09.2022 passed by the learned Additional Sessions Judge-02, North-East District, Karkardooma Courts, Delhi (hereinafter referred to as the 'Trial Court') in Sessions Case No. 44685/2015, titled *State v. Manish Jain*, dismissing the application filed by the petitioner herein under Section 311 of the Cr.P.C. for recall of the PW-4, Mohd. Javed.

3. The learned counsel for the petitioner submits that the previous



2024:DHC:2076



counsel for the petitioner before the learned Trial Court had failed to fully/properly cross-examine the said witness. He submits that it is only when the counsel was changed, that he realized that some important questions had not been put to the said witness. He submits that the interest of justice would demand that the said witness be recalled for further cross-examination.

4. The learned APP, who appears on advance notice, on the other hand, opposes the present petition by contending that the cross-examination of PW4 was concluded on 21.12.2016 (wrongly recorded as 21.12.2013 in the Impugned Order) and the subject application was filed by the petitioner only on or about 04.09.2022, that is, after the expiry of almost six years. She submits that the trial is at the stage of final arguments and is now listed for the said purpose on 18.03.2024.

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

6. At the outset, it is to be noted that 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.

7. 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



2024:DHC:2076



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 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: the*

“17. Though Section 311 confers vast discretion upon the court and is expressed in 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



2024:DHC:2076



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 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



2024:DHC:2076



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 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.””



2024:DHC:2076



8. 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 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.

e. 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.”

9. 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.

10. A bare reading of the application under Section 311 of the Cr.P.C. filed by the petitioner would show that it is bereft of any material particulars, even as to on what are the issues on which,



2024:DHC:2076



according to the petitioner, the cross-examination of the PW4 was lacking. It, in fact, gives merely a vague reason that the previous counsel inadvertently forgot to ask some questions to the said witness. This vague assertion alone cannot be a ground to put the clock back and reopen the trial.

11. In the present case, the application under Section 311 Cr.P.C. has been filed after a period of six years of the conclusion of the examination of the said witness before the learned Trial Court and there is no explanation for such delay, nor, as noted hereinabove, there is any explanation on to what issues the cross-examination was not conducted by the previous counsel and how it is going to prejudice the petitioner. It is settled law that a mere change of counsel of the accused cannot be a ground for recall of the witness.

12. In view of the above, I find no merit in the present petition. The same is, accordingly, dismissed.

NAVIN CHAWLA, J

MARCH 13, 2024/Arya/AS

Click here to check corrigendum, if any