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

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Reserved on: 01.12.2023
Pronounced on: 03.01.2024

+ **CRL.M.C. 8782/2023 & CRL.M.A. 32763/2023**

RAKESH

..... Petitioner

Through: Mr. Amit Kumar, Advocate

versus

THE STATE GOVT. OF NCT OF DELHI Respondents

Through: Mr. Manoj Pant, APP for the
State with SI Ram Kishan, PS
Neb Sarai

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. By way of present petition filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), the petitioner seeks setting aside of order dated 09.11.2023 passed by learned Additional Sessions Judge-03, South, Saket Courts, New Delhi, in Sessions Case No. 27/2020 titled as 'State vs. Rakesh' arising out of FIR No. 455/2017, registered at Police Station Neb Sarai, Delhi under Sections 307/34 of Indian Penal Code, 1860 ('IPC'). The petitioner also prays for re-calling of PW-1 and PW-2, and to permit his counsel to cross-examine these witnesses in the larger interest of justice.



2. Brief facts of the case are that the present FIR was registered on the basis of statement of Sh. Hari Chand who had alleged that on 27.08.2017, at about 8:00 PM, when he was returning home and had reached near a temple, he had seen his brother Bholu and his nephew Rakesh consuming beer. The complainant had tried to prevent them from consuming beer, however, the accused persons had started quarreling with him and during the course of quarrel, Bholu had caught hold of his hands from behind and Rakesh had suddenly taken out a sharp metal weapon with the intention to kill the complainant. In order to save himself, the complainant had leaned forward and the said metal object had hit his head, due to which he had sustained injury on the left side of his head. Thereafter, the complaint's wife had called the PCR and the complainant had been taken to Batra Hospital. During the course of investigation, accused Bholu had passed away. The chargesheet in the present case was filed under Section 307/34 of IPC on 23.09.2019 against accused Rakesh i.e. the present petitioner.

3. The testimony of complainant/victim PW-1 i.e. Sh. Hari Chand as well as complainant's wife PW-2 i.e. Smt. Kamlesh was recorded before the learned Trial Court on 30.03.2022. The prosecution had closed its evidence on 03.10.2023 and the matter was adjourned to 21.10.2023 for recording of statement of accused under Section 313 of Cr.P.C. Thereafter, an application under Section 311 of Cr.P.C. was moved on behalf of accused/petitioner Rakesh for re-calling of PW-1 and PW-2 for further cross-examination.



4. *Vide* order dated 09.11.2023, the learned Trial Court had dismissed the application filed on behalf of the accused under section 311 of Cr.P.C. The relevant portion of the impugned order reads as under:

“Heard the submissions of both the parties and perused the record.

Witness PW 1 and PW 2 were examined and cross examined at length through the counsel of the accused vide order dated 30.03.2022. after conclusion of the prosecution evidence, fresh opportunity to cross examine the witness PW 1 and PW 2 who were already cross examined on behalf of the accused through counsel who was representing the accused at that time is neither justified nor legally permissible. Hence, the application filed under Section 311 Cr.PC to further cross examine the witness PW 1 and PW 2 does not hold any merits and accordingly stands dismissed and disposed off.”

5. The present petition has been filed assailing the aforesaid order, and learned counsel for the petitioner argues that the application under Section 311 of Cr.P.C. was preferred on the ground that the accused was earlier represented by some other counsel who had neither cross-examined PW-1 on certain points such as motive and intention and had also not put forth the defence of accused to PW-1, nor he had confronted PW-2 with her earlier statement which she had made to the police. It is stated that the cross-examination of PW-1 and PW-2 on the aforementioned points is important and essential in order to arrive at correct and just decision, and no prejudice will be caused to the complainant or prosecution since the prosecution evidence has been just concluded. It is submitted that the



learned Trial Court has rejected the application in a mechanical manner and therefore, the present petition be allowed.

6. Learned APP for the State, on the other hand, argues that there is no infirmity in the impugned order since PW-1 and PW-2 were cross-examined at length by the counsel for accused, after which they were discharged. It is contended that change of counsel cannot be a ground for re-call of witness and for giving any fresh opportunity to re-open the evidence of witnesses who have already been cross-examined at length by the earlier counsel for the accused. Therefore, it is prayed that the present petition be dismissed

7. This Court has heard arguments addressed by learned counsel for the petitioner as well as learned APP for the State, and has perused the material on record.

8. At the outset, it will be important to refer to Section 311 of Cr.P.C., which 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 Court, 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."

9. In the present case, this Court notes that the application under Section 311 of Cr.P.C. seeking re-call of PW-1 and PW-2 was primarily moved on ground of change of counsel i.e. on the ground that the earlier counsel appearing on behalf of the accused had failed to cross-examine the witnesses on certain material points.



10. In this regard, this Court notes that the Hon'ble Apex Court in the case of *Ratanlal v. Prahlad Jat* (2017) 9 SCC 340 while dismissing the appeal for re-examination of witness had relied on the decision in case of *State (NCT of Delhi) v. Shiv Kumar Yadav* (2016) 2 SCC 402, wherein it was observed that:

"... 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."

11. Further, the Hon'ble Supreme Court in *Shiv Kumar Yadav* (*supra*) has held that mere incompetence or change of counsel cannot be ground for recall of witness under Section 311 of Cr.P.C. and that it is not only matter of delay but also of harassment for witnesses to be recalled which could not be justified. It was also observed that normally, it has to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant.

12. Having perused the records of the case, this Court is of the opinion that PW-1 and PW-2 were examined and cross-examined by



the counsel for accused/petitioner on 30.03.2022, after which these witnesses were discharged. The testimony of PW-1, filed on record, reveals that the earlier counsel for accused had cross-examined the witness at length and had asked questions on his criminal background and history, details of the incident, relation between the parties, false implication of accused by PW-1, etc. Similarly, PW-2 was also cross-examined by the counsel for accused on material aspects and the counsel for accused had also confronted her with her earlier statement given to the police under Section 161 of Cr.P.C.

13. Therefore, since both PW-1 and PW-2 have already been cross-examined at length on all material aspects by the earlier counsel for the accused, they cannot be re-called merely on the ground of change of counsel.

14. Thus, in view of aforesaid, this Court finds no reasons to interfere with the impugned order dated 09.11.2023 passed by the learned Trial Court.

15. Accordingly, the present petition alongwith pending application is dismissed.

16. Nothing expressed hereinabove shall tantamount to an expression of opinion on the merits of the case.

17. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JANUARY 3, 2024/ns