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

+ **CRL.M.C. 677/2025 & CRL.M.A. 3254/2025**

SHRI NIWAS SHARMA & ORS.

.....Petitioner

Through: Mr. Vijay K., Mr. Ashwani Gehlot,
Ms. Roopa Nagpal, Advs.

versus

STATE -GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr. Aashneet Singh, APP

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

04.02.2025

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1. This is a petition seeking setting aside of the order dated 05.12.2024 passed by the learned ASJ, District Shahdara, Karkardooma Courts, Delhi in SC No. 552/2018 titled as “*State Vs Shri Niwas & Ors.*” arising out of FIR No. 249/2014 registered at Police Station Welcome wherein the learned Trial Court has dismissed the application filed under section 311 of CrPC seeking recall of the witnesses i.e. PW1 and PW2 for their cross examination.
2. The relevant portion of the said order reads as under:-

“Perusal of the record shows that both the above witnesses (i.e. PW1 Suleman and PW2 Sh. Sanjeev Kumar) were examined in chief way back in the year 2019 (in the presence of Ld. Defence Counsel) and nil opportunity was given for their cross examination in the very presence of Ld. Defence Counsel who himself had not cross examined the



witnesses and hence, their cross examination was nil. Opportunity given. Thereafter, no application /s 311 Cr. PC has ever been filed on behalf of the accused persons and the application in hand has been filed after a huge gap of 5 years and now all the witnesses have been examined in this case and matter has reached the stage of Statement of accused. Considering the overall circumstances, no ground is made out to allow the application. Hence, application u/s 311 Cr. P.C is hereby disposed of as dismissed.”

3. A perusal of the order shows that the witnesses PW-1 and PW-2 (sought to be recalled for cross examination) were examined in chief on 16.09.2019 but their cross examination was nil as the opportunity was given for their cross examination. In this view, the learned Trial Court was pleased to dismiss the application on the ground that the application was filed after a gap of 5 years and all the prosecution witnesses have now been examined.
4. Mr Kinger, learned counsel appearing on behalf of the petitioners submit that both PW1 and PW2 are the eye witnesses of the alleged incident and the entire case is based upon their testimony, hence, their cross examination is necessary for the proper adjudication of the trial.
5. Issue notice.
6. Mr. Singh, learned APP accepts notice and has made arguments.
7. I have heard learned counsels for the parties and perused the material available on record.
8. Learned Trial Court has dismissed the application on 3 grounds which are as under:-



A. Opportunity was given to the petitioner but they did not examine PW-1 and PW-2;

B. Application under section 311 of CrPC has been filed after a delay of 5 years; and

C. The evidence of the prosecution is over.

9. The Hon'ble Supreme Court in *P. Sanjeeva Rao v. State of A.P.*, (2012) 7 SCC 56 has observed that the object of trial is to give fair opportunity to the accused to prove his innocence. Relevant paragraphs of the said judgment are extracted below:-

“20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs [(2000) 10 SCC 430 : 2001 SCC (Cri) 1488] . The following passage is in this regard apposite: (SCC p. 432, para 6)

“6. ... In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

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22. *Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in Maria Margarida Sequeira Fernandes v. Erasmo Jack de*



Sequeira [(2012) 5 SCC 370 : (2012) 3 SCC (Civ) 126] . A timely reminder of that solemn duty was given in the following words: (SCC p. 384, para 35)

“35. What people expect is that the court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.”

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that



virtue. A possible prejudice to the prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

10. No doubt that the petitioner has not been unable to explain the delay of 5 years but the fact remains that PW-1 (i.e. complainant) and PW-2 (i.e. Mr. Sanjeev Kumar) are the eye witnesses and not even a single question was put by the defense counsel. I am of the view that in case they are not cross examined, the petitioners would have no chance to prove their innocence and would be fighting the case with their hands tied. Relying on the aforesaid judgment, I am inclined to allow the petition.
11. For the said reasons, the impugned order dated 05.12.2024 is set aside and the petitioner be given one opportunity to cross-examine PW-1 and PW-2 subject to the convenience of the learned Trial Court.
12. However, the petitioners have waited for 5 years to move the application under section 311 of CrPC, hence, they must pay the costs of witnesses coming to Court.
13. Subject to the petitioners paying costs of the expenses of PW-1 and PW-2 as fixed by the learned Trial Court, the petition is disposed of in the aforesaid terms.
14. *Order Dasti under the signature of the Court Master.*

JASMEET SINGH, J

FEBRUARY 4, 2025/sp