

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

+ CRL.M.C. 3422/2021 and CRL.M.A. 20081/2021

Date of Decision : 21.12.2021

IN THE MATTER OF:

KRISHAN KUMAR Petitioner

Through: Mr. Inderpal Kokhar, Advocate.

versus

THE STATE (GNCT) OF DELHI Respondent

Through: Mr. Hirein Sharma, APP for State.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.(ORAL)

1. The present petition has been filed under Section 482 Cr.P.C. on behalf of the petitioner seeking setting aside of the orders dated 01.09.2021 and 21.09.2021 passed by the learned ASJ, West District, Tis Hazari Courts, Delhi, whereby opportunity of the petitioner to cross-examine the witness *Vinod Kumar Chauhan* (PW-1) was closed and the application filed under Section 311 Cr.P.C. seeking recall of the said witness dismissed.

2. Learned counsel for the petitioner submits that initially, both the father and the mother of the deceased were cited as prosecution witnesses, i.e., PW-1 and PW-2 respectively. To safeguard the interest of the petitioner so that the prosecution witnesses may not improve upon their case, a request was made to the Trial Court for an opportunity to cross-examine both the witnesses on one day. However, the petitioner's request was declined by the

Trial Court vide the impugned orders and on 01.09.2021, only *Vinod Kumar Chauhan* (PW-1) was present and examined, whereas the mother of the deceased (PW-2) was not summoned on that day.

Learned counsel also submits that although an application under Section 311 Cr.P.C. seeking an opportunity to recall and cross-examine the witness *Vinod Kumar Chauhan* was filed, the prosecution subsequently dropped PW-2 from the array of witnesses. He prays that under the circumstances, one opportunity may be granted to the petitioner to cross-examine *Vinod Kumar Chauhan* on one single day, on which day he will also conduct the cross-examination of the aforesaid witness.

3. The scope of Section 311 Cr.P.C. has been considered by the Supreme Court in P. Sanjeeva Rao v. State of Andhra Pradesh reported as (2012) 7 SCC 56, where the Court held as under:-

"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.

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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. ... 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 prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

4. In Natasha Singh v. Central Bureau of Investigation (State) reported as (2013) 5 SCC 741, while referring to its earlier decisions in Mir Mohd.

Omar and Others v. State of West Bengal reported as (1989) 4 SCC 436, Mohanlal Shamji Soni v. Union of India and Another reported as 1991 Supp (1) SCC 271, Rajeswar Prasad Misra v. State of West Bengal and Another reported as 1966 (1) SCR 178, Rajendra Prasad v. Narcotic Cell through its Officer in Charge, Delhi reported as (1999) 6 SCC 110, P. Sanjeeva Rao (Supra) and T. Nagappa v. Y.R. Muralidhar reported as (2008) 5 SCC 633, the Supreme Court has held as under:-

"8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional

evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same."

5. In the present case, it is noted that the petitioner had initially sought to cross-examine both the parents of the deceased on one day, however the prosecution subsequently chose to drop the mother of the deceased, i.e. PW-2, from the array of witnesses. It has been informed that till date, only one witness has been examined and the other witnesses are yet to be examined

by the prosecution.

6. Doubtless, the petitioner in the present case had ample opportunity to cross-examine the aforesaid witness but he did not utilise the same. Be that as it may, this Court cannot lose sight of the fact that a fair trial is the hallmark of criminal procedure. It entails not only the rights of the victims but also the interest of the accused. It is the duty of every Court to ensure that fair and proper opportunities are granted to the accused for just decision of the case. In furtherance of the above, adducing of evidence by the accused in support of his defence is also a valuable right and allowing the same is in the interest of justice.

7. Keeping in view the aforesaid and considering the fact that the petitioner has been charged for the offence punishable under Section 304B IPC and the witness *Vinod Kumar Chauhan* is the father of the deceased, this Court deems it apposite to grant one opportunity to the petitioner to cross-examine the aforesaid witness, subject however to cost of Rs.5,000/- (Rupees Five Thousand Only) to be deposited by the petitioner with the *Delhi State Legal Services Authority* within a period of six weeks from today. On deposit of the cost, the Trial Court shall summon the aforesaid witness for one day, on which date, learned counsel for the petitioner shall conduct the cross-examination of PW-1 and no adjournment shall be granted in this regard.

8. It is informed that the matter is fixed before the Trial Court for 25.02.2022. The Investigating Officer shall take appropriate steps to summon the aforesaid witness, and for that purpose, the matter shall be listed before the Trial Court on 14.02.2022.

9. It is further directed that in case the petitioner does not cross-examine

the aforesaid witness on the date fixed by the Trial Court and seeks an adjournment, his right to cross-examine the witness shall stand closed.

10. The petition is deposed of in the above terms, along with the pending application.

11. A copy of this order be communicated to the concerned Trial Court through the learned Principal District & Sessions Judge, Tis Hazari Courts, Delhi.

(MANOJ KUMAR OHRI)
JUDGE

December 21, 2021

Click here to check corrigendum, if any