

**ORDER ON APPLICATION FILED BY  
ACCUSED UNDER SECTION 311 Cr.P.C.**

When the matter was set down for defence arguments, the counsel for accused Nos.1 to 3 filed application under section 311 of Cr.P.C to recall PW.1, PW.3, PW.4, PW.6 to PW.10, PW.12 to PW.15, PW.18 and PW.19 for further cross-examination.

2. In the application, it is contended by the accused that as per their instructions, the present counsel on record appeared on their behalf and after perusing chief and cross-examination of PW.1, PW.3, PW.4, PW.6 to PW.10, PW.12 to PW.15, PW.18 and PW.19, it is noted that the further cross examination of said witnesses is necessary for the accused to prove their defence. It is also stated that the case of the prosecution is based on the circumstantial evidence and in the previous cross examination of the witnesses by the defence counsel, they did not try to demolish the linking circumstances though it indicates that said witnesses are not natural witnesses. To prove the innocence of the accused and to demonstrate that the witnesses are unnatural, it is very necessary to summon the witnesses for further cross examination. In the earlier cross examination made by the defence side, some materials were not brought on record and the accused No1 had not cross examined the witnesses on his behalf and the same was taken as nil. Further cross examination of the above witnesses is very essential to prove

the innocence of the accused and for just decision of the case. It is also stated that if the application is not allowed, the accused would be put to irreparable loss and therefore, the accused sought for allowing the application to meet the ends of justice.

3. Said application has been resisted by the learned Public Prosecutor by filing statement of objection. It is contended by the prosecution that after completion of evidence of all the witnesses the prosecution has filed written arguments and citations on 06.02.2023 and subsequently, when the matter was set down for defence arguments, the present application has been filed by the accused to recall PW.1, PW.3, PW.4, PW.6 to PW.10, PW.12 to PW.15, PW.18 and PW.19 that too without mentioning the grounds and reasons to recall them for further cross-examination and it is the matter of the year 2014 and the present application has been filed with an intention to delay the proceedings and sought for rejecting the said application.

4. Heard arguments of both side and perused records.

5. The points that arise for consideration of this court are :-

- 1) Whether the application filed by the accused Nos.1 to 3 under section 311 of Cr.P.C to recall PW.1, PW.3, PW.4, PW.6 to PW.10, PW.12 to

PW.15, PW.18 and PW.19 for further cross-examination deserves to be allowed ?

2) What order?

6. My findings on the above points are as follows:

**Point No.1 : In partly in affirmative,**  
**Point No.2 : As per the final order**  
**for the following:-**

**REASONS**

7. I have carefully perused the application, objections and the entire record.

8. In the case on hand, the accused are facing trial for the offences punishable under sections 302, 201 and 120-B of IPC r/w. Section 34 of IPC with the allegation that the accused No.1 herein was having grudge against the deceased, who is his brother as there were quarrels between them in the matter of shares in their properties and in the said backdrop, the accused No.1 hired accused Nos.2 to 4 with an intention to kill his brother Puttappa @ Puttaswamy and accordingly, accused Nos.2 to 4 killed said Puttappa on 14.10.2013 by running Toyoto Qualis vehicle over him when he was in drunken state.

9. In the trial, the prosecution has examined 20 witnesses as PW.1 to PW.20 and after completion of trial, when the matter was set down for defence

arguments, the accused Nos.1 to 3 have filed present application to recall the aforesaid witnesses for further cross examination. As stated above, in the application, it is stated that while going through the records, it is noticed that further cross examination of said witnesses is very essential and in the earlier cross examination, no attempt has been made to demolish the linking circumstances in the case, which is based on circumstantial evidence and cross examination of some of the witnesses has been taken as nil when the counsel was not present and thus, further cross examination of aforesaid witnesses is essential to prove the innocence of the accused and for just decision of the case.

10. As stated above, in all, the prosecution has examined twenty witnesses as PW.1 to PW.20. Now accused Nos.1 to 3 have sought for cross examination of all most all the witnesses examined by the prosecution except the witnesses, who have turned hostile to its case. It is to be noted that out of the witnesses sought to be recalled, PW.1, PW.3 and PW.4 have been examined by the prosecution on 5.1.2016, 7.1.2016 and 9.3.2016 respectively. It is seen from the records that that PW.1 , PW3 and PW.4 have been subjected to cross examination at length on the same dates of their chief-examination. It is further seen from the records that subsequently, PW.1 to PW.4 have been recalled at the instance of accused Nos.2 to 4 for further cross examination by virtue of the order

passed by this court on 4.10.2016. Accordingly, they were further cross examined on 20.10.2016 and 8.12.2016 respectively. It is also pertinent to note that PW.4 was again recalled at the instance of accused Nos.2 to 4 by virtue of the order dated 28.02.2017 and accordingly, he was further cross examined on 13.03.2017. Thus, it is seen from that records that PW.1, PW.3 and PW.4 now sought to be recalled have been cross examined at length by the learned counsels for accused.

11. In addition to this, it is to be noted that PW.6 and PW.7 have been examined-in-chief on 10.03.2016 and 12.05.2016 respectively and they were cross examined by the learned counsel for accused No.1 on the same days and it was adopted by the learned counsel for accused Nos.2 to 4. Thus, it is noticed that PW.6 and PW.7 have been cross examined by the learned counsel for accused No.1 and the said cross examination has been adopted by accused Nos.2 to 4.

12. Further in the present application no ground has been made out to show that further recalling of PW.1, PW.3, PW.4, PW.6 and PW.7 is necessary for the just decision of the case, which is a paramount consideration for recalling or summoning the witnesses at this stage. In addition to this, it is to be noted that this matter is of the year 2014 and those witnesses were examined in the year 2016. Since no ground has been made out by the accused Nos.1 to 3 to recall them again for

further cross examination, certainly calling said witnesses again to the court at this stage that too after the lapse of 6 to 7 years from the date of their examination would cause hardship to them.

13. It is seen from the records that PW.8 was examined on 12.5.2016 and he was treated hostile and subjected to cross examination by the Public Prosecutor and the counsels for accused have submitted that they have nothing to cross examine said witness. Now the question that arise for consideration is whether the accused Nos.1 to 3 have made out any ground to recall said witnesses for further cross examination.

14. In this regard, it is relevant to note the decision of Hon'ble Supreme Court in the case of Ratanlal vs Prahlad Jat dated 15.09.2017 in Criminal Appeal No.499/2014, which is relied by the learned counsel for accused himself. In the said case, after the examination of 28 witnesses on the side of prosecution, two witnesses who have been examined as PW.4 and PW.5 have moved applications under section 311 of Cr.P.C for rerecording their statements on the ground that the previous statements were made under the influence of police and in the said applications, they have stated that the accused Nos.1 and 2 had no role in the incident. The said application was rejected by the learned Sessions Judge and the revision preferred by said PW.4 and PW.5 before the Hon'ble High Court of Rajasthan came to be

allowed by setting aside the order passed by the Sessions Court. In appeal before the Hon'ble Supreme Court against said order of Hon'ble High Court, the Hon'ble Supreme Court has upheld the order passed by the Sessions Judge in rejecting the application filed under section 311 of Cr.P.C by holding that the Sessions Judge was justified in rejecting the application and in the said order, it is also observed that the said application was filed after the passing of eleven months and there is no reason as such to allow such an application.

15. Further in the case of *Zahira Habibullah Sheikh vs State of Gujarath* reported in (2006) 3 SCC 374, the Hon'ble Supreme Court has held that the object underlying section 311 of Cr.P.C 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 in the statements of witnesses examined from either side and determinative factor is whether it is essential to just decision of the case. In the said case, it is also held that the provision under section 311 of Cr.P.C is not limited only for the benefit of accused and it will not be an improper exercise of the powers of the court to summon a witness under said section merely because the evidence supports the case of prosecution and not that of the accused.

16. Further in the case of *State (NCT of Delhi) vs Shivakumar Yadav* reported in (2016) SCC 402, the Hon'ble Supreme Court has held 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 a bonafide 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 bonafide 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.”

17. By keeping in mind the principles enunciated in the aforesaid decisions, I have carefully gone through the records. As stated above, PW.1 to 4 were examined in the year 2016 and they were cross examined at length by the accused and it is also pertinent to note that subsequently they were recalled and subjected to further cross examination

by the accused Nos.2 to 4 in the year 2016 itself. It is also seen from the records that the trial has been completed in the year 2017 and when the matter was settled for arguments, the accused Nos.2 to 4 have filed similar application to recall PW.4 for further cross examination and accordingly, PW.4 was recalled and further cross examined on 13.02.2017 and since then the matter was adjourned for arguments. It is also seen from the records that after hearing the arguments, the matter was set down for judgment on 14.11.2019 and subsequently, the matter was again posted for hearing further arguments. At that stage, the prosecution has filed an application under section 311 of Cr.P.C seeking issuance of summons to CW.10 to CW.16, CW.28 and CW.31 on the ground that earlier examination of said witnesses was given up by the prosecution. The said application was allowed and said witnesses were summoned and examined by the prosecution and again the matter was set down for arguments since 02.02.2022.

18. After the completion of arguments of Public Prosecutor, the accused Nos.1 to 3 have filed this application to recall aforesaid witnesses. As stated above, to summon or recall any witness, the determinative factor is whether it is essential to the just decision of the case. In the case on hand, as stated above, PW.1, PW.3, PW.4, PW.6 and PW.7 have been cross examined at length by the accused. No ground has been made out to recall the said witnesses for further cross examination.

19. As stated held in the aforesaid decisions, this court has to see whether the plea for recall is bonafide and has to balance the other relevant consideration including uncalled for hardship to the witnesses and uncalled for delay in the trial. It is also to be noted that the provision enunciated in section 311 of Cr.P.C is not limited only for the benefit of accused and the witness cannot be recalled merely because his evidence supports the case of prosecution and not that of the accused. In the present application, the accused Nos.1 to 3 have not made out any ground to show that recalling of PW.1, PW.3, PW.4, PW.6 and PW.7 is essential for the just decision of the case. Moreover, as stated above, since the examination of those witnesses was completed in the year 2016, certainly, summoning them once again to the court would cause hardship to them. The accused Nos.1 to 3, who have already cross examined said witnesses have not made out any ground to recall them for further cross examination that too after the lapse of 6 to 7 years. Hence, this court finds no merit in the application in so far as recalling of PW.1, PW.3, PW.4, PW.6 and PW.7 is concerned.

20. However, it is to be noted that the cross examination of PW.9, PW.10, PW.12 to PW.15 was taken as nil on behalf of accused No.1 due to the absence of his counsel. In addition to this, PW.18 is the investigating officer and PW.19 is the medical officer, who conducted postmortem examination and their cross examination made by accused No.1

was adopted by other accused and now accused Nos.1 to 3 intends to further cross examine them. Having regard to the same, this court is of the humble opinion that it would be proper to provide an opportunity to the accused to cross examine PW.9, PW.10, PW.12 to PW.15 and to further cross examine PW.18 and PW.19 in order to provide fair trial to them.

21. Hence, by keeping in mind the intent of the legislature behind the discretionary power envisaged under section 311 of Cr.P.C and in view of the discussion made supra, this court feels it proper to provide an opportunity for accused to further cross-examine PW.9, PW.10, PW.12 to PW.15, PW.18 and PW.19 by imposing suitable cost and stringent conditions. Accordingly, I answer point No.1 partly in Affirmative and proceed to pass the following :-

### **ORDER**

The application filed under section 311 of Cr.P.C. by the accused Nos.1 to 3 is hereby allowed in part. The prayer is rejected in so far as recalling PW.1, PW.3, PW.4 and PW.6 to PW.8 is concerned.

PW.9, PW.10, PW.12 to PW.15, PW.18 and PW.19 are recalled for further cross examination subject to the following conditions:-

1) PW.9, PW.10, PW.12 to PW.15 are recalled on payment of cost of Rs.1,000/- each and PW.18 and PW.19 are recalled on payment of cost of Rs.500/- each.

2) The accused Nos.1 to 3 shall cross-examine said witnesses on the date of their appearance before the court without seeking further adjournment.

3) The accused Nos.1 to 3 shall deposit the cost imposed above in the office on or before 30.03.2023, failing which the order passed today in so far as recall of aforesaid witnesses shall stands cancelled.

Call on 31.03.2023.

JC of accused No.4 is extended till 31.03.2023.

Sd/-

**(BHANUMATHI. B.C)**

***II Addl. District & Sessions Judge  
Chikkamagaluru.***