

ORDERS ON APPLICATION FILED U/SEC.311 OF
Cr.P.C

The prosecution has filed this application U/Sec. 311 of Cr.P.C, sought permission to summon Smt.Chandrika, Assistant Director, (Physics Division), FSL, Bengaluru, who submitted the voice analysis report, for evidence.

2. It is contended in the application that, ACB police have submitted charge sheet against the accused for the offences punishable U/s 7 of Prevention of Corruption Act, 1988. The IO has collected the mobile and voice recorder and sent the same to FSL. But, he has not received report of the same. At the time of filing of the charge sheet the IO has submitted voice analysis report, same was marked through IO Shekhar as Ex.P-44. But, by over sight the witness by name Smt.Chandrika, Assistant Director, (Physics Division), FSL, Bengaluru, who submitted voice analysis report is not cited as witness in the charge sheet. Hence, it is necessary to examine the witness, whose evidence plays important role and her evidence is very much necessary for the just decision of the case. If the application is allowed and prosecution is permitted to examine

Smt.Chandrika, no injustice or hardship would be caused to the accused. On the other hand, if the application is rejected and the prosecution is denied of examining the witness, great injustice would be caused to the prosecution. Accordingly, the learned Public Prosecutor prays to allow the application.

3. The learned counsel for the accused files objection to allow the application. It is contended in the objection that, already the prosecution examined all the witnesses and closed their side evidence. Thereafter, accused statement under Sec.313 of Cr.P.C is also recorded and closed the defence side evidence also. Hence, at this stage the proposed witness by name Smt.Chandrika is examined it caused hardship to the accused. Hence, the present application filed by the prosecution is not maintainable and liable to be dismissed. There is no merit in the application. Hence, prays to reject the application.

4. Heard the arguments of learned Public Prosecutor and the counsel for the accused and upon perusal of the application, the points that arise for consideration of this Court is:

1. Whether the prosecution has made out grounds to allow the application?
2. What Order?
5. My findings to the aforesaid points is:

Point No.1: **In the Affirmative**

Point No.2: As per the final order,
for the following;

REASONS

POINT No.1:-

6. It is specifically contended by the prosecution that the proposed witness sought to be summoned is material witness to prove the charges. If the said witness is summoned and the prosecution is permitted to examine the witness, no injustice would be caused to the accused. It is further contended that the witness sought to be examined is the material witness and her evidence is very much necessary to prove the case as the voice analysis report was given by said witness. According to the prosecution, examination of proposed witness i.e., Smt.Chandrika is very much necessary for the just decision of the case.

7. The object underlying Sec.311 Cr.P.C is to prevent failure of justice on account of mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. Application for summoning the witnesses shall not be rejected on the sole ground of delay. Sec.311 of Cr.P.C provides that if it appears to the Court that the examination of a witness is essential to the just decision of the case, then the Court has got ample power to summon any witness. The power conferred upon the trial Court in Sec.311 of Cr.P.C is, therefore, wider. However, the Court must get satisfied that such recall or summoning of the witnesses must be essential to the just disposal and adjudication of the case on hand. On plain reading of Sec.311, it is clear that the Court has to look into whether the evidence of the concerned witnesses is essential for just decision.

8. In the case on hand, the accused herein have been charge sheeted for the offences punishable U/s 7 of Prevention of Corruption Act, 1988. The material witnesses were examined during the trial. The present application is filed by the prosecution to summon additional witness i.e. Smt.Chandrika. It is

relevant to observe that, IO has send the CDs to the FSL for voice analysis on 19.07.2017. After that, investigation is completed and charge-sheet is filed. After filing of the charge-sheet the FSL report of the voice analysis is received on 23.06.2020. The copy of the report is also furnished to the accused. However, the said FSL official, who has examined those CDs is not been made as witness while filing the charge-sheet as the report was not received. The said FSL report dated 14.12.2018 is marked during the evidence of investigating officer. But, the examiner of those CDs is not examined as witness and the contents of the report were not brought through the evidence of the said examiner i.e., FSL official by name Smt.Chandrika.G. The counsel for the accuse has objected for the application on ground that, already the prosecution evidence is closed and the accused put out his defence. Now, if the witnesses are recalled his defence will be effected.

It is to be noted here that, the witness being called is the FSL official, who has examined the CDs and submitted report with regard to the voice analysis. In the given facts and circumstances of the case the examiner of those CDs is to be examined and the

evidence in respect of the voice analysis report is to be brought on record. The author of the said report dated 14.12.2018 is needed to be examine to ascertain the correctness of the content of the report. The accused have got every right to cross examine the said witness and rebut the same. The defence of the accused will not get affected if, this witness is examined as this witness is only justify with regard to the examination of the CDs submitted by the IO's and voice analysis report. The defence of the accused very well remain intact and same will not affect if, this witness is examined. Hence, considering these aspects it is necessary to recall the witness and examine as witness.

9. Since the witness sought to be summon is the material witness and her evidence assumes more significance in deciding the charge. Though the said witness i.e. Smt.Chandrika is not cited as charge-sheet witness, but to throw lights on the fact examination of said witness is necessary. The present application is filed U/s.311 of Cr.P.C. to recall witness by name Smt.Chandrika.G, FSL official. It is necessary to observe the principle in respect of the provision. The court U/s.311 of Cr.P.C., can exercise discretion power

and examine the witnesses. In this regard, the Hon'ble Apex Court laid down the principles in **Rajaram Prasad Yadav Vs State of Bihar (2013) 14 SCC 461**. The Hon'ble Apex Court has laid down principles as under:

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

17.4) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or

obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6) The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10) Exigency of the situation, fair play and good sense should be the safe guard,

while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

17.11) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14) The power under Section 311 Cr.P.C. 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

10. As per the above observation, to reach a just decision if, the court satisfy that, additional evidence is necessary and witnesses to recall the court in its discretion exercise power under Sec.311 of Cr.P.C. The said non invoking of the provision should not lead to failure of justice. Here, the evidence of the witnesses is necessary to throw light on the FSL report at Ex.P-44. Hence, this court is of the view that, the witness has to be recalled and examined. If, the application is allowed and an opportunity is given to the prosecution, no injustice would be caused to the accused. On the other hand, if an opportunity is denied to the prosecution, certainly it amounts to denial of fair trial. Hence, in the facts and circumstances of the case, this Court is of the considered opinion that the application deserves to be allowed to meet the ends of justice. Accordingly, I answer **Point No.1 in the Affirmative.**

POINT No.2:-

11. In view of my discussion on Point No.1 and the reasons assigned thereof, I proceed to pass the following:

ORDER

The application filed by the prosecution U/Sec.311 of Cr.P.C, is hereby **allowed**.

The prosecution is permitted to summon Smt.Chandrika, Assistant Director, (Physics Division), FSL, Bengaluru, to meet the ends of justice.

However, it is made clear that on the day witness appears, Public Prosecutor has to adduce evidence without seeking time or adjournment, failing which evidence will be taken as nil.

Issue SS to Smt.Chandrika returnable by:

III ADJ., Mysuru