

Present : Sri C. Pramanik, J. M. 2nd Court, Bishnupur, (J.O. Code WB01207)

Order dated 10.10.2023

Today is fixed for passing order on hearing of the petition dated 17.02.2023 filed by the accused person praying for recall of PW1 on u/s 311 of the Cr. P.C

Complainant and the accused person files hazira through their Ld. Advocate.

I have already heard the submission of Ld. Advocate for the accused person as well as Ld. Advocate for the complainant. The complainant has already filed written objection. I have perused the petition and WO.

Ld. Advocate for the accused person submits that evidence of PW1 has already closed after cross-examination and due to inadvertence some facts were not countered during the cross-examination of PW1. The same are extremely important, vital, essential in respect of the case and for the purpose of the proper adjudication of the present case it is necessary to put those questions to PW1. For the said purpose, it is necessary to recall PW1(complainant of the case). Ld. Advocate further submits that it is not necessary to disclose those questionnaires at this stage as per recent judgments of the Hon'ble Court.

Ld. Advocate for the complainant raised vehement objection and submitted that evidence of PW1 was closed on 18.08.2016 and evidence of accused person (DW) was ended on 19.09.2018 and accused was examined u/s 313 of the Cr. P. C. and even, part of the argument was heard. After a long gap of seven years complainant has filed the instant petition u/s 311 of the Cr.P.C without any proper reasons for the purpose to delay the proceeding of the case which was filed long back in the year 2013. Ld. Advocate thus prays for rejection of the instant petition.

Heard both sides . Considered.

On perusal of the record, it appears that the instant case was filed long back in the year 2013 (on 13.02.2013). Evidence of both the sides has already completed. The accused person has already examined u/s 313 of the Cr. P.C. The case has already fixed for argument. During evidence, PW1 was cross-examined extensively and his cross-examination was ended on 18.08.2016.

Before considering the petition, it would be beneficial to refer the provision of Section 311 of the Cr. P. C and the relevant provision of the Indian Evidence Act which has described the order of adducing evidence which is mentioned u/s 138 of the Evidence Act. The provisions of relevant Sections are hereunder:

Section 311, Code of Criminal Procedure

'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 Code, 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.'

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Section 138, Evidence Act

‘138.Order of examinations.—*Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—*The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.’*

Thus the provision of Section 311 of the Cr.P.C. has empowered wide power to the court to summon, re-examine or recall any witness even he has already examined at any stage of the proceeding of the case i.e in stage of inquiry, trial or at any proceedings of the case . But in case of recall of the witness, the Court has to satisfy itself that the recall or re-examination should be for the just decision of the case. And the court should exercise such power with extreme care and caution and with great circumspection.

In this regard Hon’ble Court in *Rajaram case* [*Rajaram Prasad Yadav v. State of Bihar*, (2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256] has pleased to observed as follows:

“A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression ‘any’ has been used as a prefix to ‘court’, ‘inquiry’, ‘trial’, ‘other proceeding’, ‘person as a witness’, ‘person in attendance though not summoned as a witness’, and ‘person already examined’. By using the said expression ‘any’ as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 of the Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested

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under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case.

Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

Thus it is imperative that the court while exercising the widest power u/s 311 of the Cr.P.C, must comes to the conclusion that without re-examination or recall of witness who has already examined or summon and examination of a witness who has not yet called, the judgment would be inconclusive and thereby that would lead to defeat the ends of justice. The exercise of such power should not be for the purpose of fill up the lacunae of the evidence. The principle for applying the provision of section 311 of the Cr.P.C has also been discussed by Hon’ble Court in various decisions.

In State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402 : (2016) 1 SCC (Cri) 510 : 2015 SCC OnLine SC 799 at page 414, Honourable Court has pleased to observed as follows:

“ 13. After referring to the earlier decisions on the point, the Court culled out the following principles to be borne in mind : (Rajaram case [Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256] , SCC pp. 473-74, para 17)

“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 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and 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.

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17.4. *The exercise of power under Section 311 CrPC 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 CrPC 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 safeguard, 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 CrPC must therefore, be invoked by the court only in order to*

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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."

Here, in the present petition, the accused person mentioned in the instant petition and the Ld. Advocate for the accused submitted that due to inadvertence, during cross-examination of PW1 some facts were not countered and the same were extremely important and essential of the case. Admittedly as per record, evidence of PW1 was concluded on 18.08.2016 and the PW1 was extensively cross-examined. Subsequently, after conclusion of evidence of the complainant, defence witnesses have also been examined and concluded, accused person has examined u/s 313 of Cr.P.C and the case has been fixed for argument and part of argument has also been heard. The instant petition itself or the submission of Ld. Advocate on behalf of the accused person does not specify the sufficient reasons for which it becomes imperative to invoke the provision of section 311 of the Cr.P.C by recalling the PW1 after a long time of seven years of his(PW1) extensive cross-examination. It is the contention of Ld. Advocate that some important facts were not countered during cross-examination of PW1. But as per above principle laid down by the Honourable Court in ***State (NCT of Delhi) v. Shiv Kumar Yadav*** that the purpose of invoking the provision of section is not to fill up the lacunae of the evidence. The instant petition has failed to reveal the strong, valid and sufficient reasons for which the PW1 should be recalled otherwise it would defeat the ends of justice or it would be inconclusive to reach the final decision of the case.

Hon'ble Court has reiterated that prime objective of criminal justice system is to achieve the advancement of justice and recall of witness cannot be allowed by mere asking or for mere convenience of the parties to the case.

Honourable Court has pleased to further observed in ***State (NCT of Delhi) v. Shiv Kumar Yadav*** as follows:

"15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system....."

Keeping in view the above discussion and observation and principle laid down by the

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Hon'ble Court, this court is of considered view that the instant petition for recall of PW1 should be rejected.

Hence, it is

ORDERED

that the instant petition filed by the accused person is considered and rejected on contest . There will be no order as to any cost.

Fix **08.11.2023** for Argument.

D & C by

Judicial Magistrate, 2nd Court,
Bishnupur.

Judicial Magistrate, 2nd Court,
Bishnupur.