

A.F.R.
Reserved.
Court No. - 52

Case :- APPLICATION U/S 482 No. - 12409 of 2022

Applicant :- Madhusudan Shukla

Opposite Party :- State Of U.P.And Another

Counsel for Applicant :- Bipin Kumar Tripathi

Counsel for Opposite Party :- G.A.,Vijendra Kumar Mishra

Hon'ble Shekhar Kumar Yadav,J.

1. This is a petition under Section 482 Cr.P.C. against the order dated 29.04.2022 by virtue of which the application of the applicant under section 311 Cr.P.C. for summoning certain witnesses was rejected.

2. Heard Sri V. P. Srivastava, learned Senior Advocate assisted by Sri Bipin Kumar Tripathi, learned counsel for the applicant, Mr Vijendra Kumar Mishra, learned counsel for the opposite party no. 2 and Mr L. M. Singh, learned AGA for the State.

3. In short, facts giving rise to present case are that an FIR vide Case Crime No. 1052 of 1996, under Section 364 IPC was lodged on 19.10.1996 by the informant against the applicant and three others alleging therein that on 18.10.1996 at about 7 p.m. elder brother of the informant along with one Sanjay Rai were going Girdharganj to buy vegetables; at that time applicant and other named accused persons came in a jeep and took away brother of the informant with them and when the informant reached to his house from his village, Sanjay Rai is said to have narrated all these facts to the informant. The informant further apprehends that his brother has been abducted with intention to kill him because of old enmity with one co-accused Prajapati Shukla @ Jhanney Shukla, named in the FIR.

4. Investigation is said to have been carried out but about one month none of the prosecution witnesses were examined and even the statement of informant was not recorded and as such the investigation was transferred to CBCID, Gorakhpur on 31.12.1996 by parcha no. 3 and during course of process of investigation, the matter was again transferred to CBCID, Allahabad. During pendency of investigation, Investigating Officer, CBCID, Gorakhpur submitted charge sheet against Madhusudan Shukla (applicant) and Devi Sharan Yadav in the matter on 9.9.1997 under Sections 302, 364, 201/34 IPC and against accused Prajapati Shukla @ Jhannu Shukla and Girija Shanker Pandey on 4.11.1997 under Sections 364, 302, 201/34 IPC, whereupon cognizance was taken by the learned Magistrate. However, later on, the second Investigating Officer H. N. Kanojiya, Inspector CBCID, Allahabad is said to have submitted final report against the applicant and other co accused persons. But the Trial Court has proceeded merely on the basis of the previous charge sheets, without taking any notice of the final report submitted by second Investigating Officer.

5. During course of trial, after recording of the statement under Section 313 Cr.P.C., an application (163 kha) under Section 311 Cr.P.C. dated **25.4.2022** was filed on behalf of the accused applicant to produce one Sanjay Rai as well as Second Investigating Officer H. N. Kanjiya, Inspector CBCID, Allahabad either as defence witness or court witness for the just and proper decision of the trial, which has been rejected by the trial court vide order dated 29.04.2022 noticing the fact that this Court, considering it to be one of the oldest matter, on earlier occasion had already directed the trial court to conclude the

trial of the matter within six months. It is this order which is subject matter of challenge before this Court.

6. Learned counsel for the applicant has contended that examination of the witnesses named in the application filed by the applicant under Section 311 Cr.P.C. is very essential for the just decision of the case. It is further submitted that applicant has been falsely implicated in the present case, which is based on last seen testimony and the applicant has no criminal history to his credit. In support of his arguments, he relied upon the judgements of **Rajaram Prasa Yadav Vs State of Bihar and others, reported in 2013 14 SCC 461; The State represented by the Deputy Superintendent of Police Vs N. Seenivsagan, reported in AIR 2021 SC 2441.**

7. On the other hand learned counsel for the respondent no. 2 and learned AGA for the State pleading the legality and validity of the impugned order contended that application under Section 311 Cr.P.C. moved by the applicant at the fag end of the trial was nothing, but a deliberate attempt to delay the conclusion of the trial. By way of aforesaid application, applicant wanted to re-open the entire case, which in law is not permissible. Even otherwise, application of the applicant under Section 311 Cr.P.C. was an attempt to fill up a lacuna.

8. I have carefully considered the submissions as well as gone through the record.

9. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav v State of Bihar and another (supra)** and after considering the earlier precedents, the principles to be followed by the courts with regard to

exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

"14. A conspicuous reading of Section 311 Cr P C 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 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 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. 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 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, 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.

x x x

23. 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:

a) 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?

b) The exercise of the widest discretionary power under Section 311 CrPC 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.

c) 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.

d) 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.

e) 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.

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

g) 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.

h) 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.

i) 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.

j) 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.

k) 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.

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

m) 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.

n) 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. In the case of **The State represented by the Deputy Superintendent of Police (supra)**, the Apex Court has held that if it appeared to the Court that the evidence of a person who is sought to be recalled is essential to the just decision of a case, the Court could do so under Section 311 Cr.P.C. The relevant extract is as under:-

"13. In our view, having due regard to the nature and ambit of Section 311 of the Cr.P.C., it was appropriate and proper that the applications filed

by the prosecution ought to have been allowed. Section 311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the CrPC, 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". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case."

11. Thus, the power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 Cr.P.C. is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard should be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial - which entails the interests of the accused, the victim and of the society - is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

12. In the case of **Manju Devi Vs State of Rajasthan, (2019) 6 SCC 203**, Hon'ble Apex Court had noted that an application

Under Section 311 Cr.P.C could not be rejected on the sole ground that the case had been pending for an inordinate amount of time (ten years there). Rather, it noted that "the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness". Speaking for the Court, Hon. Mr. Justice Dinesh Maheshwari expounded on the principles underlying Section 311 in the following terms:

"10. It needs hardly any emphasis that the discretionary powers like those Under Section 311 Code of Criminal Procedure are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 Code of Criminal Procedure and amplitude of the powers of the court thereunder have been explained by this Court in several decisions. In **Natasha Singh Vs CBI, (2013) 5 SCC 741**, though the application for examination of witnesses was filed by the Accused but, on the principles relating to the exercise of powers Under Section 311, this Court observed, inter alia, as under:

"8. Section 311 Code of Criminal Procedure 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 Code of Criminal Procedure, 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, Code of Criminal Procedure 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.

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 Code of Criminal Procedure 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 Code of Criminal Procedure 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."

(emphasis in original)

13. In the instant case, record (application 163 Kha) reveals that the additional witness, namely, Sanjay Rai, who claims himself to be an eye witness of the incident in his statement under Section 161 Cr.P.C., sought to be summoned by the applicant by way of additional evidence, was cited in the list of witness by both the Investigating Officers at the time of filing of the charge sheet and while submitting final report but he was not produced by the prosecution side in the trial proceedings. Whereas the Second witness sought to be examined is the second Investigating Officer, who submitted the final report after

thorough investigation and, therefore, their examination in the trial proceedings are necessary for arriving at the just decision of the case, when allegedly the case is based upon circumstantial evidence.

14. The observation of the trial court in the impugned order that the applicant, by moving the application under Section 311 Cr.P.C. belatedly wants to derail the trial, also to fill up a lacuna and to delay the trial proceedings and more particularly it has also noted in the impugned order that Sessions Trial is pending since 2013, and evidence under Section 313 Cr.P.C. was recorded on 12.4.2022 and the case was fixed on 13.4.2022 for defence evidence but on that date it has been endorsed by counsel for the applicant that applicant does not want to give any defence evidence and in view thereof the application under Section 311 Cr.P.C. has been rejected but the court below has not returned any finding as to why the evidence of witnesses sought to be summoned is not necessary.

15. Keeping in view the various pronouncements, the observations noted by the Trial Court in the impugned order are not tenable when the paramount consideration is "**just decision of a case**" and also keeping in view the decision of Apex Court in **Manju Devi (supra)** wherein it has specifically been held that delay in conclusion of the proceedings should not be the reason for rejection of an application under Section 311 Cr.P.C., the order impugned is liable to be quashed. Moreover, trial Court appears to have adopted a hyper technical view in rejecting the application, however, what it appears to have ignored is the purpose for which the salutary provisions of Section 311 Cr.P.C. has been incorporated. It has failed to adhere to the well known adage that every trial is a voyage in which quest for truth is the goal. The trial court can summon

any witness even if evidence of both sides is closed. What is required to be demonstrated is, evidence of such witness is essential to the just decision of the case.

16. Accordingly, this application under Section 482 Cr.P.C. is hereby allowed. The order of the learned trial Court dated 29.04.2022 is hereby quashed.

17. Court below is directed to fix a short date for the examination of the witnesses sought to be summoned by the applicant and on that date if the applicant fails to examine the witnesses, court below shall proceed in the matter without giving any further opportunity to the applicant to lead his evidence. Since the records indicate that the matter is oldest one, the trial Court is directed to take up the matter on day today basis and dispose of the trial as early as possible but not later than six months from the date of receipt of a copy of this order.

Order Date :- 16.06.2022

RavindraKSingh

(Justice Shekhar Kumar Yadav)