Before R.P. Nagrath, J.

SANJAY GOYAL—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER—*Respondents*

CRM-M-8808 of 2013

October 28, 2013

Code of Criminal Procedure, 1973 - S.311 - "Summoning" - "additional witness" - Petitioner facing trial under S.306, 120-B of Indian Penal Code, 1860 - After examination of one witness

application under S.311 Cr.P.C. filed by complainant for summoning and examining additional witnesses - Application allowed - Petition filed seeking quashing of order - Held, court can summon and examine additional witnesses either suo motu or on application of either party - Court shall summon and examine any such person if his evidence appears to be essential to just decision of the case - Petition dismissed.

Held, that I am of the view that the trial Court can exercise discretion for summoning and examining additional witnesses or recall and reexamine any person already examined, either suo motu or on the application of either side. Section 311 Cr.P.C. says that any Court may, at any stage of any inquiry, trial or other proceedings 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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case.

(Para 12)

Further held, that the only safeguard that can be placed in such a case is that the defence could make a prayer for seeking time to cross-examine the witnesses after the chief examination of such a witness is recorded on the basis of summoning under section 311 Cr.P.C. In that event, there would not be any prejudice to the accused/petitioner in any way.

(Para 13)

Further held, that it is not a case where prayer has been made at the fag end for filling in lacunae but at the earliest possible opportunity. The witnesses to be cited and examined relate to documents which were in existence before presentation of the challan.

(Para 14)

Further held, that keeping in view the above discussion, I do not find any ground to interfere in the discretion exercised by the learned trial Court. Subject to the observations made herein and without prejudice to the merits of the case the instant petition is dismissed.

(Para 20)

Hemant Bassi, Advocate, *for the petitioner.*

Manish Deswal, DAG, Haryana.

Vivek Khatri, Advocate for respondent No. 2.

R.P. NAGRATH, J.

(1) This is a petition under section 482 Cr.P.C. for setting aside order dated 04.02.2013 (Annexure P-8) passed by the trial Court whereby application under Section 311 Cr.P.C. filed by respondent was allowed in FIR No. 621 dated 06.09.2007 Police Station City Hisar under section 306 and 120-B IPC.

(2) To briefly describe the prosecution story, Narendra Kumar deceased was married to Shikha on 01.03.2006 and couple had child from the wedlock. On 06.09.2007, the deceased left the house at about 7 O' Clock to pick his wife. Later on Anil Kumar, the other son of the complainant received a phone call from Prithvi Raj co-accused that Narendra Kumar deceased was unwell and was at the house of Sanjay Goyal petitioner the son of Prithvi Raj aforesaid and told them to reach immediately. The complainant, who is father of the deceased again enquired from Prithvi Raj coaccused and they were told that the deceased was admitted in Apollo Hospital, Hisar. The petitioner told that deceased has consumed a sulfas tablet and died later on. It was stated that Narendera Kumar was quite upset as he has been receiving phone calls from Dimple wife of the petitioner. On completion of investigation, charge-sheet under section 173 Cr.P.C was presented before the Area Magistrate against three accused including the petitioner. During investigation of the case call details were also collected and attached with the challan.

(3) It is stated by learned counsel for the complainant respondent that only one witness has been examined so far after framing of the charges and even complainant has not been examined. An application under section 311 Cr.P.C. was filed by the complainant to summon and examine the following witnesses:-

> (1) Anil son of Sham Sunder; (2) Incharge, Crime Branch of the office of Superintendent of Police, Hisar alongwith outgoing/incoming call record from the month of August and September, 2007 of

following telephone numbers (i) 9255490658; (ii) 9255173773; (iii) 9255288074; and (iv) 9255149888; (3) Official concerned of Tata Indicom, Red Square Marked, Hisar alongwith call record/ID record/Tower Record of the following telephone numbers for the month of August and September, 2007 (i) 92554-90658; (ii) 9255173773; (iii) 9255288074; and (iv) 9255149888; (4) V.R.K. Office of S.P. Hisar alongwith applications 07.09.2007 moved to the Chief Minister, Haryana, Chandigarh and reminder to S.P., Hisar dated 03.10.2007 alongwith above application to C.M., Haryana, Chandigarh; and (5) Surinder son of Sant Ram, resident of Aggarsain Colony, Sirsa.

(4) For witness No. 1, it was stated that the factum of Anil Kumar receiving phone call from Prithvi Raj was mentioned in the FIR but Anil Kumar was not cited. During investigation, the call record of mobile phone of Narendra Kumar deceased, Dimple accused and others was collected and attached with the challan, but the relevant witnesses to prove that record have not been cited. They are the witnesses at serial Nos. 2 and 3 above. It was further stated that original application dated 07.09.2007 was made by the complainant to Chief Minister, Haryana and also reminder to Superintendent of Police, Hisar was sent. Copy of the reminder dated 03.10.2007 was attached with the application. Therefore, the production of the said record by examining witness at serial No. 4 is necessary. It is stated that office of Chief Minister, Haryana also intimated the trial Court that the said application was received in the office of Chief Minister and was forwarded to the Superintendent of Police, Sirsa on 17.09.2007. Production of the said application is also necessary. The name of Surinder witness at serial No. 5 is mentioned in the said application dated 07.09.2007, whose examination is also necessary for just decision of the case.

(5) Reply to the said application was filed and petitioner opposed it on the ground that attempt is being made to bring in forged evidence of extra judicial confession and last seen etc. which is simply an abuse of the process of Court. It was admitted in reply that the complainant sent an application dated 07.09.2007 to the Chief Minister and also the reminder dated 03.10.2007 to Superintendent of Police, Hisar but the above exercise is simply to concoct the story of extra judicial confession. It is further stated that earlier an application dated 09.03.2009 was filed by the complainant

for summoning and examining the record clerk of the Superintendent of Police alongwith application dated 07.09.2007 but the same was dismissed by the trial Court on 20.12.2010 at that stage. Learned counsel submits that the prayer for same purpose would not lie.

(6) I have heard learned counsel for the petitioner, State counsel and counsel for the complainant at considerable length and find no force in the instant petition.

(7) It was vehemently contended by learned counsel for the petitioner that the instant application was filed by the complainant and not by the public prosecutor and therefore, such an application at the instance of private party does not lie as the prosecution of criminal trial by Sessions Court has to be conducted by the public prosecutor. This argument is not borne out from the record and it is observed by learned lower Court in the impugned order dated 28.02.2013 that this application for citing and summoning of additional witnesses was forwarded by the public prosecutor. Even in reply to the instant petition, the respondent- State has supported the impugned order passed by the learned trial Court.

(8) So far witnesses at serial No. 2 and 3 are concerned, there cannot be any challenge to the impugned order because in the challan report itself it is stated that details of mobile phones were collected and attached with the charge-sheet. But it is not disputed that the police officer who collected the said record and official of the mobile company with regard to the said record have not been cited in the list of witnesses.

(9) Learned counsel for the petitioner referred to the order dated 20.12.2010 passed by the trial Court on the earlier application filed by the complainant for summoning record of office of Superintendent of Police alongwith application dated 07.09.2007 moved to the Chief Minister, Haryana. That application was dismissed but it was observed that the said order would not debar the prosecution from moving application at the subsequent stage. That application was filed even before framing of charges against the accused persons. At that stage even the existence of such application dated 07.09.2007 was disputed. It was, however, observed that complainant would be at liberty to press application at the later stage if the evidence on record so warrants.

(10) The above arguments has also been elaborately dealt with by the trial Court while permitting these witnesses to be also cited and examined. It is observed that the original application dated 07.09.2007 sent by the complainant and reminder dated 03.10.2007 sent to the Superintendent of Police, Hisar are with the V.R.K. Office of Superintendent of Police, Hisar. Copy of the reminder dated 03.10.2007 alongwith application dated 07.09.2007 were also enclosed with the application.

(11) The learned counsel for petitioner further contended that such a recourse to summon so many number of witnesses amounts to filling in lacunae left in the prosecution case and would seriously prejudice case of the accused because statements of these witnesses were not recorded under section 161 Cr.P.C. and the accused would, thus, have no opportunity to confront the witnesses with previous statements.

(12) I am of the view that the trial Court can exercise discretion for summoning and examining additional witnesses or recall and reexamine any person already examined, either *suo motu* or on the application of either side. Section 311 Cr.P.C. says that any Court may, at any stage of any inquiry, trial or other proceedings 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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case.

(13) If the trial Court has found the examination of these persons as necessary in the circumstances of the case, strong and substantial ground has to be made out for setting aside the said discretion exercised by the trial Court. The only safeguard that can be placed in such a case is that the defence could make a prayer for seeking time to cross-examine the witnesses after the chief examination of such a witness is recorded on the basis of summoning under section 311 Cr.P.C. In that event, there would not be any prejudice to the accused/petitioner in any way.

(14) It is not a case where prayer has been made at the fag end for filling in lacunae but at the earliest possible opportunity. The witnesses to be cited and examined relate to documents which were in existence before presentation of the challan.

(15) Hon'ble Supreme Court in ***Rajaram Prasad Yadav vs. State of Bihar and another, 2013 (3) RCR (Criminal) 726*** laid down the following principles which have to be borne in mind while dealing with an application under Section 311 of the Code and Section 138 of the Evidence Act -

(i) 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?

(ii) 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.

(iii) 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.

(iv) 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 of such facts, which will lead to a just and correct decision of the case.

(v) 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.

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

(vii) 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.

(viii) 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.

(ix) 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.

(x) 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.

(xi) 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.

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

(xiii) 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.

(xiv) 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."

(16) The facts of the case before Hon'ble Supreme Court were as under:-

"24. ....when we examine the case on hand, at the very outset, it will have to be stated that the High Court, while passing the impugned order has completely ignored the principal objectives with which the provision under Section 311 Cr.P.C. has been brought into the statute book. As rightly argued by the learned counsel for the appellant, at the foremost when the trial was very much in the grip of the trial Court, which had every opportunity to hear the appellant, the State, as well as the second respondent, had not even bothered to verify whether the appellant, who was facing criminal trial was impleaded as a party to the proceedings in the High Court. A perusal of the order discloses that the High Court appears to have passed orders on the very first hearing date, unmindful of the consequences involved. The order does not reflect any of the issues dealt with by the Learned Sessions Judge, while rejecting the application of the respondents in seeking to re-examine PW-9, the second respondent herein. Though orders could have been passed in this appeal by remitting the matter back to the High Court, having regard to the time factor and since the entire material for passing final orders, are available on record and since all parties were before us, the correctness of the order of the Sessions Judge dated 18.11.2009, can be examined and final orders can be passed one way or the other in the present criminal appeal itself.

25. With that view, when we examine the basic facts, we find them as noted by the learned trial Judge being indisputably contrary to the complaint preferred by the second respondent on 8.7.1999, in the police station in case No. 71/1999, wherein offences under Section 324/307/34 IPC were reported alongwith Section 27 of the Arms Act. Based on the report of the doctor, the chargesheet came to be filed bearing No.127/99, dated 31.10.1999, under Sections 324/307/34 IPC and no charge under Section 27 of the Arms Ac was laid. The said case was put to trial and parties were participating. In the course of the trial, the turn of examination of PW- 9, the second respondent came on 16.3.2007, nearly after eight years from the date of

occurrence. Second respondent made a categorical statement in his evidence that he never made any statement to the police nor was he beaten on the date of occurrence, nor was he hit by any bullet shot. Further he made a clear statement that the injury sustained by him was due to the fall into the hole dug for constructing a latrine, where some instruments caused the injury sustained by him. He also made a categorical statement that his sons PWs-4 and 5, Babloo and Munna Kumar, were not present at the place of occurrence since one was staying in a hostel in Hulasganj and the other was at Ranchi on the date and time of occurrence, namely, on 07.07.1999, at about 5 p.m. While the said version of the second respondent was stated to have been recorded by the Court below on 16.3.2007, and the evidence of the prosecution was stated to have been closed on 4.4.2007, the defence evidence seem to have also commenced.

26. In that scenario, the second respondent filed the present application under Section 311 Cr.P.C. on 24.8.2007, i.e., nearly after five months after his examination by the trial Court. While filing the said application, the second respondent claimed that his evidence tendered on 16.3.2007, was not out of his own free will and volition, but due to threat and coercion at the instance of the accused persons, including the appellant. It was contended on behalf of the second respondent that the accused persons posed a threat by going to the extent of eliminating him and that such threat was meted out to him on 15.3.2007, when he was kidnapped from his wheat field by the accused, along with two unknown persons.

(17) In the facts of that case Hon'ble Supreme Court set aside the order of the High Court and restored that of the trial Court.

(18) In ***Iddar and others*** versus ***Aabida and another (1),*** the Apex Court held that the determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused and it would not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused.

(1) AIR 2007 SC 3029

(19) In ***Natasha Singh*** versus ***CBI (State) (2),*** Hon'ble Supreme Court held as under:-

> *" The power conferred 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 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."*

(20) Keeping in view the above discussion, I do not find any ground to interfere in the discretion exercised by the learned trial Court. Subject to the observations made herein and without prejudice to the merits of the case the instant petition is dismissed.

J.S. Mehndiratta