M.Cr.C.No.11624/2016
(Paijaram & Ors. v. State of M.P. & Ano.)

20/01/2017

Shri Shri Gagan Sharma, Counsel for the applicants.

Shri Prakhar Dhengula, Panel Lawyer for the respondent No.1/State.

This application under Section 482 of Cr.P.C. has been filed against the order dated 31-8-2016 passed by 2nd A.S.J., Dabra in S.T. No. 132/2016 by which the application filed by the applicants under Section 311 of Cr.P.C. for recalling Balli (P.W.1) and Mathura Bai (P.W. 2) has been rejected.

2. The facts necessary for the disposal of this application are that the applicants are facing trial for offences punishable under Sections 302 and 307/34 of I.P.C. Balli (P.W.1) and Mathurabai (P.W. 2) were examined by the prosecution and they were cross examined in detail by the Counsel for the applicants. At the later stage, the applicants filed an application under Section 311 of Cr.P.C. for recalling Balli (P.W.1) and Mathurabai (P.W. 2) for further cross examination on the ground that earlier Shri B.S. Thakur, Junior to Shri Mukesh Parashar, Advocate had cross examined these witnesses on behalf of the applicants, however, certain important questions could not be put to these witnesses therefore, now Balli (P.W.1)

and Mathurabai (P.W. 2) may be recalled.

3. The application was opposed by the Prosecution and the Trial Court by order dated 31-8-2016, rejected the application.

4. The Counsel for the applicants submit that the Counsel who was earlier engaged by the applicants could not put several questions on the material aspects, therefore, the applicants were left with no other option but to change their Counsel and because of the inability of their earlier Counsel, they may not be put to an disadvantageous position as free and fair Trial is the cardinal principle of Criminal jurisprudence.

5. Per Contra, the Counsel for the State submits that although the free and fair trial is the cardinal principle of Criminal jurisprudence, but the applicants had engaged the Counsel of their own choice and the applicants were given full opportunity to cross examine the witnesses.

6. Heard the learned Counsel for the parties.

7. The moot question involved in the present case is that whether the Change in Counsel can be said to be a sufficient reason to recall a witness who has been examined in detail by the Counsel engaged by the applicants themselves.

8. In the present case, the applicants have not placed the copy of the deposition sheet of Balli

(P.W.1) and Mathurabai (P.W. 2) on record. It is the contention of the applicants that the witnesses were cross examined by Shri B.S. Thakur, Advcoate, an associate Counsel of Shri Mukesh Parashar, Advocate and therefore, several important questions could not be put to the witnesses. It is not the case of the applicants, that any adjournment was sought from the Court on the ground of non-availability of the Senior Counsel. It is also not the case of the applicants that Shri B.S. Thakur, Advocate was never engaged by them. It is also not the case of the applicants, that full opportunity was not given to the applicants to cross-examine the witnesses. Merely because, now the Counsel has been changed by the applicants, then that by itself would not be a good ground to recall the witnesses. The Supreme Court in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC** has held as under :

> "10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has

to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311

CrPC which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed: (SCC pp. 468-69, paras 13-14)

"13. … In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted 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.'

* * *

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.'

14. 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 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."

13. After referring to the earlier decisions on the point, the Court culled out the following principles to be borne in mind: (Rajaram case, 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.

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 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."

14. In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of the illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed: (SCC p. 432, para 6)

"6. Normally, at this late stage, we would be disinclined to open up a

closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

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. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the authorities concerned including the Law Commission and the Bar Council of India.

17. In State (NCT of Delhi) v. Navjot Sandhu, this Court held: (SCC pp. 726-27, para 167)

"167. … we do not think that the Court

should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, Strickland v. Washington makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein: (SCC OnLine US SC para 44)

'44. Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Engle v. Isaac (US at pp. 133-34). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's

> conduct falls within the wide range of reasonable professional assistance….'"

9. For the reasons best known to the applicants, they have chosen not to place the copy of the deposition sheets of Balli (P.W. 1) and Mathurabai (P.W.2) on record, to show that the witnesses were not cross examined on material points. Further, it is a well established principle of law that change of Counsel cannot be a ground to recall the witnesses. Undisputedly, the Counsels were engaged by the applicants, and now they cannot complaint about the incompetency of their Counsel.

10. As full opportunity was given to the applicants to cross examine the witnesses, and there is nothing on record to show that because of the non-availability of the Counsel engaged by the applicants, the associate Counsel had cross-examined the witnesses. Merely because now the applicants have changed their Counsel, therefore, it cannot be a good ground to recall the witnesses. If the witnesses are recalled merely for the convenience of the accused persons, then it may cause hardship to the victims or the prosecution witnesses in appearing again and again for facing cross examination. Thus, under the facts and circumstances of the case, this Court is of the view, that merely on the ground of change of

Counsel, a witness cannot be recalled specifically when, he was earlier cross examined by the Counsel of the choice of the accused persons.

11. Thus, this Court is of the considered opinion that the applicants have failed to make out a case for recall of the witnesses. The Trial Court did not commit any illegality by rejecting the application for recall of witnesses. Hence, the order dated 31-8-2016 passed by the Trial Court is maintained.

12. Consequently, this application fails and is hereby **dismissed**.

(G.S.Ahluwalia)
Judge

(ra)