[2023] 11 S.C.R. 723 : 2023 INSC 786

SATBIR SINGH

v.

STATE OF HARYANA & ORS.

(Criminal Appeal No. 2634 of 2023)

AUGUST 29, 2023

[AHSANUDDIN AMANULLAH* AND S. V. N. BHATTI, JJ.]

Issue for consideration: Courts below, if justified in rejecting the application of the appellant u/s.311, CrPC for his recall as a witness in the trial for further examination.

Code of Criminal Procedure, 1973 – s.311 – Power under – Exercise of – Appellant filed complaint that the accused-ex-employees of his company had stolen company data and used it to manufacture equipment, which was manufactured by his company – Evidence of the appellant was recorded before the CFSL Report came – Though, the CFSL expert in his examination described the data found on the hard disk(s) of the accused but there was no reference as to the comparison of the two sets of data – Application filed by appellant u/s.311, rejected – Legality:

Held: Discretionary power like s.311 is to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, whilst also ensuring no prejudice is caused to anyone – It should be invoked when it is essential for the just decision of the case – On facts, the request for recall of the appellant u/s.311 was justified, as at the relevant point of time in his initial deposition, there was no occasion for him to bring the relevant facts relating to similarity of data before the Court, which arose after the CFSL expert was examined – Orders of the Courts below set aside – Application of the appellant u/s.311 for his recall to be further examined as a witness allowed. [Paras 10-12, 14]

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Ratanlal v. Prahlad Jat **(2017) 9 SCC 340 : [2017] 8 SCR 682;** *Manju Devi v. State of Rajasthan* **(2019) 6 SCC 203 : [2019] 6 SCR 68;** *Swapan Kumar Chatterjee v. Central Bureau of Investigation,* **(2019) 14 SCC 328 : [2019] 3 SCR 713;** *Harendra Rai v State of Bihar* **2023 SCC OnLine SC 1023 – relied on.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2634 of 2023.

From the Judgment and Order dated 14.12.2021 of the High Court of Punjab & Haryana at Chandigarh in CRMM No. 40058 of 2021.

Gaurav Agrawal, Sahil Tagotra, Chritarth Palli, Advs. for the Appellant.

Anil Kumar Yadav, Addl. Adv. Gen., Dr. Monika Gusain, Mithilesh Kumar Singh, Bacha Babu Mistry, Mrs. Manju Singh, Ashutosh Kumar Singh, Rakesh Kumar Yadav, Dr. Sukhdev Sharma, Advs. for the Respondents.

The Judgment of the Court was delivered by

AHSANUDDIN AMANULLAH, J.

Heard learned counsel appearing for the parties.

2. Leave granted.

3. The present appeal has been filed against the order dated 14.12.2021 in CRMM No.40058/2021 (hereinafter referred to as the "Impugned Order") passed by the High Court of Punjab & Haryana at Chandigarh (hereinafter referred to as the "High Court"), by which the prayer for recall of the appellant as a witness in the trial before the Court below for further examination has been rejected.

4. The brief facts relating to the case are that the appellant made a complaint against the accused that they, being ex-employees of his company, had stolen company data and used such data to manufacture equipment, which was being manufactured by the appellant's company. During trial, before the Report from the Central Forensic Sciences Laboratory, Chandigarh (hereinafter referred to as "CFSL") could come, the evidence of the appellant was recorded. However, when the CFSL expert who had prepared the Report was examined on 20.08.2021 by

the Court, though he described the data which was found on the hard disk(s) of the accused, but there was no reference as to whether they were comparable to/same in regard to what was allegedly stolen from the appellant's company. Thus, under the circumstances, the appellant was constrained to apply for his recall as a witness, which was done within five days of the evidence of the CFSL expert being recorded i.e., on 25.08.2021. The same having been rejected, by the Trial Court and the High Court, the matter is before this Court.

5. Learned counsel for the appellant submitted that there was no previous occasion for him during the course of the trial to put any question with regard to comparison of data as the CFSL expert had clearly taken a stand that he had not submitted any report with regard to the comparison of the two sets of data. It was submitted that the comparison of the two sets of data was the main essence of the complaint and without the same, the trial itself would be reduced to a farce.

6. He further submitted that the courts erred in reckoning the delay counting it from the date of first lodging of the complaint though the same should have been considered from the date the cause of action arose i.e., on 20.08.2021, and the application was filed on 25.08.2021.

7. Learned counsel for respondents no.2 to 9 submitted that the appellant is only indulging in dilatory tactics as he has every opportunity to make submissions, as he deems fit, during arguments which are yet to be concluded. Learned counsel further contented that the appellant cannot be, and should not be allowed to, fill up the lacunae left in the earlier round, at the current stage.

8. Learned counsel for the State joined the proceedings via video-conferencing.

9. Section 311[1] of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "CrPC") has engaged this Court's attention before. We will

1 **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.

advert to a few decisions of recent vintage. While overturning an order of the High Court allowing an application for recall of a witness, which was rejected by the trial Court, this Court held as under, in Ratanlal v Prahlad Jat, (2017) 9 SCC 340:

'17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

18. In Vijay Kumar v.State of U.P.[Vijay Kumar v.State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240], this Court while explaining scope and ambit of Section 311 has held as under: (SCC p. 141, para 17)

> *"17.Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of [CrPC] and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously."*

19.In Zahira Habibullah Sheikh (5) v. State of Gujarat [Zahira Habibullah Sheikh (5) v.State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , this Court has considered the concept underlying under Section 311 as under: (SCC p. 392, para 27)

"27.The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. 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 will 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 of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

20.In State (NCT of Delhi) v. Shiv Kumar Yadav [State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402 : (2016) 1 SCC (Cri) 510], it was held thus: (SCC pp. 404g-405a)

"… Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for

delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined."

21. The delay in filing the application is one of the important factors which has to be explained in the application. In Umar Mohammad v. State of Rajasthan [Umar Mohammad v.State of Rajasthan, (2007) 14 SCC 711 : (2009) 3 SCC (Cri) 244] , this Court has held as under: (SCC p. 719, para 38)

"38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed there against and the High Court also rejected the said contention. It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed."'

10. In *Manju Devi v State of Rajasthan,* (2019) 6 SCC 203, this Court emphasized that a discretionary power like Section 311, CrPC is to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, whilst also ensuring no prejudice is caused to anyone. A note of caution was sounded in *Swapan Kumar Chatterjee v Central Bureau of Investigation,* (2019) 14 SCC 328 as under:

'10.The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the

three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11.It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12.Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.'

11. In *Harendra Rai v State of Bihar,* 2023 SCC OnLine SC 1023, a 3-Judge Bench of this Court was of the opinion that Section 311, CrPC should be invoked when *'… it is essential for the just decision of the case.'*

12. Having considered the matter and surveyed the law *supra*, the Court finds that a case for interference has been made out. Under the peculiar facts of the present case, the request for recall of the appellant under Section 311, CrPC was justified, as at the relevant point of time in his initial deposition, there was no occasion for him to bring the relevant facts relating to similarity of data before the Court, which arose after the CFSL expert was examined.

13. Further, we find that if opportunity is given for re-examination, respondents no.2 to 9 will not be prejudiced as they will have ample opportunity to

cross-examine the appellant. We have noted their apprehension apropos delay and issued appropriate direction *infra.*

14. In view of the above, the appeal is allowed. The orders of the Courts below are set aside. The application of the appellant under Section 311, CrPC for his recall to be further examined as a witness stands allowed. The same be done on a date to be fixed by the Trial Court, within six weeks from today. The trial will be brought to conclusion within 9 months from the date of receipt of this judgment. Pending applications are disposed of.

Headnotes prepared by : Divya Pandey *Result of the case :* Appeal allowed.