(2017) 03 JH CK 0106

JHARKHAND HIGH COURT

Case No: 124 of 2016

Roshan Aara		APPELLANT
	Vs	
Jahir Alam		RESPONDENT

Date of Decision: March 10, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 313, Section 197, Section 311 - Power to examine the accused - Prosecution of Judges and public servants - Power to summon materi

Hon'ble Judges: Rongon Mukhopadhyay

Bench: SINGLE BENCH

Advocate: Indrajit Sinha, Binod Singh

Judgement

1. Heard Mr. Indrajit Sinha, learned counsel appearing for the petitioner and Mr. Binod Singh, learned S. C. (L & C) for the respondent.

2. In this writ application, the petitioner has prayed for quashing of the order dated 09.06.2016 passed by the learned Sub Divisional Judicial Magistrate, Dhanbad in connection with Katras P.S. Case No. 120 of 2013 whereby and whereunder the learned Sub Divisional Judicial Magistrate, Dhanbad has rejected the application filed by the petitioner under Section 311 of the Cr.P.C. for recalling P.W. 9 and P.W. 11 for further cross-examination.

3. A First Information Report was instituted on the allegation that on 12.05.2013 an information was received that one Rajesh Gupta who is named accused in Baghmara P. S. Case No. 121 of 2013 is trying to flee away from his hide out. On such information the informant along with other Police personnel surrounded the abode of the accused Rajesh Gupta who on seeing the Police party he tried to flee away but was apprehended. It is also alleged that while the informant was trying to take away the accused in a police jeep

his supporters reached the spot and upon ransacking the police vehicle had taken away Rajesh Gupta from police custody.

4. Based on the aforesaid allegation Katras P.S. Case No. 120 of 2013 was instituted for the offence punishable under Sections 147, 148, 149, 341, 323, 353, 332, 290, 427, 283, 224, 225, 504 of the Indian Penal Code.

5. Investigation resulted in submission of charge-sheet on 20.08.2013 against the petitioner and others and cognizance was subsequently taken. After charges were framed against the petitioner trial proceeded and altogether fourteen witnesses have been examined by the prosecution in course of trial. The accused persons have also been examined under Section 313 of the Cr.P.C. On 14.09.2015 an application was preferred by the petitioner along with other accused persons under Section 311 of the Cr.P.C. to recall the witnesses P.W. 1 and P.W. 3, P.W. 5, P.W. 6 and P.W. 7. However, the said application was rejected on 14.09.2015. Subsequent thereto on 06.06.2016 the petitioner had filed another application for recalling the Investigating Officers namely Alok Singh and Shailendra Kumar Singh who had been arrayed as P.W. 9 and P.W. 11 for further cross-examination. Another application was filed seeking time to file certain copies of various letters which have been mentioned in the said application. Vide order dated 09.06.2016 the prayer with respect to bringing on record the documents were allowed whereas the application preferred by the petitioner under Section 311 Cr.P.C. had been rejected and which is impugned to the present application.

6. Mr. Indrajit Sinha, learned counsel appearing for the petitioner, has submitted that recalling P.W. 9 and P.W. 11 is necessary for the just decision of the case in view of the subsequent development from which the petitioner could come to know that an application for grant of sanction has been made before the authority but the said fact was never brought by the Investigating Officer before the court below. It has been submitted that the P.W. - 9 and P.W. 11 in absence of the petitioner having any knowledge about the steps taken for sanction under Section 197 of the Cr.P.C. have never been cross-examined on the point of sanction and, therefore, in the interest of justice it would be necessary for recalling them for their further cross-examination. Learned counsel also submits that two applications were preferred by the petitioner before the learned trial court and the prayer made in both the applications were interconnected, as such allowing the first prayer and refusing the second prayer of the petitioner tantamounts to non-application of mind on the part of the learned trial court. Learned counsel thus submits that the impugned order dated 09.06.2016 so far as it relates to refusal of the application filed under Section 311 of the Cr.P.C. is concerned deserves to be quashed and set aside.

7. Mr. Binod Singh, learned S. C. (L & C) for the respondent, has opposed the prayer made by the petitioner and has stated that the trial is at the fag end and it would not be legally permissible to recall P.W. 9 and P.W. 11 for their further examination. Learned

counsel submits that the accused persons have been examined under Section 313 of the Cr.P.C. and the application filed by the petitioner is only with a view to delay the trial.

8. It appears that the petitioner has based his prayer for recall and re-examination of P.W. 9 and P.W. 11 on the ground that the petitioner had subsequently come to know that the Investigating Officer had applied for sanction for prosecution as the petitioner is a sitting Member of the Jharkhand Legislative Assembly. Since it is an admitted fact that P.W. 9 and P.W. 11 were never cross-examined on the point of sanction as such issue had never cropped up in course of the trial and being a subsequent development the petitioner had filed the application under Section 311 of the Cr.P.C.

9. In order to appreciate the contention of the learned counsel for the parties it would be necessary to discuss the scope and ambit of Section 311 of Cr.P.C.

> "311. Power to summon material witness, or examine person present. -
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> 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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> In the case of Natasha Singh V. Central Bureau of Investigation (State) reported in (2013) 5 SCC 741 it was held as follows:-
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> 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 CrPC 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 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 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. Undoubtedly, an application filed under Section 311 CrPC must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned trial court prejudged the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 CrPC. By doing so, the trial court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the handwriting expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW 40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the handwriting expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or alleged to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case.

In the case of State of Haryana vs. Ram Mehar & Ors. reported in 2016 (4) JBCJ 85 [SC] it was held as follows:-

"38. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the

accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefor, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors.

Hence, we reiterate the necessity of doctrine of balance.

10. What would thus fall from the aforesaid judicial pronouncements quoted above is that the provisions of Section 311 Cr.P.C. is by way of mechanism to let the trial court arrive at a truth and such power has obviously to be exercised judiciously and the same cannot be allowed by either the prosecution or for the defence to fill up the lacuna in their respective cases.

11. Coming back to the factual matrix of the case the petitioner is a sitting Member of Jharkhand Legislative Assembly and prosecuting the petitioner sanction was sought for by the Investigating Officer. This fact was never in the knowledge of the petitioner but such information has been subsequently gathered. It is not in dispute that the efforts made by the Investigating Officer in obtaining sanction from the prosecution of the petitioner being conspicuously absent, P.W. 9 and P.W. 11 were, therefore, never examined or cross-examined on the said fact. It is no doubt true that the prosecution witnesses have been examined and the accused persons have also examined under Section 313 of the Cr.P.C. but in view of the provisions of Section 311 of the Cr.P.C. even at the fag end of the trial an application under Section 311 of the Cr.P.C. can be considered and if necessary allowed if the court finds that allowing such application will not render filling up of the lacuna in either the prosecution case or the defence case.

12. As has been held in the case of State of Haryana vs. Ram Mehar & Ors. (Supra)

magnanimity of the court does not mean conveying individual generosity founded on any kind of fanciful notion and has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but is opined by the other parameters and exceptions.

13. In the impugned order dated 09.06.2016 the learned Trial Judge has concentrated himself only on the purported delaying tactics of the petitioner without specifying as to how allowing the application under Section 311 Cr.P.C. shall lead to filling up of the lacuna in the defence case. The trial court has also not considered the issue as to whether subsequent development did give right to the petitioner to examine P.W. 9 and P.W. 11 as the emergence of the fact regarding efforts for obtaining sanction had seen the light of the day very recently. The learned trial court has also not considered the fact that allowing the prayer of the petitioner of exhibiting certain documents which also includes the communication made and received by the Investigating Officer are in some way connected with the application filed under Section 311 of the Cr.P.C.

14. The narration and discussion made above, would lead this Court to conclude that recall and re-examine of P.W. 9 and P.W. 11 on the question of sanction are necessary for arriving at a just decision of the case. In such view of the matter, therefore, the impugned order dated 09.06.2016 passed by the learned Sub Divisional Judicial Magistrate, Dhanbad in G. R. No. 2023 of 2013 so far as it relates to refusing the application preferred by the petitioner under Section 311 of the Cr.P.C. is, hereby, quashed and set aside and the application preferred by the petitioner under Section 311 of the Cr.P.C. is allowed.

15. The learned trial court is directed to recall P.W. 9 and P.W. 11 for their further examination and the said exercise must be and with all sincerity be completed within a period of thirty days from the date of receipt/production of a copy of this order.

16. This writ application stands allowed.