

(2017) 01 AHC CK 0330
In the Allahabad High Court
Case No : 4120 of 2016

KALUWA & OTHERS

APPELLANT

Vs

STATE OF U P & ANOTHER

RESPONDENT

Date of Decision : 10-01-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 311](#) - Power to examine the accused - Power to summon material witness, or examine person present
[Indian Penal Code, 1860](#), [Section 302](#), [Section 34](#), [Section 147](#), [Section 148](#), [Section 149](#) - Punishment for murder - Acts done by several persons in furtherance of common intention - Punishment for rioting - Rioting, armed with deadly weapon - Every member of unlawful assembly guilty of offence committed in prosecution of common object

Citation : (2017) 01 AHC CK 0330

Hon'ble Judges : Mukhtar Ahmad

Bench : Single Bench

Advocate : Amar Nath Singh, Devesh Kumar Shukla

Final Decision : Dismissed

Judgement

1. This criminal revision has been preferred against the order dated 2.12.2016 passed in Sessions Trial No.1612 of 2011 under Section 147, 148, 149, 302/34 I.P.C. whereby an application moved on behalf of the revisionist/ accused under Section 311 Cr.P.C. has been rejected.

2. Facts, filtering unnecessary averments, giving rise to this revision are that FIR under the aforesaid sections bearing Case Crime no. 498/2011 was lodged by Abid-opposite party no.2 against 6 accused persons, charge sheet against 5 accused persons were filed by the Investigating Officer on which sessions trial no. 1612 of 2011 was initiated in which the prosecution evidence has been concluded and statement of accused persons under Section 313 Cr.P.C. are also recorded. The evidence in defence has also been adduced and case came at the stage of arguments.

3. It also appears that against one accused Malook, charge sheet was submitted by the police subsequently on which Sessions Trial no. 760 of 2015 arose. In that trial, witnesses Abdul Salam, Jabir and Abid were examined. on behalf the prosecution. Accused persons at the stage of arguments in S.T. No.1612/2011 moved an application under Section 311 Cr.P.C. with a prayer to summon the prosecution witnesses namely 1. Abdul Salam 2. Jabir and 3. Abid for further cross-examination. Learned trial Court after hearing both the parties refused the prayer by rejecting the application under Section 311 Cr. P.C. vide impugned order. Assailing that order, the instant revision has been preferred.

4. I have heard Mr. A.N. Singh learned counsel for the revisionists, Mr. D.K. Shukla learned counsel for the opposite party no.2, learned A.G.A. and perused the record.

5. For proper appreciation of the submissions of both the parties, it would be appropriate to quote Section 311 Cr.P.C. which runs as under: "311 CrPC. 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."

6. Learned counsel for the applicants has submitted that the witnesses prayed to be summoned for further cross-examination were examined in the Sessions Trial No. 1612 of 2011 and the same very witnesses are subsequently examined in Sessions Trial no. 760 of 2015 but there are grave contradictions in their version while examining in both the trial. Hence, further cross-examination of these witnesses was very essential and necessary to decide the case after proper adjudication but the learned trial Court did not consider this aspect of the matter and arrived at a wrong conclusion. It is further submitted that these witnesses were examined in sessions trial no. 1612 of 2011 in which they had stated that the assailants were wearing helmets but in their cross examination only 3-4 questions were asked and with a view to arrive at a correct conclusion further cross-examination is very much required.

7. These arguments were opposed by learned counsel for the opposite parties by saying that the witnesses were examined and actually they have been cross examined at length but the reason assigned for their further cross examination is not acceptable. In the garb of further cross examination the accused persons want to re-open the entire case and learned trial Court has rightly observed that further cross examination of the witnesses was not required and application was rightly rejected.

8. I have bestowed my considerations to the submissions made on behalf of the parties. In view of the provisions of Section 311 Cr.P.C., it comes out that any

witness may be summoned at any stage by the Court if the evidence appears to be essential, for just and proper decision of the case. In *Natasha Singh Vs. C.B.I. (State)* (2013) 5 SCC 741, the Hon'ble Supreme Court has observed in para 14 as under: "14. 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 Cr.P.C. 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."

9. In the decision reported in *Mohanlal Shamji Soni vs. Union of India and another* - 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph

10. ...In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated." 10. In *Raj Deo Sharma (II) vs. State of Bihar* 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:- "9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *A.R. Antulay* case nor in *Kartar Singh* case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person."

(Emphasis added)

11. In *U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan*

- 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:- "15.A conspectus of authorities referred to above would show that the principle is well settled that 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 of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or reexamining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the 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."

12. In *P. Sanjeeva Rao vs. State of A.P.*- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 13 and 16, which are as under:- "13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in *Hoffman Andreas v. Inspector of Customs, Amritsar* (2000) 10 SCC 430,. The following passage is in this regard apposite:

"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.

"16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

(Emphasis added)

13. In the matter in hand, admittedly the witnesses were examined in 2012.

Witness Abdul Salam was examined on 17.5.2012. A lengthy cross examination of that witness was made on behalf of the accused persons, copy of his statement is made available on the record. In the same year, witnesses Jabir and Abid were also examined on certain dates they were cross examined at length. Hence, the reason that on the point of wearing helmets by assailants they were not properly cross examined, cannot be the ground of summoning these witnesses for further cross examination. Learned counsel for the revisionist has also failed to demonstrate as to how the comparative study of oral testimony of the witnesses in two aforesaid trials can be the ground for their further cross examination. Admittedly, the matter relates to the incident dated 18.8.2011, the evidence of both the parties is concluded and the matter is at the stage of arguments.

14. I find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. I do not find any bonafides in the application of the revisionist, while seeking the permission of the Court for re-examination. In the light of the above conclusion, applying the various principles set out above, I am convinced that the order of the trial Court impugned before this court did not call for any interference.

15. Hence, revision fails and it is hereby dismissed. Learned trial Court is directed to to decide the concerning matter expeditiously preferably within three months from the date of filing the certified copy of this judgment, without granting any adjournment to any of the parties unless it is required for very compelling reasons.