

(2022) 05 DEL CK 0144

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 938 Of 2022, Criminal Miscellaneous Application No. 4010 Of 2022

Sukhvinder Singh @ Gagga & Ors

APPELLANT

Vs

State (Gnctd Of Delhi)

RESPONDENT

Date of Decision : 20-05-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 304, 307, 325, 326, 356, 506
Code Of Criminal Procedure, 1973 — Section 173(5), 311, 482
Arms Act, 1959 — Section 27
Evidence Act, 1872 — Section 138

Citation : (2022) 05 DEL CK 0144

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Sanjay Khanna, Pragya Bhushan, Meenakshi Dahiya

Judgement

Prateek Jalan, J

The proceedings in the matter have been conducted through hybrid mode [physical and virtual hearing].

1. The petitioners are facing trial in Sessions Case No. 46/2020, arising out of FIR No. 01/2018, dated 03.01.2018, registered in Police Station, Defence Colony, under Section 325 of the Indian Penal Code, 1860 ["IPC"]. By way of this petition under Section 482 of the Code of Criminal Procedure, 1973 ["CrPC"], they have assailed an order dated 28.01.2022, by which the Trial Court has allowed an application filed by the prosecution under Section 311 of the CrPC for summoning of an additional witness.

2. The FIR was registered at the instance of one Gurmeet Singh [hereinafter "the complainant"] in respect of an incident alleged to have taken place on 11.12.2017. The complainant claims to have left his home at around 11:35 PM by car to withdraw money. He found that a car driven by the petitioner No. 1 was following him. The estranged wife of the complainant, who is the petitioner No.

3, was also in the car. It is alleged that the petitioner No. 1 pulled him out of the car, threw him on the road and beat him. The petitioner No. 3 is also accused of instigating others to beat the complainant. The complainant drew out his gun to defend himself, but the petitioner No. 2 tried to snatch the gun, in the course of which a shot was fired, and it hit the rear side of the car. The complainant claims to have been subjected to blows by fists and with a baseball danda [hereinafter "baseball bat"]. It is alleged that another shot was also fired, and that the petitioner No. 2 snatched the complainant's phone, gold chain and approximately ₹1500/- cash. An FIR under Section 304 of the IPC [FIR No. 234/2017, dated 12.12.2017, registered in Police Station Defence Colony, under Section 307 of the IPC and Section 27 of the Arms Act, 1959] was registered against the complainant at the instance of the petitioner No. 1. The complainant was detained by the police but alleged that he and his family members have been threatened by the petitioner Nos. 1 and 3.

3. In the course of the investigation, the complainant was examined and a Medico-Legal Case ["MLC"] was drawn up by the All India Institute of Medical Sciences Trauma Centre, wherein Dr. Kaberi Debbarma, Junior Resident, opined that the injuries were grievous and caused with a blunt weapon.

4. Charges have been framed against the petitioners under Section 326/34/506/356 of the IPC.

5. During the course of the trial, Dr. Debbarma was examined as PW-7. She testified to having prepared an MLC of the complainant on 12.12.2017 (Exhibit PW-3/A), and identified her signatures thereupon. She also testified that she had prepared a discharge summary (Exhibit PW-4/A). During the course of her cross examination, she stated that the discharge summary at PW-4/E does not bear her signatures, but is signed by one Dr. Vinay Kumar Sahu, Orthopedician, while the discharge summary, in general, was signed by her. The relevant portion of her testimony in cross examination is extracted below:-

" It is correct that the Discharge Summary Ex. PW-4/E does not bear my signatures, but is signed by Orthopedician. The opinion in Orthopedic OPD was given by Dr. Vinay Kumar Sahu while the Discharge Summary in general was signed by me. It is correct that the Discharge Summary Ex. PW-4/E does not bear the original signature of Dr. Vinay Kumar Sahu. The Discharge Summary Ex. PW-4/E was not prepared by me."

6. It is in these circumstances that the prosecution filed an application dated 07.12.2021 before the Trial Court under Section 311 of the CrPC, seeking that Dr. Sahu be summoned as a witness. The ground stated in the application was that, during the examination of Dr. Debbarma, it has been found that opinion on the MLC was also given by Dr. Sahu.

7. Vide the order dated 28.01.2022, the Trial Court allowed the aforesaid application, noticing that the object of Section 311 of the CrPC is to bring on record best available records to ascertain the facts. The Trial Court noticed that

the prosecution had relied upon the discharge summary, x-ray report and MLC which form part of the charge sheet and had cited Dr. Debbarma as a witness. As it was only during her cross examination that the role of Dr. Sahu came to light, the Trial Court held that his evidence will be required to clarify the medical condition of the complainant and the extent of the injury suffered by him.

8. In support of this petition, Mr. Sanjay Khanna, learned counsel for the petitioners, submitted that the Trial Court has effectively permitted the prosecution to fill a lacuna in the prosecution evidence. He pointed out that the list of witnesses in the charge sheet does not name Dr. Sahu, and that the evidence of a second doctor is now sought to be adduced to make out the case of injury by a baseball bat. He drew my attention to the copy of the MLC where the name of the proposed witness, i.e. Dr. Sahu, does not appear, and also submitted that the signature of Dr. Sahu does not appear in the discharge summary. Mr. Khanna cited the decisions of the Supreme Court in *Rajaram Prasad Yadav vs. State of Bihar and Another* (2013) 14 SCC 461 and *V.N. Patil vs. K. Niranjan Kumar and Others* (2021) 3 SCC 661 to submit that, in the circumstances of this case, the said application of the prosecution ought to have been rejected.

9. Ms. Meenakshi Dahiya, learned Additional Public Prosecutor for the State, on the other hand, argued that the evidence of the proposed witness, as to the extent of the complainant's injuries and treatment undergone, is required to arrive at a just decision of the matter. She emphasised that the proposed witness was an independent professional witness whose medical opinion must be produced as it is relevant to the case at hand.

10. Section 311 of the CrPC reads as follows:-

"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."

11. The scope of the provision has been considered by the Supreme Court in several decisions. In *Natasha Singh vs. Central Bureau of Investigation (State)* (2013) 5 SCC 741, the Supreme Court emphasised that the object of the provision is to enable the Court to determine the truth and to render a just decision after scrutiny of relevant facts and on obtaining proper proof. Although it cannot be used to fill up a lacuna or cause prejudice to the accused, the power is required to be exercised if the evidence of the proposed witness is likely to be germane to the issue. These principles were restated in *Rajaram Prasad Yadav Supra* (note (2013) 14 SCC 461), cited by Mr. Khanna, in the following terms:

"17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the

Evidence Act, we feel the following principles will have to be borne in mind by the courts:

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.”

12. In *Manju Devi vs. State of Rajasthan and Another* (2019) 6 SCC 203, the Court held that the provision is intended to ensure that the record is kept straight and any ambiguity with regard to the evidence is clear, without causing prejudice to anyone.

13. The recent judgment in *V.N. Patil Supra* (note 2), also cited by Mr. Khanna, concerns a case like the present one wherein the proposed witness was not cited in the final report submitted to the Trial Court under Section 311 of the CrPC. The Supreme Court noticed that the Trial Court had permitted summoning of the witness, holding that no hardship could be caused to the accused since the witnesses and the documents intended to be summoned would be subjected to cross examination and testification as per the provisions of the CrPC. Although the High Court had reversed the view of the Trial Court, the Supreme Court allowed the appeal and restored the judgment of the Trial Court for the following reasons:-

“17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

xxxx xxxx xxxx

21. In the instant case, although the application was filed by the learned Additional Special Public Prosecutor under Section 173(5) read with Section 311 CrPC but it was open for the learned trial Judge as well to exercise suo motu powers in summoning the witnesses whose statements ought to be recorded to

subserve the cause of justice, with the object of getting the evidence in aid of a just decision and to uphold the truth.”

14. Applying these principles to the facts of the present case, I am of the view that the judgment of the Trial Court requires no interference under Section 482 of the CrPC. The documents filed alongwith the charge sheet include the MLC and the discharge summary. The name of Dr. Debbarma appears on the MLC, which she has also identified. The discharge summary mentions that it is signed by the proposed witness, i.e. Dr. Sahu, on 12.12.2017 at 04:59 and by Dr. Debbarma on 12.12.2017 at 05:02 [Both the signatures appear to be electronic signatures.] Mr. Khanna’s argument that the evidence is intended to fill a lacuna in the prosecution case is, therefore, untenable. The fact that Dr. Sahu was involved in the treatment of the complainant was proved by the documents filed alongwith the charge sheet. His role has been elaborated by Dr. Debbarma in the course of her cross examination. As held by the Supreme Court in *Raja Ram Prasad Yadav Supra* (note 1) [paragraph 17.10] and *V.N. Patil Supra* (note 2) [paragraph 14], the guiding factors in such a situation are fair play and good sense, with parties being given the opportunity to correct errors in missing any particular evidence, even due to inadvertence. In *V.N. Patil Supra* (note 2) also, in fact, the Supreme Court permitted the evidence of a doctor who conducted the second post-mortem of the deceased to be brought on record, when the doctor who had been examined by the prosecution had turned hostile. In the light of the fact that the prosecution had placed the MLC and discharge summary on record, the summoning of Dr. Sahu, who had treated the complainant, cannot be characterised as an attempt to fill a lacuna in the prosecution evidence.

15. The Trial Court has also held that the medical evidence is essential to clarify the medical evidence placed before the Court, to arrive at a just determination of the case. I do not find any reason to disagree with this view.

16. Mr. Khanna's submission that the proposed witness cannot be summoned at this stage as he was not cited as a witness in the charge sheet also does not appeal to me. As mentioned above, the Supreme Court, in *V.N. Patil Supra* (note 2), also considered a similar argument but permitted the summoning of the witness. I have had occasion to deal with the issue in a recent judgment, i.e. *Dr. Pradeep Dutta vs. State (NCT of Delhi) and Others* Judgment dated 02.05.2022, in CRL.M.C. 1203/2022, wherein a similar contention has been rejected, relying upon the judgments of the High Courts of Himachal Pradesh [*Kewal Gupta vs. The State of Himachal Pradesh* (1989) SCC Online HP 77] and Orissa [*Karam Chand Mukhi and Others vs. Santosh Pradhan and Another* (2004) SCC Online Ori 300].

17. For the aforesaid reasons, I am of the view that the present petition is devoid of merit. The same is, therefore, dismissed, but with no order as to costs. The pending application also stands dismissed.