

HON'BLE DR. JUSTICE CHILLAKUR SUMALATHA

CRIMINAL PETITION No.3527 of 2022

ORDER:

Projecting that the order that is rendered by the Court of V Additional Metropolitan Sessions Judge, Hyderabad in CrI.M.P.No.73 of 2022 in S.C.No.296 of 2015, dated 28.3.2022 is unsustainable in law and thereby, seeking the Court to quash the same, the petitioner who is arrayed as accused in the said Sessions Case is before this Court.

2. Heard the submission of learned counsel for the petitioner as well as learned Assistant Public Prosecutor.

3. During the course of proceedings, the respondent-State moved an application under Section 311 Cr.P.C. seeking the trial Court to reopen the evidence on prosecution side and to recall P.W.-7 for the purpose of getting the bonafide certificate of the alleged victim girl marked. The accused, who is the petitioner herein, resisted the said application. However, the trial Court by order dated 28.3.2022

allowed the said application. Aggrieved by the same, the petitioner is before this Court.

4. The submission of the learned counsel for the petitioner is that initially, the case was registered for an offence punishable under Section 363 IPC and on completion of investigation, charge sheet was laid. The same was numbered as S.C.No.296 of 2015. The trial proceedings concluded. Even arguments were heard. The trial Court thereafter reopened the case for want of bonafide certificate of the alleged victim girl. Through docket order dated 31.01.2022, the trial Court addressed a letter to Narayanaguda Police Station to cause production of bonafide certificate of the alleged victim girl. On that, the petitioner/accused preferred Revision challenging the said docket order. On coming to know about the filing of Revision by the petitioner/accused, the respondent-State filed CrI.M.P.No.73 of 2022 under Section 311 Cr.P.C. seeking the Court to reopen the evidence on prosecution side and to recall P.W-7 for the purpose of

marking the bonafide certificate of the alleged victim girl. Learned counsel by submitting thus, contends that the trial Court is expected to deliver judgment basing on the material that is available on record and the Court is not expected to conduct a roving enquiry by collecting the evidence as if it is the prosecutor and the same is impermissible under law.

5. The learned counsel for the petitioner brought to the notice of this Court the order that is rendered by this Court in CrI.R.C.No.63 of 2022 dated 16.02.2022, wherein and whereby this Court had set aside the said docket order dated 31.01.2022. Further, submitting that the power granted under Section 311 Cr.P.C. cannot be invoked to fill up the lacunae in its evidence by the prosecuting agency, the learned counsel for the petitioner relied upon the decision of the High Court of Bombay in the case between **Nayna Rajan Guhagarkar Vs. State of Maharashtra**¹, wherein the Court at para 6 of the order observed as follows:-

¹ 2021 SCC Online Bom 1054

“No doubt, under Section 311 Cr.P.C, any Court may, at any stage of any inquiry, trial or other proceeding 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, if it is essential to the just decision of the case, however, at the same time, the said power under Section 311 cannot be used to fill in the lacunae in the prosecution evidence. Having regard to the peculiar facts of this case that the impugned order issuing witness summons for recalling the complainant and panch was passed after arguments were advanced and written submissions were filed, on the aspect of memory card not being proved, it was not permissible for the learned Judge to pass the impugned order. The same, in the facts, would clearly tantamount to filling up the lacunae in the case. It would also result in causing serious prejudice to the petitioner.”

6. Further, stating that the power granted under Section 311 Cr.P.C. should not be exercised when the same would cause prejudice to the accused, the learned counsel for the petitioner relied upon the

decision of the Hon'ble Apex Court in the case between ***Mannan Shaikh and others Vs. State of West Bengal***², wherein the Court at para 12 of the order held as follows:-

“The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the section uses the word “*shall*”. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words “*essential to the just decision of the case*” are the keywords. The court must form an opinion that for the just decision of the case recall

² (2014)13 SCC 59

or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be guided only by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill up the lacuna. Whether recall of a witness is for filling up of a lacuna or it is for just decision of a case depends on the facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.”

7. Contradicting the submission made by the learned counsel for the petitioner/accused, the learned Assistant Public Prosecutor contended that when certain material is required for the Court to come to a just conclusion, it has got every power to call for the said material. The learned Assistant Public

Prosecutor also contends that the age of the alleged victim girl is a relevant factor and her age has to be established by the prosecuting agency before the trial Court and therefore, steps were taken for getting her bonafide certificate marked, and that, having regard to the genuineness in the request made, the trial Court allowed the application which is filed to recall P.W-7 for getting the bonafide certificate of the alleged victim girl marked. Therefore, the objection taken by the learned counsel for the petitioner/accused is unsustainable. The learned Assistant Public Prosecutor further submits that the bonafide certificate which was intended to be marked was indeed referred to by the Investigating Officer while giving evidence, but inadvertently the said document could not be marked and therefore, the trial Court has rightly given an opportunity for the prosecuting agency to get the said document marked.

8. The power granted under Section 311 Cr.P.C. to the Court is wide enough. The Court is empowered to

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 who was already examined. The Court can do so at any stage of inquiry, trial or other proceedings that are pending before it. This power has to be exercised when the Court deems exercise of such power to be essential for just conclusion of the case. A fair judicial system requires the Courts to play active and vital role during the course of trial proceedings. Time and again, the Hon'ble Apex Court held that the trial Courts are not expected to be mute or silent spectators. Furthermore, Section 165 of the Indian Evidence Act, 1872 grants exclusive power to the Court to put questions and to get answers regarding the relevant facts for arriving at a just conclusion irrespective of the fact that the prosecution or the defence failed to exercise due diligence in eliciting the material facts from the witnesses.

9. During the course of his submission, the learned counsel for the petitioner time and again submitted that in case of production of the bonafide certificate, the defence taken by the petitioner/accused during the course of cross-examination of the prosecution witnesses would be defeated.

10. The primary motto of the Courts of law is to decide the case upon merits and for doing so, the genuine and relevant facts have to be examined. In the process of adjudication, the advocates, though they appear for the accused, being the officers of the Court need to assist the Court to come to a just conclusion. Admittedly, the object of adducing evidence is to aid the Court for coming to a just conclusion and to uphold the truth.

11. Therefore, this Court is of the view that the learned judge of the trial Court did not err in allowing the application that is filed for reopening the evidence on prosecution side and for recalling P.W-7 for the purpose of getting the bonafide certificate of the

alleged victim girl marked. Thus, with the foregoing observations, this Court concludes that this Criminal Petition lacks merits.

12. Resultantly, this Criminal Petition is dismissed.

13. As a sequel, pending miscellaneous applications, if any, shall stand closed.

Dr.CHILLAKUR SUMALATHA, J

15.7.2022

Note:

LR copy to be marked.

B/o

dr