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SooperKanoon Citation : sooperkanoon.com/682486

Court : Delhi

Decided On : Jul-22-1998

Reported in : 1998VAD(Delhi)202; 74(1998)DLT501; 1998(46)DRJ762

Judge : J.B. Goel, J.

Acts : Code of Criminal Procedure (CrPC), 1973 - Sections 311 and 482

Appeal No. : Crl. Misc. (Main).No. 1250/98

Appellant : Devinder Singh

Respondent : State

Advocate for Def. : Mr. M.S. Butalia, Adv.

Advocate for Pet/Ap. : Mr. R.N. Mittal, Sr. Advocate and; Punit Mittal, Adv

Judgement :
ORDER

J.B.Goel, J.1.This is a petition under Section 482 of the Code of Criminal Procedure (the Code) challenging the legality and validity of the order dated 4.4.1998 & 18.4.1998 passed by the trial court whereby the applications under Section 311 of the Code filed by the petitioner and his two co-accused for recalling some prosecution witnesses have been dismissed.2. Similar application dated 1.2.1997 filed by the accused persons was earlier dismissed on 17.4.97. That

order was not challenged.

3. The petitioner Devinder and co-accused Vijendar have been charged under Section 506/34 IPC and co-accused Surinder Singh and Devinder Singh have been charged under Section 376 IPC also. The prosecutrix Kumari Meena aged 12 years has alleged in her first information complaint that on 3.1.87 at about 5.00 p.m. she had gone to fetch water from a tubewell. While she was filling the pitcher and was alone accused Surinder gagged her mouth and the three accused forcibly took her to nearby jungle where Surinder and Devinder one after the other raped her and they and the co-accused Vijendar who remained present had extended threats of killing her if she raised alarm or informed any person thereafter. On return to her home, she told the incident to her mother, at that time her father was not at home and when he came home the incident was also narrated to him. Police was informed; the prosecutrix lodged a report of the incident with one ASI. FIR was registered in the night itself. She was medically examined. Her clothes were seized. The three accused were arrested. Medical report as also CFSL report suggested that rape had been committed. After investigation the three accused have been put to trial. During trial the prosecutrix as PW-1 and her parents as PW-3 and PW-4 deposed supporting the prosecution case. Statement of the prosecutrix recorded under Section 164 of the Code was proved by the Magistrate as PW-2. Some police officials who had joined the investigation were also examined. Statements of the accused persons were recorded under Section 313 Cr.P.C.4. The accused also examined three witnesses in defense. Thereafter on the application of the Prosecution under Section 311 of the Code five more witnesses were examined. The accused also further examined DW-4 Mukesh, brother of the prosecutrix who proved a letter alleged to have been written at the instance of the prosecutrix denying that the occurrence had taken place. Affidavits of prosecutrix and her father in support of the letter have also been filed. Thereafter, the present application under Section 311 of the Code was filed seeking recalling for cross-examination of the prosecutrix and her parents on the ground that the prosecutrix has now denied that the occurrence of rape had at all taken place and her complaint is motivated. As already noticed another application under Section 311 Cr.P.C. dated 1.2.97 was dismissed by the trial court on 17.4.97 but that order was not challenged in revision or by any other proceedings.

The second application has also been disallowed by the learned trial court on 4.4.98.5. Learned counsel for the petitioner has contended that the learned trial court has acted illegally and to the great prejudice of the petitioner in disallowing the application as in the facts and circumstances the witnesses ought to have been summoned which was in the interest of justice and for a just decision of the case. He has placed reliance on Mohd. Hussain Umar Kochra etc. Vs . K.S. Dalipsinghji and another : 1970 CriLJ9 , Deepak Tandon Vs . State : 53(1994)DLT312 , State v. Ramesh @ Ramesh Kumar, (1990) 1 C.C. Cas 444 and also relying on Mohanlal Shamji Soni v. Union of India & Anr. 1991 SCC 595 has contended that this also support the petitioner. Whereas learned counsel for the State has supported the impugned order and has contended that there is no valid ground to recall and re-examine the witnesses as obviously the accused persons have tampered with the evidence and won over the witnesses to back out now request for recalling the witnesses is not bonafide nor in the interest of justice but to subvert the administration of justice. He also contends that first application was dismissed on 17.4.1997 and that order was not challenged and no new ground exists to re-agitate the same so belatedly; that successive applications seeking the same relief is misuse of the process of the court and to delay the trial. He also contends that the trial court has rightly held that it is required for a just decision of the case.The provisions of Section 311 are identical to those of Section 540 of the old Code except that the words 'to be' have been inserted before the word 'essential' which has not made any change in the scope of the provision. Section 540 has been the subject matter of consideration in a number of cases by the Hon'ble Supreme Court which have been referred to in the case of Mohanlal Shamji Soni (supra) where case law both Indian and English has been referred to.6. There it has been held that :'This Section is manifestly in two parts. Whereas the word used in the first part is 'may' the word used in the second part is `shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Court and enables it `at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,

(1) to summon any person as a witness, or

(2) to examine any person in attendance, though not summoned as a witness, or

(3) to recall and re-examine any person already examined.The second part which is mandatory imposes an obligation on the court -(1) to summon and examine, or

(2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.7. It has further been emphasised that: '... This section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part, on the other hand, is not discretionary and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

It is further observed that Section 540 does not give carte blanche, unguided, uncontrolled and uncanalised power and the power under it must be used judicially and not capriciously or arbitrarily and

'Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defense or to the disadvantage of the accused or to cause serious prejudice to the defense of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.'

After referring to case law having bearing on the aspect, in conclusion, it has been laid down that :

'27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the

examination of any person which would depend on the facts and circumstances of each case.'

8. The first question is whether the second application is maintainable when the first application was dismissed on 17.4.1997 and that order was not challenged. It is not disputed that similar prayer was made earlier and was disallowed on 17.4.97 and that order was not challenged. However, learned counsel for the petitioner has contended that after that order was passed further material has been brought on record; namely that letter dated 5.2.1997 has been proved by her brother as DW-4 and also the prosecutrix and her father have also produced their two affidavits in support of that statement.

9. Basically, the petitioner basis its claim on the letter dated 5.2.97 (Now. Ex. DW1/A). This material was available earlier also. The statement of the brother or the two affidavits of the prosecutrix and her father are only in support of this, which do not constitute new ground or material. These could have been obtained earlier. The fact remains that the petitioner seeks recalling of the prosecution witnesses to retract their Statements made earlier. There is no change in circumstances. This second application in my view was not maintainable and is a misuse of the process of the Court.

10. I have gone through the statements made by the prosecutrix, her father and mother (as PWs 1, 3 and 4) as well as the statements of the accused persons. Suggestions had been put to the prosecutrix that such occurrence had not taken place and that two of the accused Surinder Singh and Devinder singh had not committed rape nor the accused persons had forcibly taken her away, to which she denied. A suggestion had also been put to her that there was a dispute between her father and uncle on the one hand and the father of the accused Surinder and also enmity with parents of Vijendar on the other hand and that the accused had been falsely implicated which she denied. She had also denied that this was a false case lodged after consulting the baradari. No evidence of such enmity or hostility between the family of the prosecutrix or with any particular person of the baradari with any of the accused has been led by the accused persons. Apparently the prosecutrix and her parents appear to have been won

over either for consideration or under some threat or otherwise after the case had been prolonged for about 10 years.

Strong reliance has been placed on the case of Mohd. Hussain Umar Kochra : 1970 CriLJ9 where rejecting the request for recalling of the witness, it was observed by the Hon'ble Supreme Court that there was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. Here also except stating that no such incident had taken place and that the earlier statement was made by her at the instance of the baradari who had colluded with the police, no material has been placed on the record as to who were the members of that baradari; why the baradari may have colluded with the prosecutrix and her parents to involve the 3 accused in a false serious offence of rape. Exercise of power under Section 311 will depend on the facts and circumstances of each case. As noticed earlier the accused themselves have not led any such evidence of enmity either between the family of the prosecutrix or any persons of the baradari on the one hand and the families of the accused on the other hand. In the absence of such relevant material it cannot be said that there is any material showing that the testimony of these witnesses is incorrect necessitating re-summoning the said witnesses. It thus cannot be said that recalling of these witnesses is necessary for the decision of the case in a just manner or is necessitated by exigencies of situation or on the grounds of fair play and good sense. No party can be allowed to misuse the process of the Court by adopting dubious modes. The salutary power under Section 311 can be exercised to subserve justice and not to subvert the administration of justice.

11. In the circumstances it cannot be said that the exercise of power by the Court under Section 311 of the Code is necessary or justified on the spacious ground of a just decision of the case. It cannot be said that a just decision cannot be given on the material already on record.

12. In view of the above discussion, I do not find any illegality or impropriety or infirmity in the orders dated 4.4.1998 & 18.4.1998 passed by the learned trial court rejecting the applications of the petitioner. No interference with the impugned orders is called for. This petition has no merit and the same is hereby dismissed.