

**AFR**  
**Reserved**

**Court No. - 78**

**Case :- APPLICATION U/S 482 No. - 8463 of 2020**

**Applicant :- Amarjeet @ Kaluwa**

**Opposite Party :- State of U.P. and Another**

**Counsel for Applicant :- Mohd. Afzal**

**Counsel for Opposite Party :- G.A.,Pradeep Singh Sengar**

**Hon'ble Rajiv Joshi,J.**

The present application under Section 482 Cr.P.C has been moved with a prayer to quash the impugned order dated 14.2.2020 passed by Additional Session Judge, Hapur in Special Session Trial No. 89 of 2018 (State Vs. Amarjeet @ Kaluwa and others) under sections 302, 307, 201, 376D, 394, 411 and 120 IPC and section 34 POCSO Act, 2012 arising out of Case Crime No. 438 of 2018, Police Station Hapur Dehat, whereby the application ( No. 22/1) dated 10.01.2020 of the applicant moved under Section 311 Cr.P.C. for recalling PW-5 Nitin (injured witness) has been rejected.

Heard Sri Kamal Krishna, learned Senior Advocate assisted by Sri Mohd. Afzal, learned counsel for the applicant, learned A.G.A. for the State, and Sri Pradeep Singh Sengar, learned counsel for the opposite party no. 2. Perused the record.

The facts as reflect from the record are that opposite party no. 2 had lodged an FIR to the effect that on 05.09.2018 in the morning when he had gone to bring fodder from his field and his wife and son Himanshu had gone to Delhi due to some work, his daughter/victim aged about 12 years and son Nitin aged about 10 both were at home. At about 1.30 p.m. his nephew Lalit gave an information to the informant that Nitin has received some knife injury at his neck. Getting this information, he reached home and did not find his daughter there. Soon thereafter, he reached Nandani Hospital, where his son Nitin was admitted, on regaining consciousness, his son has disclosed that co-accused Ankur Teli and Sonu @ Pauwa were committing rape upon her sister and when he raised alarm, they had caused injury on his neck by

knife and thereafter he concealed himself in the house. When he regained consciousness, he found himself in hospital. When informant reached at home along with police, he found the entire house hold goods scattered all over the place and jewellery etc. was missing. When police party made search of his daughter, her dead body was found in naked and dead condition in the room beneath straw. On this information, Case Crime No. 438 of 2018 was registered against the co-accused Ankur Teli and Sonu @ Pauwa at P.S. Hapur Dehat, District Hapur on 05.09.2019 at about 20.05 hours.

After investigation, charge sheet has been submitted in the case against the accused-applicant along with two other co-accused on 27.10.2018 under the above mentioned sections and after charges having been framed against the accused persons, statements of 13 witnesses have been recorded in the trial. The statement of PW-13, Kaushalendra Singh, Investigating Officer, was recorded before the trial court on 23.7.2019. The cross-examination of the said witnesses was done by the accused persons. Subsequently, on the basis of statement of PW-13, whereby the applicant came to know about some Compact Disc (C.D.) containing statement of the injured- Nitin, which was the part of case diary, he moved an application with a prayer that the C.D. containing videography of the statement of injured Nitin, may be given to the applicant and then cross-examination of PW-13 can be done. The said application dated 22.7.2019 was rejected by the trial court vide order dated 24.7.2019.

Against the aforesaid order, the applicant preferred an application u/s 482 Cr.P.C. No. 30532 of 2019, which was allowed by this Court on 16.9.2019 directing the trial court to provide a copy of the C.D.. Thereafter, an application was moved on behalf of the applicant for supply of a copy of the aforesaid C.D., which was rejected by the trial court vide order dated 22.10.2019.

Against the said order of the trial court dated 22.10.2019, the applicant again moved an application u/s 482 Cr.P.C. No. 39761 of 2019, which was allowed by this Court vide order dated 13.11.2019. The operative portion of the said order reads as under:

*“I find that the Coordinate Bench of this Court had already passed an order dated 16.09.2019 directing for providing the copy of the said CD, therefore the best possible efforts ought to have been made by the trial court to provide a copy of the same. In my opinion, the trial court ought to have sent the damaged CD to Central Forensic Science Lab, Hyderabad with a direction for preparing a copy of the same, if the same was possible/feasible and in case any report is received from the end of the Central Forensic Science Laboratory, Hyderabad the same could have been taken into consideration. If the copy of the same was not possible to be made, the appropriate order could have been passed taking into consideration the said report.*

*12. In view of above, the impugned order is set aside and it is directed to the trial court that it shall send the damaged CD to Central Forensic Science Laboratory, Hyderabad for a copy of it to be prepared within a period of 15 days and obtain a report in respect to opinion of the said laboratory within a specified time period to be fixed by it and after receipt of such a report from laboratory, it may pass appropriate order.*

*13. The application stands allowed. “*

Subsequently, the C.D was sent to Central Forensic Laboratory as per the order this Court and after analysis, a report was submitted by the Central Forensic Laboratory on 9.12.2019 to the effect that the C.D is damaged and the Laboratory does not have the facility to retrieve the data from broken/damaged C.D. This chapter came to an end. Subsequently, all the prosecution witnesses have been examined before the trial court. The statement of the accused was also recorded on 11.9.2019 under Section 313 Cr.P.C.. Thereafter, the case was fixed for defence evidence of the accused persons under Section 233 of Cr.P.C. Subsequently, the applicant in his defence evidence produced the list of witnesses on 3.1.2020 and also produced the mobile (Vivo) and pen drive.

It is submitted by the accused-applicant that the mobile phone contained the video clip of injured witness PW-5 Nitin, recorded when he was treated in the hospital. Thereafter, it was made viral and also shared with the mobile of the applicant.

The applicant in defence produced DW-2 Krishna Pal Yadav @ Monu

before the trial court along with the video clip in the mobile (Vivo) and pen drive with certificate under Section 65-B of Indian Evidence Act. As per the applicant, in this video clip, the injured Nitin was disclosing the names of the accused persons involved in the offence. The pen drive and mobile phone containing the video clip was exhibited by the trial court. The statement of DW-2 was recorded on 10.1.2020. The applicant on the same day i.e. 10.1.2020 moved an application under Section 311 Cr.P.C. to recall the witness PW-5 Nitin (injured) for his re-examination on the question of said video clip.

The trial court vide impugned order dated 14.2.2020 rejected the application filed under Section 311 Cr.P.C. on the ground that the application has been moved just to delay the trial; that no list of questions have been given and further that the evidence of both the sides has been concluded.

The order dated 14.2.2020 passed by Additional Session Judge, Hapur in Special Session Trial No. 89 of 2018 is impugned in the present application.

While assailing the order impugned, learned counsel for the applicant firstly submitted that application under section 311 has illegally been rejected by the court below on the ground that the application has been moved just to delay the trial. According to the learned counsel, since the applicant is in jail, there is no question for delaying the trial by the applicant. It is further submitted by the learned counsel for applicant that there is no requirement in law to submit a list of questionnaire along with the application filed under Section 311 Cr.P.C. for recalling a witness. It is next submitted by learned counsel for the applicant that the only stage for submitting/producing the video clip of the injured witness PW-5 Nitin is under Section 233 Cr.P.C., which comes after recording of statement under Section 313 Cr.P.C. and the accused-applicant can only produce the video clip only in his defence before the trial court and not before that, and therefore, the further examination of PW-5 Nitin is necessary for the purpose of confronting his statement contained in the video clip in which he has disclosed the names of actual accused persons, who have committed the offence. It is lastly submitted by learned counsel for the applicant that no prejudice will be caused to the

prosecution, if the injured witness P.W.-5 Nitin is confronted with the said video clip in his re-examination.

On the other hand, learned counsel for the informant as well as learned AGA supported the impugned order and submitted that the entire evidence in the matter has been closed, the video clip including the pen drive is already in the knowledge of the accused-applicant, which is apparent from the statement of PW-2 recorded on 5.9.2018 and the application has been moved at a very belated stage, which has rightly been rejected by the trial court.

I have considered the submissions so raised by learned counsel for the parties.

Before considering the statement, provision of Section 311 Cr.P.C., is quoted hereunder:

***“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.”***

From bare perusal of Section 311 Cr.P.C., it is apparent that in order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary power at any stage of inquiry, trial or other proceeding can summon any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to exercised with caution and circumspection. Recall is not a matter of

course and the discretion has been given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

*In Vijay Kumar v. State of Uttar Pradesh and Anr., (2011) 8 SCC 136*, the Apex Court while explaining scope and ambit of Section 311 has held as under:-

*“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of CrPC and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously”.*

In *Zahira Habibullah Sheikh (5) and Anr. v. State of Gujarat and Others, (2006) 3 SCC 374*, the Apex Court has considered the concept underlining under Section 311 as under:-

*“27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide*

*power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind”.*

In **State (NCT of Delhi) v. Shiv Kumar Yadav & Anr., (2016) 2 SCC 402**, it was held thus:-

*“... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined”.*

Now, in the present case, the statement of the injured PW-5 has been recorded on 12.2.2019 and cross-examination of the said witness was also conducted by the accused. The pen drive (Kha 2) as well as video clip (Kha 3) have already been exhibited by the court, which appears to be necessary for just decision of the case. So far as the observation made by the trial court that the said application is without the list of questionnaire is concerned, it is firstly stated that there is no requirement under the law to file questionnaire along with the application for recalling the witness and secondly that it is clearly mentioned in the application under section 311, Cr.P.C. itself that injured witness P.W.-5 Nitin is to be summoned with regard to the contents of his video clip. When the accused-applicant is in jail, therefore, there is also no occasion to delay the proceeding of the trial. There can be no dispute that the accused has a right to summon any evidence/witness which may be

relevant for proper appreciation of the prosecution evidence and to substantiate his defence, therefore, in any case when the mobile and pen drive have already been exhibited in the record, then, recall of the injured witness appears to be necessary for his re-examination by the defence on the question of that video clip.

Taking into consideration the entire facts and circumstances as well as the earlier orders passed by this Court referred to above, in the considered opinion of this Court, no prejudice is likely to be caused either to the prosecution or the defence in case the injured witness P.W.-5 Nitin is recalled for his re-examination on the point of aforesaid video clip. The trial court has not dealt with the merits of the case and proceeded to reject the application on irrelevant grounds.

Consequently, the order dated 14.2.2020 passed by Additional Session Judge, Hapur in Special Session Trial No. 89 of 2018 (State Vs. Amarjeet @ Kaluwa and others) cannot be sustained in the eyes of law and the same is hereby set aside.

The application stands allowed. The trial court is directed to recall the injured witness PW-5 Nitin under section 311 Cr.P.C. for the said purpose at an early date.

**Order Date :-02.11.2020**

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