

V. N. Patil vs K. Niranjana Kumar on 4 March, 2021

Author: Ajay Rastogi

Bench: Ajay Rastogi, Indu Malhotra

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 267 OF 2021
(Arising out of SLP(CrI.) No(s). 8965 of 2018)

V.N. PATIL

...APPELLANT(S)

VERSUS

K. NIRANJANA KUMAR & ORS.

...RESPONDENT(S)

JUDGMENT

Rastogi, J.

1. Leave granted.

2. Respondent nos. 1 to 3 are facing criminal trial in Sessions Case No. 538 of 2004 for offences under Sections 498A, 304B, 302 read with Section 34 of the Indian Penal Code(hereinafter being referred to as “IPC”) and under Section 4 and 6 of the Dowry Prohibition Act, 1961 due to the death of wife of the 1st respondent under unnatural circumstances on intervening night of 2nd/3rd April, 2004 at Bangalore.

3. During pendency of the trial, an application was filed by the Ld. Additional Special Public Prosecutor under Section 173(5) read with Section 311 of Code of Criminal Procedure, 1973(hereinafter being referred to as “CrPC”) for summoning the witnesses along with securing the relevant records to meet the ends of justice. The Ld. Additional City Civil & Sessions Judge, Bengaluru City, after detailed discussion and taking note of the scope of Section 311 CrPC allowed the application by its order dated 3rd September, 2016, after assigning cogent reasons in support thereof.

4. This came to be challenged by respondent nos. 1 to 3 in a petition filed under Section 482 CrPC. The Ld. Judge of the High Court after recording submissions made by the learned counsel for the parties, without assigning any reasons, albeit brief, which may at least facilitate this Court to

understand what weighed with the Judge in setting aside the finding recorded by the Ld. Trial Judge in its Order dated 3rd September 2016 by its impugned judgment dated 11th January, 2017.

5. Aggrieved by the order of the High Court impugned dated 11 th January 2017, the appellant (complainant (father of the deceased)) has approached this Court by way of special leave.

6. The background facts in brief which may be relevant for the purpose are that the marriage of Keerthi (deceased daughter of the appellant) was solemnized with the 1st respondent on 17th February, 2002. On the intervening night of 2nd/3rd April, 2004, at about 3.30 am, the appellant received a call that her daughter had died. In connection with her unnatural death, on the basis of a complaint filed by the appellant (father of the deceased), Crime No. 162/2004 came to be registered at the Sanjay Nagar Police Station, Bangalore for an offence punishable under Section 302, 498A IPC.

7. During the course of trial, as per the record and evidence, the examination of all the relatives, witnesses and the documentary evidence produced by the investigating officer, indicates that the second post mortem on the victim's body was conducted on 4 th April, 2004 by the team of 5 doctors in J.J. Hospital, Mumbai, in respect of which the investigating officer/PW 44 had corresponded under Exhibit P-40 to Exhibit P-42 seeking for the copy of the said second post mortem on 13th September, 2005 itself. It further reveals that the stated documents indicated above were not made available to the investigating officer during the submission of the main charge sheet and additional charge sheet. Ld. Trial Court had permitted to produce the documents by its order dated 30 th October, 2012. Even after Exhibit P-42, the original documents of the stated second post mortem with the other relevant documents were still with the Mumbai doctors and police and PW 27 Dr. Bheemappa Havanur who conducted the first post mortem on 3 rd April, 2004 turned hostile. At this stage, application came to be filed by the Ld. Additional Special Public Prosecutor under Section 173(5) read with Section 311 CrPC for summoning the witnesses and to examine the Doctor who conducted the second post mortem to meet the ends of justice.

8. Learned counsel for the respondents made various submissions in questioning the application filed under Section 173(5) read with Section 311 CrPC when the trial reached the stage of hearing and contended that the witnesses cited to be summoned for the purpose of examining them on behalf of the prosecution, are neither the witnesses examined by the investigating officer during the course of his investigation, nor cited as the prosecution witnesses in the final report. What is sought to be brought on record is the result of the private investigation said to have been done at the instance of members of the family of the deceased alone, and not at the instance of the investigating officer, or the accused. After the prosecution witness PW 27 Dr. Bheemappa Havanur, who conducted the autopsy on the dead body of the deceased, was declared hostile, application is said to have been filed to fill up the gap at the stage of investigation which is not permissible in law, and also raised objections on the merits of the matter as to what will be the effect of the second post mortem which had been conducted on the body of the deceased in J.J. Hospital, Mumbai.

9. The Ld. Trial Judge, after perusal of record and taking into consideration the rival contentions of the parties, observed that the case is registered initially at Sanjay Nagar Police Station, Bengaluru,

under Crime No. 162/2004, which was later on investigated by the then Cord of Detectives(COD), Bengaluru, and thereafter the original charge sheet and also additional charge sheet was submitted, in which there is a clear reference on record documentarily as well as in the deposition of PW 44 who is stated to be the investigating officer. The record further reveals that the second post mortem which was got conducted at J.J. Hospital, Mumbai appears to have been made through the Worli Police, Mumbai by lodging the complaint there, by the members of the family of the deceased, wherefor, at the very outset, it is not the post mortem having made privately, as it is through the Police at Mumbai.

10. It was further observed that as per Exhibits P-36, P-40 to P-42, which are available on record that PW-44 Investigating Officer had initiated the correspondence with the Worli Police, as well with the Doctors of J.J. Hospital, seeking for sending copy of the second post-mortem which clearly indicates that the very intendment prevailed with PW 44 in corresponding with the Worli Police, Mumbai and Mumbai Doctors with the Exhibits P-36 and P-42 to obtain the said copy of the second post mortem conducted at the J.J. Hospital, Mumbai, required for investigation by him in Bengaluru, by considering it as part and parcel of his investigation, and the second post mortem is not the outcome of the personal instance of the family members of the deceased, but the relevance of the second post mortem with the case, which PW-44 has deposed in his chief-examination itself, more particularly, in connection with Exhibit P-36 and Exhibits P-40 to P-42.

11. Taking note of the factual matrix of the matter on record, the Ld. Trial Judge, after assigning cogent reasons, allowed the application filed under Section 311 CrPC to meet the ends of justice observing further that no hardship or prejudice would be caused to the respondents accused, since the said witnesses and documents intended to be summoned, will certainly be subjected to cross-examination and their testification, as per the provisions of CrPC.

12. The order of the Trial Court was assailed by the respondent nos. 1 to 3 in Criminal Petition No. 7887 of 2016 under Section 482 CrPC. The High Court has not taken pains to examine the scope and ambit of Section 311 CrPC, and the reasoning assigned by the Ld. Trial Judge, and erroneously set aside the order of the Ld. Trial Judge dated 3rd September, 2016 by its impugned judgment dated 11th January, 2017.

13. After going through the rival submissions and perusal of the record of the case with reference to the law applicable, in our considered view, the judgment impugned before us is unsustainable in law, and we find it difficult to approve it.

14. The scope of Section 311 CrPC which is relevant for the present purpose is reproduced 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."

15. The object underlying Section 311 CrPC 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 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 the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said “wider the power, greater is the necessity of caution while exercise of judicious discretion.”

16. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar Vs. State of Uttar Pradesh and Another 2011(8) SCC

136. “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 the Code 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. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason.”

17. This principle has been further reiterated in Mannan Shaikh and Others Vs. State of West Bengal and Another 2014(13) SCC 59 and thereafter in Ratanlal Vs. Prahlad Jat and Others 2017(9) SCC 340 and Swapan Kumar Chatterjee Vs. Central Bureau of Investigation 2019(14) SCC 328. The relevant paras of Swapan Kumar Chatterjee(supra) are as under: “10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.”

18. 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.

19. Indisputedly, the facts in the instant case are that the daughter of the appellant died an unnatural death on the intervening night of 2nd/3rd April, 2004 in Bangalore where she was living with the respondents who are facing trial under Sections 498A, 304B, 302 read with Section 34 IPC and under Sections 4 and 6 of the Dowry Prohibition Act, 1961 and the trial is at the fag end of its closure and the case is listed for hearing.

20. At this stage, application came to be filed by Ld. Additional Special Public Prosecutor under Section 173(5) read with Section 311 CrPC for summoning the witnesses along with the concerned documents to adduce their evidence in connection with the second post mortem conducted on the body of the deceased and after perusal of the record, the factual statement has been recorded by the Ld. Trial Judge in paragraphs 9 & 10 as follows: “9. In connection with the same, at the very outset, on record it could be seen that it is contended that the said second post mortem is got conducted in J.J. Hospital, Mumbai. The second post mortem appears to have been made through the Worli Police, Mumbai by lodging the complaint there at by the members of the family of the deceased, wherefore, at the very outset, it is not the post mortem having got made privately, as it is through the Police.

10. Notwithstanding as to whether the Worli Police have further continued the investigation or otherwise or directly connected to the instant case in hand, it is clear from the records as per Exhibits P-36, P-40 to P-42 which are available on record that the PW-44/Investigating Officer had initiated the correspondence with the Worli Police as well as the Doctors of J.J. Hospital seeking for sending the copy of the second post mortem, which clearly goes to indicate that the very intendment prevailed with the PW-44/Investigating Officer in corresponding with the said Worli Police, Mumbai and Mumbai Doctors in accordance with the Exhibits P-36 and P-42, reveals that the said copy of the second post mortem conducted at the J.J. Hospital, Mumbai, was required for the investigation by him in Bengaluru, by considering it as the part and parcel of his investigation.”

21. What had further transpired for summoning the witness along with the documents in connection with the second post mortem report has been noticed in paragraph 18 of the judgment of the Trial Court which is extracted hereunder: “18. It is also significant to note that, the Doctor by name Bhimappa Havanur having stated to have conducted the first post mortem at Bowring Hospital in Bengaluru, has turned hostile to the prosecution, according to the prosecution, by giving the two different contradictory and divergent opinions in connection with the cause of death, wherefore, now, it is equivalently incumbent upon this Court to determine and trace out the real cause of death of the deceased through the medical experts only who have conducted the post mortem. Therefore, to make out the reality under the peculiar circumstances of the PW 27 having turned hostile to the prosecution by giving the contradictory and two divergent opinions, certainly the efforts being endeavoured to put in by the prosecution to summon the proposed witnesses along with the documents certainly need to be taken into consideration in the positive sense, only with an intention to see that the miscarriage of justice in any manner is prevented at any point of spell and juncture.”

22. In the instant case, although the application was filed by the Ld. Additional Special Public Prosecutor under Section 173(5) read with Section 311 CrPC but it was open for the Ld. 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.

23. We find that the Ld. Judge of the High Court has not adverted to the factual matrix noticed by the Ld. trial Judge in its Order dated 3rd September, 2016 and taking note of the submissions made by the contesting parties summarily, without assigning any reasons, albeit brief it may be, set aside the judgment of the Ld. trial Judge. We consider it appropriate to quote what has been observed by the High Court in its impugned judgment dated 11th January, 2017 which is as under: “4. The learned Government Pleader would however seek to make a weak attempt to justify the apparent illegal procedure that has been permitted by the trial Court in allowing the aforesaid application.

Therefore, the petition is summarily allowed. The order dated 3.9.2016 in S.C. No. 538/2004 on the file of LI Additional City Civil and Sessions Judge (CCH No. 52), Bengaluru, is quashed. The court below is directed to proceed further, in accordance with law.”

24. It is not necessary that in every case, it is required to record elaborate reasons but since the matters are carried forward to this Court, the reasons, albeit brief may be, have to be recorded to facilitate this Court to understand as to what weighed with the Ld. Judge while passing the impugned judgment, moreover, when the finding of reversal has been recorded by the Ld. Judge in its impugned judgment.

25. Consequently, the appeal succeeds and is allowed. The judgment of the High Court impugned dated 11th January, 2017 is hereby set aside. Since the trial is pending for almost 16 years by this time, the Ld. Trial Judge may proceed in compliance of the Order dated 3rd September, 2016 expeditiously and conclude the pending trial at the earliest.

26. Pending application(s), if any, stand disposed of.

.....J. (INDU MALHOTRA)J. (AJAY RASTOGI)
New Delhi March 04, 2021