

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

THE HON'BLE MR.JUSTICE S.VISHWAJITH SHETTY

CRL.P.No.200181/2021

Dated:16-02-2021

Dinesh and Others vs. The State through Narona Police Station

ORDER

1. Petitioners who are accused nos.1 to 3 in S.C.No.239/2017 pending on the file of I Addl. Sessions Judge, Kalaburagi, registered for the offences punishable under Sections 302, 201 read with 34 IPC, have challenged the order dated 06.01.2021 passed by the said Court exercising its power under Section 311 Cr.PC, principally on the ground that the learned Sessions Judge had no jurisdiction to exercise the power under Section 311 Cr.PC since the case was already posted for judgment.

2. Brief facts of the case are, on the basis of the complaint filed by one Shivaraj S.Malipatil, Narona Police, Alland Circle, Kalaburagi, have registered a case in Crime No.102/2017 against unknown persons for the offences punishable under Sections 302, 201 IPC and subsequently, charge sheet has been filed in the said case against the petitioners herein for the offences punishable under Sections 302, 201 read with 34 IPC. After the

charge sheet was filed, the accused are tried for the alleged offences before the Court of I Addl. Sessions Judge, Kalaburagi, in S.C.No.239/2017. After completion of recording the evidence in the said case, the learned Sessions Judge had heard the arguments on both sides and thereafter posted the matter for judgment. At that stage, the impugned order dated 06.01.2021 has been passed by the learned Sessions Judge suo motu exercising his power under Section 311 Cr.PC.

3. Learned Counsel for the petitioners submits that since the case is already posted for judgment, the learned Sessions Judge had no jurisdiction to exercise the power under Section 311 Cr.PC. The said power can be exercised only at the stage of trial. He submits that the learned Sessions Judge having heard the arguments of both parties, thereafter cannot invoke the power under Section 311 Cr.PC because that would amount to filling up the lacuna in the case of the prosecution, and therefore, he prays to allow the petition.

4. Learned Counsel for the petitioners has relied on the judgment of the High Court of Kerala in the case of K.SAJEENDRAN VS SECRETARY, THALAKULATHUR GRAM PANCHAYAT - 2004 CRL.L.J. 555. In paragraphs 5, 6 & 8 of the said judgment, it has been held as under:

"5. In this regard, it is worthwhile to quote Section 311 Cr.PC.

"The 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 such person if his evidence appears to it to be essential to the just decision of the case."

(Emphasis supplied)

Therefore this power can be exercised only "at any stage of any inquiry, trial or other proceedings". Inquiry, trial or other proceedings are mentioned in the Section in the alternative. Admittedly, this was a trial case. When the Section mentions alternatively "other proceedings" as distinct from inquiry and trial, "other proceedings" shall be "proceedings" other than trial. Admittedly, there was a trial and witnesses have been examined and the case has been posted for judgment.

6. Section 353(1) of the Code of Criminal Procedure speaks about judgment.

"353(1): The judgment in every trial in any Criminal court of original jurisdiction shall be pronounced in open court by the presiding officer

immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleader, -

(a) by delivering the whole of the judgment; or

(b) by reading out the whole of the judgment;

or

(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader."

Therefore, the judgment comes on termination of the trial. It can immediately be after the termination of the trial or subsequent to the date on which the case is posted for judgment. Therefore, when the case is posted for judgment, the trial stands terminated.

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8. The power under Section 311 of the code can be exercised, as already mentioned only, "at any stage of any inquiry, trial or other proceeding". The other proceeding is alternate to trial or inquiry. In this case, the trial has been terminated when the case was posted for judgment. So, the stage of the trial is already over. Consequently, the power under Section 311 of the Code ought not to have been invoked by the magistrate."

5. Learned Counsel for the petitioner has also relied upon the judgment of the Rajasthan High Court in the case of VINOD KUMAR SINGH VS THE STATE OF RAJASTHAN, wherein it is held in paragraphs 9 to 11 as under:

"9. Further, the provision under Section 311 Cr.P.C. can be exercised at any stage of any enquiry, trial or other proceedings. The words 'enquiry', 'trial' or 'other proceedings' are mentioned in the alternative. In the instant matter, it was a trial case. When the provision mentions alternatively 'other proceedings' as distinct from 'enquiry' and 'trial', the other proceedings shall be different than trial. Undisputedly, in the present case, there was a trial and final argument had been heard on 29.09.1999. Thereafter, the case was posted for judgment on 05.10.1999.

10. Section 353(1) of the Code of Criminal Procedure provides about the judgment, which reads thus:-

353(1). The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleader,-

(a) by delivering the whole of the judgment; or

- (b) by reading out the whole of the judgment;
or
(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

In other words, the stage of a judgment comes on termination of the trial. A judgment can come immediately after termination of the trial or on the subsequent date which may be given for the same and the case is so posted. Therefore, when case is posted for judgment, the trial stands terminated.

11. In the instant case, the case was posted for judgment on 05.10.1999 by the learned court below and this shows that the trial had been terminated on 29.09.1999, in view of the provisions under Section 353 Cr.P.C. When the provision under Section 311 Cr.P.C. are to be exercised at any stage of enquiry, trial or other proceedings and, as mentioned above, the word 'other proceedings' is in the alternative to the trial. Therefore, in the present case, being one of a trial and was posted for judgment, stage of trial had come to an end.

In other words, the trial in the present case was already over when the learned court below had posted the matter for judgment. Consequently, the powers under Section 311 of the Code could not

have been exercised by the learned Magistrate once the trial stood terminated and the case was posted for judgment. The said provisions cannot be invoked by the learned Magistrate on the day when the matter is posted for judgment. Therefore, the order impugned in the present case is not sustainable under law on this count alone."

6. He also submits that the prosecution cannot be permitted to fill up the lacuna in the prosecution case by invoking Section 311 Cr.PC and in this context, he has relied upon the judgment of the Hon'ble Apex Court in the case of RAJENDRA PRASAD VS THE NARCOTIC CELL THROUGH ITS OFFICER IN CHARGE, DELHI - AIR 1999 SCW 2356, wherein at paragraph 8, it is held as under:

"8. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition-of the possibility of making mistakes to which humans

are proved. A corollary of any such lapses or mistakes during the conducting Of a case cannot be understood as the lacuna which a court cannot fill up.

Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

7. Per contra, learned HCGP has argued in support of the impugned order and he has relied upon the judgment of the High Court of Madhya Pradesh in the case of KHOOB SINGH S/O KANHAIYA VS THE STATE OF M.P. disposed of on 08.03.2018, wherein in paragraph 22, it has been held as under:

"22. Consequently, we hold that the judgment of this Court in *Imrat Singh* (supra) does not lay down correct law and is thus, overruled. Relying upon the Supreme Court judgments referred to above, an application under Section 311 of the Code can be filed at any stage of trial even after conclusion of the argument as the trial is complete only after the judgment is announced. Section 353 of the Code contemplates that the judgment in every trial shall be pronounced in an open Court immediately after termination of the trial. Though the recording of the witnesses may be complete but the trial concludes only after pronouncement of the judgment."

8. The point for consideration that arises in this petition is,
"whether the power under Section 311 Cr.PC could be invoked by the court even at a stage when the case is posted for judgment?"

9. From the reading of Section 311 Cr.PC, it is clear that the power under the said section can be exercised by the court at any stage of any inquiry, trial or other proceedings under the Code. In the case on hand, the power exercised by the court below is during the course of "trial".

10. The word 'trial' is not defined formally in the Criminal Procedure Code. However, the word 'inquiry' has been defined

in Section 2(g) of the Code, which reads as under:

""inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;"

11. In the case of HARDEEP SINGH VS STATE OF PUNJAB - (2014)3 SCC 92, the Constitution Bench of the Hon'ble Apex Court while considering the ambit of Section 319 Cr.PC has held that trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led in this behalf. The legal position, has been summarized by holding that as 'trial' means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges, the courts puts him on notice of the same. The trial commences only after the charges are framed. The inquiry under Section 2(g) of Cr.PC is a stage before the actual commencement of trial and it is an act conducted under the Cr.PC by the Magistrate or the Court and it does not relate to the investigation of the case by the investigating agency, but it is an inquiry after the case is brought to the notice of the court on the filing of the charge sheet. The inquiry that is held prior to trial, is therefore, distinct. During trial, examination and

determination of a charge or accusation against an accused may take place before the court and it may result into either the conviction or acquittal of the accused. During trial, evidence may be recorded by the court and its judgment delivered on appreciation of such evidence.

12. The Hon'ble Apex Court in the case of MOHANLAL SHAMJI SONI VS UNION OF INDIA & ANOTHER - AIR 1991 SC 1346, has held in paragraph 21 as under:

"21. At the risk of repetition it may be said that Section 540 allows the court to invoke its inherent power at any stage, as long as the court retains seisin of the criminal proceeding, without qualifying any limitation or prohibition. Needless to say that an enquiry or trial in a criminal proceeding comes to an end or reaches its finality when the order or judgment is pronounced and until then the court has power to use this section"

13. In view of the judgment of the Hon'ble Apex Court in Mohanlal Shamji Soni's case which has been referred by the Hon'ble Apex Court subsequently in Rajendra Prasad's case, the question whether the word 'trial' in criminal proceedings would include the stage of pronouncement of judgment in the case, is no more res integra. The Hon'ble Apex Court in Mohanlal Shamji Soni's case has referred to Section 540 of the old Code which is a corresponding provision to Section

311 of the new Code. The Hon'ble Apex Court in Mohanlal Shamji Soni's case has held that the trial in criminal proceedings comes to an end or reaches its finality when the order or judgment is pronounced and until then the court has power to use Section 311 Cr.PC. Therefore, I am of the considered view that there is no merit in the contention of the learned Counsel for the petitioners that since the case is now posted for judgment, the learned Sessions Judge could not have invoked the power under Section 311 Cr.PC as the stage of trial is already over. Accordingly, the point for consideration is answered in the affirmative.

14. The second contention of the learned Counsel for the petitioners that by exercising power under Section 311 Cr.PC, the prosecution should not be permitted to fill the lacuna in the prosecution case also does not merit consideration. In the case on hand, the learned Sessions Judge has stated in the impugned order that PW-30 was examined and his evidence was deferred for want of DNA report, but the same was not received by the court in spite of issuing notice to the concerned SHO. Subsequently, the courts were closed due to the outbreak of Covid-19 pandemic and after the courts reopened, due to oversight, summons was not issued to PW-30, even though other witnesses were examined and cross-examined, this error came to the notice of the court when the matter was reserved for judgment. Immediately thereafter, the matter

was posted before the court for the purpose of recalling PW-30. This was objected by the learned Counsel for the accused by citing the judgment of Kerala High Court in K.Sajeendran's case referred to supra. The learned Sessions Judge has observed that the evidence of PW-30 was needed, otherwise the accused and prosecution may be put to hardship and inconvenience.

15. From the reading of the observations made by the learned Sessions Judge in the impugned order, it is clear that the learned Sessions Judge wanted to exercise his power under Section 311 Cr.PC only to see that justice has been done. The Hon'ble Apex Court in Mohanlal Shamji Soni's case referred to supra, has observed in paragraphs 16 & 18 as under:

"16. The second part of Section 540 as pointed out albeit imposes upon the Court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. Though any party to the proceedings points out the desirability some evidence being taken, then the Court has to exercise its power under this provision-either discretionary or mandatory-depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision

is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice. In this connection we would like to quote with approval the following views of Lumpkin, J. in *Epps v. S.*, 19 Ga, 118 (Am), which reads thus:

"...it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly Counsel seek only for their client's success; but the judge must watch that justice triumphs."

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18. The next important question is whether Section 540 gives the court carte-blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at

the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. 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 defence or to the disadvantage of the accused or the cause serious prejudice to the defence 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."

16. Even in Rajendra Prasad's case referred to supra, the Hon'ble Apex Court has observed that 'lacuna in prosecution' is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proved. A corollary of any such latches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up. An oversight in the management

of the prosecution cannot be treated as irreparable lacuna. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

17. In the case on hand, it is neither the prosecution nor the defence which has filed the application under Section 311 Cr.PC, but it is the learned Sessions Judge himself who having noticed the mistake, has suo motu exercised the power under Section 311 Cr.PC and issued summons to PW-30 only for the purpose of producing and marking the DNA report. As observed by the learned Sessions Judge, the evidence of PW-30 was deferred for the said purpose. But subsequently, though the other witnesses were examined, the court has failed to recall him and mark the DNA report, which according to the court is very essential for the purpose of a just decision in the case. Such an exercise of power by the learned Sessions Judge cannot be termed as an attempt to fill up the lacuna in the prosecution case. The exercise of power under Section 311 Cr.PC is for a just decision of the case. Under the circumstances, I am of the opinion that the impugned order passed by the learned Sessions Judge

islegally correct and does not call for any interference at the hands of this Court. Accordingly, I proceed to pass the following order:

Petition is dismissed.