

CBI v. Neetu Sharma & ors.
CC No. 126/2019

17.08.2020

Present: Sh. Lalit Mohan, learned PP for the CBI.

SI Rahul Nehra HIO.

Sh. Anindya Malhotra, learned counsel for accused no. 1, 2
and 3.

Accused Rahul Sharma in person.

Accused no. 4 in person.

Sh. Ankit Kumar, learned counsel for accused no. 5.

This matter is listed today and is being taken up through video
conference as per the notification no. 26/DHC/2020 dated 30.07.2020 of
Hon'ble High Court of Delhi.

Reply to the application of CBI u/s 294 read with section 311
Cr.P.C. has been filed on behalf of accused no. 1, 2 and 3 as well as for
accused no. 5. Copy in e-form has been supplied to learned PP for CBI.

I have heard the arguments on the application.

Put up at 3.00 PM for orders.

(Shailender Malik)
Special Judge (PC Act) CBI
Rouse Avenue Courts, New Delhi
17.08.2020

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CBI v. Neetu Sharma & Ors.
CC No.126/2019

17.08.2020 at 03.00 p.m.

Vide my separate order of even date application of CBI under Section 294 read with 311 Cr.P.C. stands dismissed.

Put up now this case for recording statements u/s 313 Cr.P.C. of different accused persons on 01.09.2020 either in the physical court hearing or through video conference.

(Shailender Malik)
Special Judge (PC Act) CBI
Rouse Avenue Courts, New Delhi
17.08.2020

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**IN THE COURT OF SH.SHAILENDER MALIK, SPECIAL JUDGE
(CBI) (P.C. ACT)-22, ROUSE AVENUE COURT COMPLEX, NEW
DELHI**

C.C. No.126/2019

R.C. No.220/2013/E0013CBI/EOU-VI/EO-II

CBI Vs. Neetu Sharma & Ors.

ORDER

1. This order of mine will dispose off the application moved by CBI under Section 294 read with 311 Cr.P.C. It is stated in the application that certain documents as mentioned in Annexure-I to this application, filed with the charge sheet have been left to be exhibited and are essential to be proved. It is stated that regarding those documents it is necessary that accused persons may be called upon either to admit or deny the genuineness of those documents. In case accused persons deny those documents, CBI may be permitted to recall different witnesses as mentioned in Annexure-II to the application for proving those documents as per law. It is stated that those documents are necessary to be proved for just decision of the matter.

2. At this stage it is important to note certain relevant dates. Accused persons are facing the trial for offence under Section 420, 465, 467, 468, 471 IPC read with Section 120B IPC as well as for offence under Section 13(2) read with 13(1)(d) of the P.C. Act, 1988 qua accused no.5 Harsh Chopra who is the public servant. Charge in this case was framed on 05.02.2016. Thereafter prosecution was called upon to lead evidence to prove its case. Prosecution has examined as many as 57 witnesses in totality and P.E. came to an end on 06.02.2020.

Thereafter an application under Section 311 Cr.P.C. was moved on behalf of accused no.1 to 3 for recalling three witnesses, same was allowed and those three witnesses were recalled and examined on 28.02.2020 and matter was fixed for recording of statements of accused persons under Section 313 Cr.P.C. On 05.03.2020 questionnaire of incriminating evidence, put to different accused persons under Section 313 Cr.P.C. was provided to the accused persons in soft copy, for enabling them to answer those questions and also to give statement of defence, if any as per Section 313(5) Cr.P.C. In the meantime due to spread of pandemic/Covid-19 the physical hearing of the matter could not be conducted as lockdown was ordered by Notification by the Government and the Courts were closed. Proceedings in this case were taken up through Video Conferencing and then when matter was to be proceeded ahead for proceedings under Section 313 Cr.P.C. of the accused persons, present application has been moved on behalf of the CBI on 29.06.2020.

3. Reply to this application has been filed on behalf of accused no.1 to 3 taking the plea that the application is devoid of merits and devoid of any cogent, reasonable explanation or justification on the part of CBI for moving application under the provisions of Section 294 Cr.P.C. read with 311 Cr.P.C. at this belated stage of trial. It is stated that prosecution evidence was closed on 06.02.2020 and when the stage of recording of S/A u/s 313 Cr.P.C. was going on, under which questionnaire of incriminating evidence put to different accused persons have already been supplied. This application is silent as to the reason for non-proving of documents earlier during the trial. It is stated that defence of the accused persons have already been revealed by way of cross-examination of different witnesses and accused persons would be highly prejudiced if at this belated stage witnesses which are

nine in number (as per details given in Annexure-II) are allowed to be recalled. It is stated that evidence of Investigating Officer had started on 19.03.2019 and cross-examination of the IO concluded on 06.02.2020. As such it took around one year for completion of evidence of IO, even during this period of time of one year this application was not moved, whereas matter was adjourned on the request of CBI on many occasions. It is also stated in para 8 of the reply that during the whole trial CBI had moved as many as nine applications including applications under Section 311 Cr.P.C. for recalling certain witnesses. Those applications were allowed on different dates, as per the details given in tabulation form in para 8 of the reply. It is stated that despite getting sufficient opportunities to lead evidence as well as to recall witnesses at different times, prosecution is trying to prolong the trial as well as trying to fill up the lacunae. It is also stated that provisions of Section 294 Cr.P.C. cannot be invoked at this belated stage of trial.

4. Reply to this application has also been filed on behalf of accused no.5 taking the plea that application is nothing but an abuse of process and an attempt to fill up the lacunae, which is against the spirit of Section 311 Cr.P.C. It is stated that application is based on false and misconceived reasons and prosecution has already availed sufficient time to examine different witnesses for proving its case. It is also stated that by moving the present application under Section 311 Cr.P.C. prosecution is trying to rebuild its case at this belated stage of trial.

5. I have heard ld. PP for CBI and Sh.Anindya Malhotra, ld. Counsel for accused no.1 to 3 as well as Sh.Ankit Kumar, ld. Counsel for accused no.5. Accused no.4 has not filed the reply as he submits that witnesses sought to be recalled do not pertain to him.

6. It is submitted by Ld. PP for CBI that documents as per details

given in Annexure-I to this application are very important and relevant, which were left to be proved as per law though part of the charge sheet. He submits that those documents may be allowed to be proved as per law even at this stage of the trial as it would not cause any prejudice to the accused persons. He submits that provisions of Section 311 Cr.P.C. has to be invoked liberally in the interest of justice so that both prosecution as well as accused persons would get fair trial.

7. On the other hand ld. Counsel for accused no.1 to 3 submits that there is no denial that provision of Section 311 Cr.P.C. is to be exercised liberally so that each of the party must get sufficient opportunity to lead evidence as per its desire to prove its case for fair trial. However, he submits that provision of Section 311 Cr.P.C. is with the rider that none of the parties can be allowed to invoke such provision to fill up the lacuna left out of sheer negligence. He has relied upon judgment of Apex Court in case of **Natasha Singh vs. CBI (2013) 5 SCC 741**. He also submits that provision of Section 294 Cr.P.C. cannot be conveniently invoked at this stage of the trial. In this regard he has relied upon judgment of Delhi High Court in case of **Montari Industries Limited vs. State 2004 LawSuit (Del) 787** and of Bombay High Court in case of **State of Maharashtra vs. Barjor Buchiya 2009 LawSuit (Bom.) 2245**. Ld. Counsel for accused no.1 to 3 submits that application is absolutely silent as to the reasons for recalling the witnesses for proving these documents at this stage, more specifically when nine different applications were moved by CBI including three applications under Section 311 Cr.P.C. earlier. He further submits that when an application under Section 311 Cr.P.C. was moved on behalf of accused no.1 to 3, CBI in its reply has taken the objection that said application is nothing but an attempt to prolong the matter, whereas now CBI itself is prolonging the trial. Similar is

the argument of ld. Counsel for accused no.5.

8. Sec. 311 of the Code of Criminal Procedure, 1973 reads as:

“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”.

9. 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 (a) to summon any person as a witness, or (b) to examine ' any person in attendance, though not summoned as a witness, or (c) 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.

10. In **Mohanlal Shamji Soni v. Union of India, AIR 1991 SC 1346** it was observed that:

"It is therefore clear 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.”

11. In **AG Vs Shiv Kumar Yadav & Anr. VII (2015) SLT 112**, while considering the scope of section 311 Cr. P. C. **regarding recalling of a victim of alleged sexual assault, Hon’ble Supreme Court has observed as “...While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the Counsel conducting a case is competent particularly when a Counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a Counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in Court repeatedly, particularly in sensitive cases. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in Court to face cross-examination...”**

12. Reference can also be given to judgment in case of **Natasha Singh** (supra) more particularly in para 15 and 16 wherein Hon'ble Apex Court has observed :

“The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution,

or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.....

Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.”

13. Being guided by above discussed proposition, in the facts of the present case, first of all it be noted that application is completely silent as to why those documents as per details given in Annexure-I were not proved during the trial. While this Court has been very liberal in interpreting the provision of Section 311 Cr.P.C. for each of the parties to ensure that they can lead evidence available and prove documents as per law but at the same time it is also important that one who moves the application under Section 311 Cr.P.C. must give cogent reasons for recalling any witness or for proving any document left to be proved during the trial. There is no bar for allowing the application under

Section 311 Cr.P.C. even at belated stage of trial when P.E. has been closed. But at the same time it has also to be ensured by the Court that accused must not be prejudiced for moving an application at belated stage of trial when prosecution was given sufficient opportunity to lead evidence for period of about four years. As noted above 57 witnesses have been examined by the prosecution, out of those witnesses 9 witnesses are sought to be recalled. Obvious question arises why those documents were not proved when these witnesses being examined. These witnesses were examined way back in the year 2016, 2017 and 2018 whereas present application has been moved after 3/4 years when stage of Section 313 Cr.P.C. is going on. Important aspect in this regard to be noted is that prior to moving of this application, prosecution had already moved three applications under Section 311 Cr.P.C. which were duly allowed and the witnesses were recalled and examined during the trial. Whereas in respect of the present application, application is absolutely silent as to why documents were not proved as per law earlier. Details of the documents have also not been given as to how these documents are essential.

14. Provision of Section 294 Cr.P.C. cannot be invoked at this stage when stage of Section 313 Cr.P.C. is going on. Provision of Section 294 Cr.P.C. is with the object to cut short the trial so that prosecution can examine those witnesses and prove those documents which are really in dispute. In this case trial is almost complete as P.E. has already been closed. Moreover the tone and tenor of language of the application indicates as if prosecution is taking it for granted that provision of Section 294 Cr.P.C. is bound to be allowed at any stage, whereas such prayer is against the law. Reliance has been rightly placed on judgments in case of **Montari Industries Limited** (supra) and **Barjor Buchiya** (supra).

15. Delay in moving the application under Section 311 Cr.P.C. may not in every situation be a reason for denial of the same, but at the same time a deliberate delay, total non-application of mind and non-mentioning of any reason to explaining the delay would certainly give an impression as if the prosecution is seeking judicial process for granted. As per the legal proposition of recalling any witness as discussed above, it is established law that none of the parties be it prosecution or the accused persons should be prejudiced in allowing the application under Section 311 Cr.P.C. Ld. Counsel for accused no.1 to 3 rightly pointed out that even during the time when Investigating Officer (PW57) was being examined it took around one year for completion of his evidence primarily because CBI has sought adjournments on many occasions due to non-availability of IO. Even during this period of time prosecution could not move such application.

16. Even otherwise on merits careful examining all documents sought to be proved and the witnesses sought to be recalled, it would be evident that most of these witnesses have deposed as per their previous statements under Section 161 Cr.P.C. Without expressing much on the merits of the matter, prosecution at this stage cannot be allowed to rebuild its case and to prove numerous documents as per the details given in Annexure-I. If such application is allowed, it would certainly amount to re-trial and would certainly cause prejudice to the accused persons.

17. For the reasons stated above application stands dismissed.

Announced on 17.08.2020

(Shailender Malik)
Special Judge (CBI) (PC Act)
Rouse Avenue Courts, New Delhi

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