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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 22.08.2023***
Pronounced on: 04.09.2023

\+ **CRL.M.C. 5211/2023 & CRL.M.A. 21435/2023**

STATE OF NCT OF DELHI ..... Petitioner

Through: Mr. Sanjay Lao, Standing Counsel for the State with SI Rahul, PS Seelampur.
Mr. Laksh Khanna, APP for the State, Mr. Abhinav Kumar Arya, Mr. Priyam Agrawal, Advocates
Mr. Deepak Kumar, Ms. Dimple Aggarwal, Advocates for R-4

versus

MOHD. IQBAL GAZI & ORS. ..... Respondents

Through: Mr. M.N. Dudeja, Mr. Aditya Mishra, Advocates for R-2

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 (*'Cr.P.C'*) has been filed on behalf of petitioner/State seeking setting aside a impugned order dated 07.03.2023 passed by learned Sessions Judge-03, North-East District, Karkardooma Courts,

New Delhi (*'Trial Court'*) in Sessions Case no. 45052/2015 arising out of FIR bearing no. 351/2013 registered at Police Station Seelampur, Delhi for offence punishable under Sections 3(2) and 3(4) of Maharashtra Control of Organised Crime Act, 1999 (*'MCOCA'*) *vide* which the learned Trial Court had dismissed application under Section 311 of Cr.P.C. preferred on behalf of the State for summoning and examining six witnesses.

2. Briefly stated, the facts of the present case are that the present FIR was registered on the basis of an application filed under Section 9 of MCOCA, following a complaint by Mohd. Mobin against the respondents. The complainant had alleged that the respondents had not only committed serious offences but they were also part of an organised crime syndicate, engaged in ongoing unlawful activities. Further, multiple FIRs had been registered against the respondents, with Mohd. Mobin being a victim in FIR no. 228/2012. On 29.07.2013, the Court of Special Judge, MCOCA, Karkardooma, Delhi, had allowed the application, leading to the registration of present FIR bearing no. 351/2013. Thereafter, on 18.04.2015, chargesheet was filed against the accused Mohd. Iqbal Gazi, with a supplementary chargesheet for accused Mohd. Jamal being filed on 26.08.2016 before the learned Trial Court. Charges were framed against respondents for offences punishable under Sections 3(1), 3(2), 3(3), 3(4) and 3(5) of MCOCA.

3. On 27.02.2023, the petitioner/State had filed an application under Section 311 of Cr.P.C. in the present case for summoning and examining six witnesses being Nodal Officers to prove CDR, CAFF, and location ID chart of mobile nos. ***591 and ***796, one Md.

Furkan, one Md. Rizwan, Ahlmad of Court of learned Metropolitan Magistrate, Karkardooma Courts, Delhi and SI Shailender, IO of case FIR No. 12/2015, P.S. Seelampur. A list of witnesses for summoning and examination was also annexed along with the said application which is as under:

1. Nodal Officer – Aircel with CDR, CAF & Location chart with respect to Mobile No.***591 (pertaining to Kamaluddin @Kamal @Bilal) for the from 01.12.2014 to 03.02.2015.
2. Nodal Officer – Vodafone with CDR, CAF & Location Chart with respect to Mobile No.***791 (pertaining to CRL.M.C.-5211/2023 12 Jamal @Ranjha) for the period from 20.12.2014 to 12.02.2015.
3. Md. Fukran s/o Faimuddin to depose about his statement under Section 161 Cr.P.C. in case FIR No.12/15 PS Seelampur.
4. Md. Rizwan s/o Faimuddin to depose about his statement under Section 161 Cr.P.C. in case FIR No.12/15 PS Seelampur.
5. Ahlmad of Court of Sh. Vipul Sandwar learned Metropolitan Magistrate, Karkardooma, Delhi with original file containing statements under Section 161 Cr.P.C. of Md. Fukran and Md. Rizwan, and phone call details of accused Kamaluddin and Md. Jamal with protected witness in the present case.
6. SI Shailender, IO of case FIR No. 12/15 PS Seelampur to depose the fact relevant to the present case.

4. However, *vide* impugned order dated 07.03.2023, the learned Trial Court had dismissed the application filed by the State under Section 311 of Cr.P.C. and had passed the following order:

"An application u/s 311 Cr. PC was filed by Id. SPP for summoning and examining 6 witnesses, as per list attached with the application. Reply to this application filed by Sh. Piyush Singhal, Id. counsel for accused Kamaluddin @ Kamal and submissions heard.

As per contentions of Id. Addl. PP, accused Kamal had made some threatening calls to one protected witness, while being lodged in the jail itself. According to Id. Addl. PP, such threatening calls were made prior to filing of chargesheet in this case, but after registration of the FIR. He submitted that CDR of respective phone numbers are required to be proved by calling Nodal Officer from the concerned service provider. He further submitted that other 4 witnesses from S .No. 3 to 6 are related to FIR no. 12/15, PS Seelampur, but witnesses Furkan and Rizwan would depose about the mobile phone being used from jail to make call to one of the protected witnesses of this case by accused Kamal. He further submitted that Furkan was lodged in the jail and he used to take same mobile phone from Kamal, in order to make call to Rizwan. Ld. Addl. PP further submitted that statement of these witnesses were recorded u/s 161 Cr.PC in FIR no. 12/15 and hence, record of those statements would be produced by Ahlmad of the concerned court and IO of that FIR would depose about examining these witnesses in FIR no. 12/15.

Queries were made to the Ld . Addl . PP and IO to explain, as to how the alleged threatening calls from accused Kamal to one of the protected witnesses is relevant for the purpose of charges framed in this case. However, no satisfactory answer could be given by any of them. Apparently, this threatening call was not the base for lodging FIR in this case. The trial is being conducted on the basis of charges framed in this case. The charges have been framed on the basis of allegations made by prosecution for several alleged acts of accused persons, which took place prior to registration of FIR and which according to prosecution constitute offence under MACOC Act. If any fact is not relevant for the purpose of proving aforesaid charge, then there remains no purpose to prove such fact on the record. Moreover, as far as Nodal Officers are concerned, Id. Addl. PP conceded that no CDRs have been placed on the record by the prosecution till date. In absence of any such CDR, there is no meaning to call any Nodal Officer. Prosecution has not sought permission to tender any document on the record at this belated stage and they can not assume such permission being available to them mere on their mentioning about such document. Whatever happened in FIR no. 12/15, PS Seelampur, can not be

> ipso facto treated as relevant in this case. Since no relevance of threatening call has been explained, therefore, I do not find purpose of summoning any witness, as mentioned in the list. Hence, this application is rejected..."

5. Learned Standing Counsel for the State/petitioner argues that the impugned order suffers from errors of law and infirmity. It is stated that SI Rizwan was cited as a witness but the record mentioned against his name in the list of witnesses in the main chargesheet could not be produced by him since the said record was not in his custody and could only have been produced by the Nodal officers of the telecom Company who had issued the SIM card numbers in question and thus, the observation of learned Trial Court that there was no meaning to call any Nodal Officer as no CDR had been placed on record by the prosecution was bad in law. In this regard, it is also argued that though the CDR may not have been part of the record, which is now a part of record, the learned Trial Court failed to appreciate that the Nodal Officer had been called alongwith the CDR which reveals conspiracies amongst accused persons which can be proved only through the call records, for which examination of Nodal officer is essential. It is also stated that that learned Trial Court also failed to appreciate that one Mohd. Fukran who was in jail in the year 2015 in FIR no. 442/2013 registered at P.S. Jafrabad had used the mobile phone containing SIM card number ***591, after taking it from accused Kamaluddin who was lodged in the jail at the same time. It is also argued that the learned Trial Court also failed to appreciate that Mohd. Fukran used to make telephone calls to Mohd. Rizwan who was his real brother on his mobile number ***172 and therefore, it is essential for the prosecution to lead evidence

to the effect that the mobile number having SIM number ***591 was in possession of accused Kamaluddin and that accused Kamaluddin had extended threats to one of the productive witnesses in the present case. It is also stated that the learned Trial Court has failed to appreciate that it is imperative to lead evidence to the effect that accused Jamal, who was using mobile number ***796, used to extend threat to the protected witnesses on his mobile phone. It is also stated that the learned Trial court failed to appreciate basic ingredients of unlawful continuing activities as defined under MCOCA. It is stated that accused persons who are facing trial for offences under MCOCA had been continuing giving threats. Therefore, it is prayed that present petition be allowed.

6. *Per contra*, learned counsel for respondent no. 2 argues that the petitioner/State has failed to show as to how these witnesses are relevant for the just decision of the present case, when the alleged calls were made in the year 2015, and the present case was registered in the year 2013, and there is no direct or indirect connection between those calls and the present case. It is further stated that considering the well-settled law of Section 311 Cr.P.C., learned Trial Court has rightly rejected their application and there is no infirmity with the impugned order.

7. This Court has heard the arguments addressed by both learned counsel for the petitioner/State and learned counsel for the respondents, and has perused material on record.

8. Before considering the submissions of the learned counsels on merits, this Court refers to Sections 2(1)(d) and 2(1)(e) of MCOCA, which are reproduced as under:

> "Section 2(1).
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> (d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;
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> (e) "organised crime "means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency."

9. After going through the same, this Court is of the opinion that the present FIR bearing no. 351/2013 was registered in the year 2013 under Section 3(2)/3(4) of MCOCA at PS Seelampur, Delhi, however, the chargesheet in this case was filed in the year 2015 in Session Case No. 45052/2015. The record which is sought to be summoned pertains to FIR No.12/2015 which was also registered at P.S. Seelampur, wherein the statement of Mohd. Fukran, and Mohd. Rizwan had already been recorded and chargesheet had been filed in the Court. This Court also takes note of the fact that the IO SI Shailender, who had conducted investigation in FIR No.12/2015, PS Seelampur and had also filed chargesheet in the Court, is a crucial witness to depose about the threats extended by the accused in the present case to the protected witnesses of this case and to prove the fact that SIM card number ***591 and ***796 were used by the accused persons.

10. This Court after taking note of Section 2(1)(d) of MCOCA is of the opinion that there is merit in the argument of the learned counsel for respondent that Section 2(1)(d) contemplates the conduct of last ten years prior to registration of the FIR of the case under MCOCA, however, the conduct has to be determined in accordance with the facts and circumstances of each case.

11. This Court is of the opinion that every case is a quest of finding the truth and for that it has to follow the procedure as established by law. A criminal court has to follow the procedure set by the Code of Criminal Procedure, Indian Penal Code and Indian Evidence Acts, etc., as applicable in each case depending on the stage of trial. In this background, Section 311 of Cr.P.C. is of importance since it is one of the tools to attain the goal of reaching the truth of the matter which is the ultimate quest before any court of law in an adversarial system of adjudication.

12. It would be appropriate at this stage to refer to Section 311 of Cr.P.C. which reads as under:

> "**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."

13. The Hon'ble Supreme Court in ***Rajaram Prasad Yadav v. State of Bihar & Anr.*** *(2013) 14 SCC 461* has laid down guidelines

regarding exercise of powers under Section 311 Cr.P.C. The relevant portion reads as under:

> "...15.1 In the decision in *Jamatraj Kewalji Gowani v. State of Maharashtra*, this Court held in para 14: (AIR pp. 182-83)
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> > "14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court at or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court"s action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction..."
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> 15.3 In the decision in *Raj Deo Sharma (2) v. State of Bihar*, the proposition has been reiterated as under in para 9: (SCC p.613)
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> > "9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *A.R. Antulay* case nor in *Kartar Singh* case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.
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> 15.6. In *P. Sanjeeva Rao v. State of A.P.* the scope of Section 311 CrPC has been highlighted by making reference to an earlier decision of this Court and also with particular reference

to the case, which was dealt with in that decision in paras 20 and 23, which are as under: (SCC pp. 63-64)

> "20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in *Hoffman Andreas v. Inspector of Customs*. The following passage is in this regard apposite: (SCC p. 432, para 6)
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> > "6....In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.
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> > 23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in- chief about an incident that is nearly seven years of Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

14. In ***Satbir Singh v. State of Haryana*** *SLP (Crl.) 1258/2022, decided on* ***29.08.2023***, the Hon'ble Apex Court has made the

following observations on the power to recall witness under Section 311 Cr.P.C. when the same is essential for just decision:

> 9. Section 3111 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "CrPC") has engaged this Court's attention before. We will advert to a few decisions of recent vintage. While overturning an order of the High Court allowing an application for recall of a witness, which was rejected by the trial Court, *this Court held as under, in Ratanlal* v Prahlad Jat, (2017) 9 SCC 340:
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> > '17.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 authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine 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 be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion 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.
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> 10. In *Manju Devi v State of Rajasthan, (2019) 6 SCC 203*, this Court emphasized that a discretionary power like Section 311, CrPC is to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, whilst also ensuring no prejudice is caused to anyone.
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> 11. In *Harendra Rai v State of Bihar, 2023 SCC OnLine SC 1023*, a 3-Judge Bench of this Court was of the opinion that Section 311, CrPC should be invoked when '… it is essential for the just decision of the case.'

15. Having discussed law of Section 311 of Cr.P.C., when the facts of the present case and the prayer before this Court to allow application filed under Section 311 of Cr.P.C. by the prosecution is examined, this

Court reaches a conclusion that in the present case, the accused was threatening the protected witnesses of this case from the jail itself which is a relevant fact for deciding the present case to prove his conduct, as this conduct has direct relationship with the offence in question. The police officials could have filed a supplementary chargesheet, since the information and the relevant documents were in their possession in the year 2015 itself, which was permissible under the law as per Section 173 (8) of Cr.P.C.

16. Furthermore, it is crucial to highlight that the allegations against the respondents are that they were engaging in the act of threatening the witnesses of the case in question even while being lodged within the confines of jail. **Such actions strike at the core of protection of witnesses who are the eyes and ears of the judicial system and are the only means of reaching just decision of a case and bring home the guilt of an accused.** The Court also remains conscious of the fact that in case the witnesses who are protected under the law in a criminal case are threatened even from jail, it will directly affect the courts reaching a just decision and punishing the guilty. A witness under threat can never depose truthfully.

17. Therefore, since the prosecution wants to bring on record the evidence of those witnesses who will prove the conduct of the accused of threatening the protected witnesses of this case from the jail itself which will be relevant factor for deciding the present case, this Court is of the firm opinion that dismissing this petition would result in miscarriage of justice as the crucial evidence which should be before

the Court to decide the present case will not be brought before it due to technicalities of law.

18. In these circumstances, the present petition is allowed subject to the following conditions:

i. The witnesses sought to be summoned will be examined within one month and no unnecessary adjournment shall be sought by the prosecution in this regard.

ii. The statements of the witnesses sought to be examined and the documents relied upon sought to be proved through such witnesses will be provided to the learned defence counsel at least fifteen days prior to the date fixed for such examination of the witnesses to enable the learned defence counsel to effectively cross-examine such witnesses.

19. In view thereof, the present petition alongwith pending application, if any, stands disposed of in above terms.

20. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

SEPTEMBER 04, 2023/ns