

GAHC010234622013



2024:GAU-AS:13009

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./627/2013

SMTI SAAZ BEGUM
D/O MD. TAJAJUL R/O K.B. ROAD, WARD NO. 11, P.S. NORTH LAKHIMPUR,
DIST. LAKHIMPUR, ASSAM.

VERSUS

THE STATE OF ASSAM and ANR
REP. BY THE PUBLIC PROSECUTOR

2:SMTI. GEETA SINGH
W/O MR. SADASHIV NARAYAN SINGH R/O K.B. ROAD
WARD NO. 11
P.S. NORTH LAKHIMPUR. DIST. LAKHIMPUR
ASSAM

Advocate for the Petitioner : MS.I GOHAIN, MS.I SARMA,MR.M SARMA
Advocate for the Respondent : PP, ASSAM, MR.S K SINGH,MR.B S SINGHA,MRB PUSHILAL

BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date of hearing : 25.09.2024

Date of Judgment : 18.12.2024

JUDGMENT & ORDER(CAV)

Heard Mr. M. Sarma, learned counsel, appearing on behalf of the petitioner. Also heard Mr. B. S. Singh, learned senior counsel, assisted by Mr. B. Pushilal, learned counsel, appearing on behalf of Respondent No. 2.

2. The petitioner, herein, by way of instituting the present criminal petition, has presented a challenge to an order, dated 15.07.2023, by which the learned trial Court had allowed an application filed by the respondent No. 2, invoking the provisions of Section 311 of the Code of Criminal Procedure, 1973, for recall of PW-4 and to allow him to exhibit the original copy of an undertaking executed by the petitioner, herein.

3. The brief facts requisite for adjudication of the issues arising in the present proceeding, is noticed as under:

The Respondent No. 2 viz. Smti. Geeta Singh, had lodged a complaint before the Court of the Judicial Magistrate, North Lakhimpur, for 20.11.2008, alleging that the petitioner had formed a committee consisting of 20 members, including the Respondent No. 2, in the pretext of giving financial assistance and the petitioner had told that there would be a game of betting amongst the members who would contribute Rs. 5,000/- each and it was told by the petitioner that the members would get commission in the game. However, the petitioner misappropriated the money involved and also misappropriated the commission of the Respondent No. 2 amounting to Rs. 31,475/-. The said complaint so filed, had also as one of its enclosures, an undertaking, signed by the petitioner, herein. The said complaint was forwarded to the North Lakhimpur Police Station for investigation. On receipt of the said complaint, the police treating the same as First Information Report(FIR) registered North Lakhimpur P.S. Case No. 766/2008 under Section 420 of the Indian Penal Code. On completion of the investigation; the police laid the charge sheet being charge sheet No. 92/2009, dated 12.03.2009, against the petitioner under Section 420 of the Indian Penal Code.

The said case is presently pending disposal before the Court of learned Chief Judicial Magistrate, North Lakhimpur, in G.R. Case No. 1507/2008 under Section 420 of the Indian Penal Code. It was projected that the charge was framed under Section 420 of the Indian Penal Code and the trial commenced.

Altogether, 6(six) witnesses including the PW-4 came to be examined and thereafter, cross-examined and the statement of the petitioner under Section 313 of the Code of Criminal Procedure, 1973, was also recorded. The matter was, thereafter, fixed for arguments on 27.05.2013.

On 27.05.2013, the Respondent No. 2, as informant, had filed an application through the Addl. Public Prosecutor, invoking the provisions of Section 311 of the Code of Criminal Procedure, 1973, before the learned trial Court praying for recalling of PW-4 for re-examination and exhibiting an agreement which was contended to have been admittedly not produced, either, before the police, or, before the learned trial Court. The said application was opposed by the petitioner, herein.

The learned trial Court, upon hearing the parties to the proceeding, vide order, dated 15.07.2013, by recording a conclusion that re-examination of PW-4 was essential to a just decision in the case, was pleased to allow the prayer of the learned Addl. P.P., Assam. Accordingly, the PW-4 was directed to be recalled and 31.07.2013, was fixed as the date for re-examination of PW-4.

- 4.** Being aggrieved, the petitioner has filed the present proceeding.
- 5.** It is to be noted that while issuing notice in the matter vide order, dated

28.02.2013; this Court had stayed the further proceeding in G.R. Case No. 1507/2008 under Section 420 of the Indian Penal Code, pending before the Court of learned Chief Judicial Magistrate, North Lakhimpur.

6. Mr. Sarma, learned counsel for the petitioner, by reiterating the facts as noticed hereinabove; has submitted that the existence of the said undertaking was not highlighted by the PW-4 in his deposition and as such, the prosecution, by filing the said application under Section 311 of the Code of Criminal Procedure, 1973, is trying to improve its case and fill up the lacunae so found to have existed in the matter.

7. Mr. Sarma, learned counsel, has further submitted that the said application so filed at the fag end of the case, would not be permissible to be entertained and accordingly, the learned trial Court had exceeded in its jurisdiction in passing the order, dated 15.07.2013, permitting recalling of PW-4 for re-examination.

8. Mr. Sarma, learned counsel, has also submitted that the learned trial Court, by making a general observation that the re-examination of the PW-4, appears to be essential for a just and fair decision in the case, had proceeded to allow the application so filed, invoking the provisions of Section 311 of the Code of Criminal Procedure, 1973. However, there is no material disclosed in the said order, dated 15.07.2013, justifying the conclusions so drawn in the matter by the learned trial Court.

9. Mr. Sarma, learned counsel, has further submitted that the prosecution is trying to bring on record, new documents and the permission now granted for

the same by the learned trial Court, would cause prejudice to the defence of the accused which is, admittedly, not permissible in law and has contended that the application so filed, is an abuse of the process of law.

10. In support of his contentions, Mr. Sarma, learned counsel, has relied upon a decision rendered by this Court in the case of **Gopal Jhunjunwala v. Shurva Teja Chaudhury & anr.**, reported in **2008(4) GLR 20**, and has contended that a lacuna in the prosecution case, must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution and the advantage of it, should normally go to the accused in the trial of the case.

11. In the above premises, Mr. Sarma, learned counsel for the petitioner, has submitted that the order, dated 15.07.2013, would call for an interference from this Court with a further direction to the learned trial Court, to conclude the matter basing on the materials as available on record after hearing the arguments of the parties.

12. Per contra, Mr. Singh, learned senior counsel, appearing on behalf of Respondent No. 2, has submitted that a copy of the undertaking executed by the petitioner, herein, was already available in the records of the learned trial Court in-as-much as the same formed the part of the complaint initially instituted by the Respondent No. 2 before the Judicial Magistrate, North Lakhimpur, on 20.11.2008. The learned senior counsel has submitted that during the examination-in-chief of PW-4, he had referred to the said undertaking given by the petitioner, herein.

13. Mr. Singh, learned senior counsel, by referring to the cross-examination

of the PW-4, has submitted that he was crossed by the learned counsel for the petitioner on the said point and it was brought on record that the document that was submitted before the police and available in the records, was a photo copy. The learned senior counsel has, therefore, submitted that during the examination of the PW-4, the said undertaking of the petitioner could not be exhibited in-as-much as the original of the same was not readily traceable and was not asked for and/or seized by the police. It had remained with the PW-4 and he had not realized the importance of the same. After cross-examination of the PW-4, he had started looking for the said document and on 12.05.2013, he had found the same kept inside an old magazine which was lost while shifting his shop from K. B. Road to Khelmati. Accordingly, the said document was brought to the notice of the Respondent No. 2 and thereafter, on consultation with the Addl. P.P., Assam; the application under Section 311 of the Code of Criminal Procedure, 1973, came to be so filed in the matter by the Respondent No. 2. The learned senior counsel has further submitted that the said undertaking so executed on 16.04.2002, by the petitioner, herein, reveals about the existence of the committee and her role therein and accordingly, the same would be a material piece of evidence in arriving at a just and fair decision in the case presently pending in the Court of learned Chief Judicial Magistrate, North Lakhimpur, in G.R. Case No. 1507/2008 under Section 420 of the Indian Penal Code.

14. Mr. Singh, learned senior counsel, has, accordingly, submitted that the learned trial Court on appreciating the contentions made by the prosecution in the matter about the importance of the said document, for a just and fair decision in the matter, had allowed the application for recall of the PW-4 vide by order, dated 15.07.2013, and accordingly, the same would not call for any interference.

15. In support of his submissions, Mr. Singh, learned senior counsel, appearing for the Respondent No. 2; has relied upon the following decisions of the Hon'ble Supreme Court:

(i). Iddar & ors. v. Aabida & anr., reported in **AIR 2007 SC 3029;**

(ii). Rajaram Prasad Yadav v. State of Bihar & anr., reported in **AIR 2013 SC 3081;**

(iii). Mannan Sk & ors. v. State of West Bengal & anr., reported in **2014 CRL.J. 4072;** and

(iv). Varsha Garg v. State of Madhya Pradesh & ors., reported in **2022 SCC SConLine 986.**

16. I have considered the submissions advanced by the learned counsels appearing for the parties and also duly perused the materials made available on record. I have also considered the decisions referred to by learned counsels for the parties.

17. The facts as noticed hereinabove, in the present proceeding, are not disputed.

18. The petitioner has assailed the order, dated 15.07.2013, passed by the learned trial Court, permitting recall of PW-4 for re-examination and for production of the original copy of the undertaking executed by her on 16.04.2002, to be not permissible, in-as-much as, the same was contended to be for the purpose of improving the case of the prosecution and accordingly, the lacunae in a prosecution case not being permissible to be so covered up by introduction of a projected new evidence; it was submitted that the benefit, if

any, in the matter on account of such lacunae, would have to go in favour of the accused i.e. the petitioner, herein.

19. The issue involved in the present proceeding being in relation to the power of the learned trial Court, under the provisions of Section 311 of the Code of Criminal Procedure, 1973. The provisions of Section 311, being relevant, is extracted hereinbelow:

“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.”

20. A perusal of the provisions of Section 311 of the Code of Criminal Procedure, 1973, would go to reveal that the Court may, at any stage of an inquiry, trial or other proceeding under the 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 for the just decision of the case.

21. The provisions of Section 311 of the Code of Criminal Procedure, 1973, would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness, or, to recall or re-examine any witness already examined. It is, therefore, imperative that the invocation of Section 311 of the Code, and its application in a particular case, can be ordered by the Court, only, by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case. The power vested under the said provision is made available to any Court, at any

stage, in any inquiry, or, trial, or, other proceeding initiated under the Code of Criminal Procedure, 1973, for the purpose of summoning any person as a witness, or, for examining any person in attendance, though not summoned as a witness, or, to recall, or, re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court, to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose, the essentiality of a person to be recalled and re-examined, has to be ascertained. It is also to be highlighted that while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

22. The Hon'ble Supreme Court in the case of **Rajaram Prasad Yadav**(supra), after noticing its earlier decisions in the matter, had laid down the principles to be borne in mind by a Court while dealing with an application under Section 311 of the Code of Criminal Procedure, 1973, read with Section 138 of the Indian Evidence Act, 1872. The principles so laid down in the aforesaid decision being relevant, is extracted hereinbelow:

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311, Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311, Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311, Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the

grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

23. The Hon’ble Supreme Court in its decision rendered in the case of **Mannan Sk**(supra), on the issue with regard to the object of Section 311 of the Code of Criminal Procedure, 1973, had drawn the following conclusions:

“10. The aim of every Court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word ‘shall’. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words ‘essential to the just decision of the case’ are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it’s exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill- up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

.....

14. If we view the present case in light of the above judgments, we will have to sustain the High Court’s order. PW15-SI Dayal Mukherjee stated in the court that he had re- corded the statement of deceased Rupchand Sk. Thus, this fact was known to the defence. He was cross-examined by the defence. Inadvertently, the said statement was not brought on record through PW15-SI Dayal Mukherjee. Rupchand Sk died after the said statement was recorded. The said statement, therefore, became very vital to the prosecution. It is obvious that the prosecution wants to treat it as a dying declaration. Undoubtedly, therefore, it is an essential material to the just decision of the case. Though, the fact of the recording of this statement is deposed to by PW15-SI Dayal Mukherjee, since due to oversight it was not brought on record, application was made under Section 311 of the Code praying for recall of PW15-SI Dayal Mukherjee. This cannot be termed as an inherent weakness or a latent wedge in the matrix of the prosecution case. No material is tried to be brought on record surreptitiously to fill-up the lacuna. Since the accused knew that such a statement was recorded by PW15-SI Dayal Mukherjee, no prejudice can- be said to have been caused to the accused, who will undoubtedly get a chance to cross- examine PW15-SI Dayal Mukherjee.”

24. The Hon’ble Supreme Court in the case of **Varsha Garg** (supra), after examining the provisions of Section 311 of the Code of Criminal Procedure, 1973, had noticed, as under:

“29. The first part of the statutory provision which uses the expression "may" postulates That the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

30. A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed.

“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. When any party to the proceedings points out the desirability of 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.”

Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the "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." In that context the Court observed:

“18... 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 to 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.”

31. Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra, the Court held:

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is 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.”

32. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be

governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

.....

 38. *Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.*

39. *In the decision in Zahira Habibullah Sheikh v. State of Gujarat, which was more recently reiterated in Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd., the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:*

"28. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge."

(emphasis supplied)

40. *The right of the accused to a fair trial is constitutionally protected under Article 21. However, in Mina Lalita Baruwa (supra), while reiterating Rajendra Prasad (supra), the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In Rajendra Prasad (supra), the Court had held that:*

"8. 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 trial 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."

(emphasis supplied)"

25. On application of the decisions of the Hon'ble Supreme Court noticed

hereinabove, to the facts of the present case; it is found that the undertaking so executed by the PW-4, is already a part of the records of the learned trial Court in-as-much as the same was enclosed along with the initial complaint so filed by the Respondent No. 2 before the Judicial Magistrate, North Lakhimpur, on 20.11.2008, which was subsequently forwarded to the North Lakhimpur Police Station and leading to the proceeding now pending in G.R. Case No. 1507/2008 under Section 420 of the Indian Penal Code.

26. The contention of the petitioner that the PW-4, in his deposition, before the learned trial Court, had not referred to the existence of the said undertaking, is clearly perverse in-as-much as, both, in his examination-in-chief as well as in his cross-examination, the PW-4 had clearly referred to the existence of such undertaking made by the petitioner, herein, and it is also available in his deposition that he had only submitted a photo copy thereof. The said document being a document which would establish the fact of formation of a committee, in question, as well as of the role of the petitioner, therein; the same in the considered view of this Court, was requisite to be examined for arriving at a just and fair conclusion in the matter. The exhibition of the said document would not, in any manner, prejudice the interest of the petitioner, herein. The said document in the facts and circumstances of the matter, clearly satisfies the requirements of being a relevant material, however, the same was not brought on record due to inadvertence.

27. It is settled by the decisions of the Hon'ble Supreme Court referred to hereinabove that the Court is vested with broad and wholesome power, in terms of Section 311 of the Code of Criminal Procedure, 1973, to summon and examine, or, recall and re-examine any material witness at any stage and the closing of the prosecution evidence, is not an absolute bar. The object

underlying Section 311 of the Code is that there may not be failure of justice on account of mistake or inadvertence 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 being as to whether, it is essential for a just decision in the case.

28. Section 311 of the Code of Criminal Procedure, 1973, 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 311 of the Code, 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.

29. This Court having noticed that the reference to the said undertaking made by the petitioner, herein, on 16.04.2002, was already available on record and the same was referred to by the PW-4, in his deposition, before the learned trial Court, the non-production of the original copy thereof, being only on account of an inadvertence; it would not be permissible in a trial to foreclose any party from correcting errors. If proper evidence was not adduced and/or relevant material was not brought on record due to any inadvertence; the Court should be magnanimous in permitting such mistakes to be rectified in-as-much as the 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.

30. At this stage, the reliance placed by the learned counsel for the

petitioner on the decision of this Court in the case of **Gopal Jhunjhunwala** (supra); is being considered.

31. Mr. Sarma, learned counsel for the petitioner, by relying on the said decision, has submitted that the lacuna in the prosecution case, must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution and the advantage thereof should normally go to the accused in the trial of the case. However, it is seen that this Court in the said decision, had further observed that an oversight in the management of the prosecution, cannot be treated as an irreparable lacuna. It is further held that no party in a trial, could 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. In view of the said observations as made by this Court in the case of **Gopal Jhunjhunwala**(supra), which squarely applies to the facts of this case; this Court is of the considered view that the said decision relied upon by Mr. Sarma, learned counsel for the petitioner, would not advance the case of the petitioner, herein.

32. In view of the above position and this Court having also concluded that the undertaking executed by the petitioner would be a material evidence in the trial for arriving at a just and fair decision therein; the order, dated 15.07.2013, passed by the learned trial Court, permitting recall of the PW-4 for re-examination and for exhibition of the original undertaking in course of his such re-examination, is not erroneous and therefore, would not call for any interference.

33. Further, the said order, dated 15.07.2013, having been so issued for

arriving at a just and fair decision in the matter; this Court, in the light of the decisions of the Hon'ble Supreme Court, considered hereinabove, would not proceed to interfere with such directions so passed by the learned trial Court.

34. In the above view of the matter; the order, dated 15.07.2013, is upheld and the learned trial Court is directed to proceed with the trial of the case from the stage of the re-examination of the PW-4 in terms of the directions passed by it vide the order, dated 15.07.2013. It is further provided that the proceeding being a long pending one, the learned trial Court shall endeavour to expeditiously conclude the proceeding at an early date and the parties to the proceeding, are directed to facilitate the learned trial Court to conclude the proceeding, at the earliest.

35. In view of the above, this criminal petition stands dismissed. However, there shall be no order as to costs.

JUDGE

Comparing Assistant