

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Application No. 1494 of 2019

Ram Bhullan

--Applicant

Versus

State of Uttarakhand and Another

--Respondents

Presence:-

Mr. Ramji Srivastava, learned counsel for the applicant.

Mr. Siddhartha Bisht, learned AGA with Mr. Vikas Uniyal, learned Brief Holder for the State.

Hon'ble Siddhartha Sah, J.

Mr. Ramji Srivastava, learned counsel for the applicant.

Mr. Siddhartha Bisht, AGA with Mr. Vikas Uniyal, learned Brief Holder for the State/respondent no.1.

2. By means of the present Criminal Misc. Application under Section 482 of Cr.P.C., the applicant has sought setting aside of the impugned order dated 01.08.2019 passed by the court of Special Judge, N.D.P.S. Act in S.S.T. No.203 of 2017, 'State vs. Pirthivi Raj Singh and another (Case Crime No.278 of 2016) under Section 8/20 of N.D.P.S. Act, Police Station Nehru Colony, District Dehradun whereby the trial court had allowed the application of the prosecution under Section 311 Cr.P.C.

3. Brief facts for adjudication of the present case are as follows:

An FIR was lodged by the complainant Kailash Panwar, Deputy Superintendent of Police, STF, Dehradun with the averments that on

18.12.2016 at about 11:30, informant was given an information that two persons in a White Bolero bearing no. UP 40 U 8503 are coming from Haridwar towards Dehradun, and in its oil tank illegal charas is being smuggled. On this information, the complainant constituted a team with the equipments required and reached at Haridwar Road near I.I.P. and tried to collect independent witnesses but none agreed to the same, after which the complainant and his party checked each other, and about 1:15 PM, saw a White color Bolero no. UP 40 U. 8503, in which two persons were sitting and the same was intercepted and stopped and the driver of the vehicle told his name as Prithvi Raj and the second person, who was sitting in the said vehicle told his name as Ram Bhulan both of District Bahrach, U.P. and on checking they produced the paper of the vehicle and licence etc. On checking the vehicle, it was found that an additional tank was fitted as oil tank in the vehicle and in the original oil tank charas was being smuggled by hiding the same and both the accused took out the said charas from the oil tank and stated that they were going to Saharanpur to supply the same and on smelling it was found that the contraband is Charas and thereafter weighment was called and the Charas was weighed, which was about 43.540 Kg. and the Recovery Memo was prepared at the spot. On this complaint of the Complainant an FIR was lodged as Case Crime No.278 of 2016 for the

offence punishable under Section 8/20 N.D.P.S. Act, at P.S. Nehru Colony, District Dehradun.

4. After the investigation, charge sheet was filed by the IO against the applicant and one Prithvi Raj under Section 8/20 of the NDPS Act. Against the charge sheet, trial court took cognizance and summoned the accused and thereafter the charges were framed against them and trial commenced. In the trial, the P.W.-1-DSP Kailash Panwar was examined before the trial court. After the examination of P.W.-1, the prosecution moved an Application Under Section 311 Cr.P.C. to recall P.W.1 to rectify the mistake made by the prosecution, in which it was averred by the prosecution that as per the prosecution story, the applicant was apprehended with the Bolero Car, Registration U.P. 40U-8503 with 43.544 Kilo Gram Charas by the DSP Sri Kailash Panwar (P.W.-1) along with his raiding team. As per the prosecution story, the contraband was kept by the applicant along with the other accused person in the spare Oil Tank, which is fitted along with the Original Oil Tank of the Vehicle. The prosecution filed the application to recall the P.W.-1 as he inadvertently was not able to produce the oil tank as an evidence before the court during trial.

5. Objection was filed by the applicant against the application filed by the prosecution.

6. The trial court, after hearing both the parties, allowed the application of the prosecution under Section 311 Cr.P.C. vide order dated 01.08.2019, wherein it was observed by the trial court that the prosecution inadvertently failed to produce the oil tank, in which it was alleged that the applicant along with the co-accused had put 43.540 Kg. Charas.

7. Assailing the order dated 01.08.2019, Learned counsel for the applicant, Mr. Ramji Srivastava, would submit that vide the application under Section 311 Cr.P.C., the prosecution has tried to fill up the lacuna in the prosecution case. He would also submit that by means of the said application under Section 311 Cr.P.C., the prosecution wanted to rebut, which is not legally permissible, otherwise, it would be an unending exercise. He would next submit that in fact, the contraband was seized from the vehicle and it was lying with the police at that particular point of time. By way of recalling the PW1, who had seized the vehicle, the prosecution wanted to prove the seizure, which it had failed when the PW1 was examined at the initial stage. He would further submit that the vehicle was seized on 18.12.2016 at the time of lodging of the FIR, and prosecution was trying to call the vehicle after three years, which, in fact, was never released. He would submit that no photographs of the vehicle were taken, and he would submit that possibility of tampering with the evidence in the meantime cannot be ruled out since no photographs were produced.

8. While referring to provisions of Section 311 of Cr.P.C., he would submit the basic ingredients of Section 311 of Cr.P.C. are missing in the application filed by the prosecution. He would further submit that a bare perusal of the application under Section 311 of Cr.P.C. would reveal that it is an application filed just to fill in the lacuna, and it doesn't even mention that no prejudice will be caused to the accused.

9. However, he would very fairly submit that after the order dated 01.08.2019, the PW1 was re-examined on 05.08.2019, and prior to that, no interim order was passed by this Court, and as such, the proceedings

continued, and in fact, now the matter is fixed for judgment.

10. Learned counsel for the applicant, in support of his submissions, has relied upon the judgment of the Hon'ble Supreme Court in the case of **Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328**, and relied upon para nos. 12 and 13 thereof, which are extracted hereunder for ready reference :-

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

13. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.”

11. With reference to the aforesaid judgment, he would submit that the power under Section 311 of the Cr.P.C. can be invoked by the Court only to meet the ends of justice, and there has to be strong and valid reasons, and the power should be exercised with great caution and circumspection. He would also submit that where prosecution evidence has been closed long back, the reason for non-examination of the witnesses earlier is not satisfactory, the summoning of witness at a belated stage would cause great prejudice to the accused and

should not be allowed.

12. He would further rely on a judgment of the Hon'ble Supreme Court in the case of **Ratanlal versus Prahlad Jat and Others**, reported in **(2017) 9 SCC 340**, and has placed reliance upon para nos. 21 and 22 thereof, which are extracted hereunder for ready reference.

21. *The delay in filing the application is one of the important factors which has to be explained in the application. In Umar Mohammad v. State of Rajasthan [Umar Mohammad v. State of Rajasthan, (2007) 14 SCC 711 : (2009) 3 SCC (Cri) 244] , this Court has held as under: (SCC p. 719, para 38)*

“38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed.”

22. *Coming to the facts of the present case, PWs 4 and 5 were examined between 29-11-2010 and 11-3-2011. They were cross-examined at length during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has recorded a finding that they were not under any pressure while recording their evidence. After a passage of 14 months, they have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over. We do not find any reasons to allow such*

an application. The Sessions Judge, therefore, was justified in rejecting the application. In our view, the High Court was not right in setting aside the said order.”

13. He would stress upon para 22 whereof that if no reasons are assigned for the delay in filing the application, the Court would be justified in rejecting the application. He would also rely upon a judgment of the Hon’ble Supreme Court in the case of **State of Tripura versus Panna Ahammad**, reported in **2026 SCC OnLine SC 960**, and has referred to para nos. 16 and 17 thereof, which are extracted hereunder for ready reference.

“16. Secondly, the principal ground urged in support of the application under Section 311 CrPC is that certain facts arising from the CDRs of the relevant mobile numbers could not be brought on record during the earlier cross-examination due to inadvertence. However, it is an admitted position that the said CDRs were filed by the prosecution itself along with the charge-sheet and formed part of the record throughout the course of the trial. The defence was thus aware of the said material and had adequate opportunity to examine the prosecutrix with reference thereto. The power under Section 311 CrPC cannot be exercised merely to fill up lacunae in the defence case.

17. Lastly, it is important to mention that the prosecutrix has already been subjected to the ordeal of deposition and cross-examination on four separate occasions before the Trial Court, in addition to having her statement recorded during investigation and before the learned Magistrate under Section 164 CrPC. Directing recall would inflict further and unjustifiable hardship upon the prosecutrix. The witnesses cannot be expected to face hardship of appearing in court repeatedly, particularly in sensitive cases. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in Court to face cross-examination.”

14. He would submit that where the prosecution was aware of the material, and had adequate opportunity to examine the witnesses, the power under Section 311

cannot be exercised merely to fill up the lacuna. Thus, on the aforesaid premise, he would submit that the application under Section 311 of the Cr.P.C. filed by the prosecution does not contain the essential ingredients as envisaged under the provisions of the said section, and as such, since the application of the prosecution did not fulfill the criteria as laid down by the Hon'ble Supreme Court as well as envisaged in the Section 311 of Cr.P.C., the trial court committed a grave error of law, that too after the examination of three witnesses. It was an erroneous order, and since the application was filed merely to fill up a lacuna, hence the trial court erred in law in allowing the said application, and thus submitted that the present criminal miscellaneous application under Section 482 of Cr.P.C. deserves to be allowed, and impugned order deserves to be quashed.

15. Learned counsel for the applicant also submits that the judgment in the case of **A.G. v. Shiv Kumar Yadav and Another, reported in 2015 SCC OnLine SC 1662**, relied upon in the impugned order dated 01.08.2029, is in fact against the State, and he would submit that that particular judgment of the Hon'ble Supreme Court is leaning in favor of allowing the application under Section 311 Cr.P.C., and the trial court has totally misread and misinterpreted the said judgment of the Hon'ble Supreme Court and has drawn the attention of the court to paragraph nos. 3, 4, 27, 28, and 29 thereof. Said paragraph nos. 3, 4, 27, 28, and 29 are being extracted hereunder for ready reference:-

“3. Aggrieved by the order of the High Court, the victim as well as the State have moved this Court.

4. On 10th March, 2015, when the matter came up for hearing before this Court, stay of further proceedings was granted but since the prosecutrix had already been recalled in pursuance of the impugned order and further cross-examined, the said deposition was directed to be kept in the sealed cover and publication thereof by anyone in possession thereof was restrained.

27. At this stage, to judge as to whether certain questions should have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court u/s. 311 Cr.P.C. I am supported in my view by the observations of Hon'ble Delhi High Court in its order dated 20/02/2008 in case titled as *Raminder Singh vs. State*, Criminal MC 8479/2006, where it has been held as under :

“In the first place, it requires to be noticed that scope of Section 311 CrPC does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed under Section 311 then not only would it be pre-judging what according to it are ‘material portions’ of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 CrPC. No judgment has been pointed out by the learned Counsel for the petitioner in

support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time.”

28. It may also be relevant to mention that Article 22(1) of the Constitution of India confers a Fundamental Right upon an accused, who has been arrested by the police to be defended by a legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon’ble Superior Courts in numerous pronouncements including the case of State of Madhya Pradesh vs. Shobha Ram and others, AIR 1966 SC 1910 wherein it has been observed as under:

“Under Art. 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an arrest’s made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one’ own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty.”

29. In the case of State vs. Mohd. Afzal & Ors. 2003 IV AD (Cr.) 205, the Hon’ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in Strickland vs. Washington 466, U.S. 688 (1984) was cited before the Delhi High Court and the ld. Counsel for the accused in that case had argued that the law required a conviction to be set

aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of (1991) 1 SCC 286 Kishore Chand vs. State of Himachal Pradesh, (1931) 1 SCC 627 Khatri & Ors. vs. State of Bihar & Ors., (1980) 1 SCC 108 Hussainara Khatoon & Ors. vs. Home Secretary, State of Bihar, (1983) 3 SCC 307 Rajan Dwivedi vs. Union of India, (1978) 3 SCC 544 Madhav Hayawadanrao Hoskot vs. State of Maharashtra while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as State vs. Navjot Sandhu & Ors. AIR 2005 SC 3820."

16. Learned counsel for the applicant would further submit that whether the application was filed by the prosecution was for the just and proper decision of the case is not decipherable from the impugned order dated 01.08.2019. He would further submit that regarding the aspect of prejudice, there is no finding recorded by the trial court. He would further submit that even the application under Section 311 of the Cr.P.C does not specifically state about the necessity of recalling the witness.

17. Per contra, learned counsel for the State would submit that what the prosecution wanted to do by means of the application under Section 311 of Cr.P.C. was to produce the vehicle in question, White Bolero, which was

relevant, since from the said vehicle the contraband was recovered. He would further submit that the vehicle is also mentioned in the seizure memo, FIR, and the charge sheet as well. Prosecution wanted to re-examine the DSP as to from which vehicle the contraband was recovered. He would refer to the impugned order. He would submit that the application cannot be rejected merely on the ground that it is being filed for filling up the lacuna. He would further draw the attention of the Court to the impugned order dated 01.08.2019, wherein the trial court has made certain observations and noted the facts of the case, and would submit that as per the prosecution case, in the Bolero car UP 40 U 8503, on 18.12.2016 at 13:50 hours, charas was concealed in an additional tank which was recovered by the police. At that relevant time, the vehicle was in the possession of the police, and it was one of the best evidence in the case, which could not be produced in evidence due to a mistake on the part of the prosecution. In such a situation, if the witnesses are permitted to be examined, it would be for a just and proper disposal of the case. He further submitted that the trial court has observed that by allowing the application, the rights of the accused would not be prejudiced and he would thus submit that in view of the facts and circumstances of the case, the order impugned dated 01.08.2019 does not deserve any interference.

18. Learned State Counsel would also submit that in NDPS matters, the vehicle and other material are very important. He would further submit that it is in the discretion of the court to find out as to what is essential for the case. He would further submit that in the present case, the nature of the vehicle was very important and he

would also submit that in the case of vehicles, Section 42/43 of the NDPS are attracted in the cases of private/commercial vehicles respectively. He would submit that it is necessary that the vehicle ought to have been examined in the present case. The examination of the vehicle has become very important in the present facts and circumstances of the case. Lastly, he would submit that it is not the case of the applicant that the application under Section 311 of Cr.P.C. was not maintainable.

19. Having heard the learned counsel for the parties and after going through the record, there are three very crucial aspects of the matter. The main thrust of the learned counsel for the applicant is that by virtue of the application under Section 311 Cr.P.C., the prosecution has tried to fill up the lacuna in the prosecution case. Before proceeding further, this aspect needs a thorough deliberation.

20. The learned counsel for the applicant, while advancing his submission, has laid great emphasis on the point that the prosecution, after having examined the PW-1, at a later stage, realized that the material vehicle, in which they alleged that there was a second fuel tank fitted, and in one of the tanks, the contraband was being trafficked, at the initial stage the prosecution failed to corroborate the statements of the PW-1 with the evidence of the particular Bolero car. He would submit that the prosecution, after having realized their error, has filed the application under Section 311 Cr.P.C. to recall PW-1, just to fill in the lacuna, which is not permissible, and he has cited the judgment of the Hon'ble Supreme Court in the case of **State of Tripura vs Panna and Others, reported in 2026 SCC Online SC 960**, and had

particularly invited the attention of the court to para 16 thereof, wherein it is held that the power under Section 311 Cr.P.C. cannot be exercised merely to fill up the lacuna in the defense case.

21. The aspect of lacuna in prosecution evidence came up for consideration before the Hon'ble Supreme Court in the case of **Rajendra Prasad vs Narcotic Cell, reported in (1999) 6 Supreme Court Cases 110**. Question was framed by the Hon'ble Supreme Court in para 2 thereof, which reads as under:-

"Can a trial court permit lacuna in prosecution evidence filled up? The conventional concept is that the court should not do so. But then, what is meant by lacuna in the prosecution case, has to be understood before deciding the question one way or the other."

22. While elaborating on this aspect, the Hon'ble Supreme Court in para 8 thereof has answered the question to the effect;

"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 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."

23. And in para 12 thereof, after considering the whole aspect, has held: -

"We cannot, therefore, accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defense highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot, therefore, be spurned down or frowned at."

24. Perusal of the impugned order dated 01.08.2019 would reveal that the trial court has inter alia, relied upon the judgment of the Hon'ble Supreme Court in the case of **Zahira Habibullah H. Sheikh and Another vs State of Gujarat and Others, reported in (2004) 4 Supreme Court Cases 158**. Reference needs to be made to paragraph nos. 27, 28, and 44 thereof, which are being extracted hereunder for ready reference :-

"27.Mr. KTS Tulsi, learned Senior Counsel also appearing for the accused persons in the appeal filed

by the State submitted that in Section 311 the key words are "if his evidence appears to it to be essential to the just decision of the case". Therefore, the Court must be satisfied that the additional evidence is necessary and it is not possible to arrive at a just conclusion on the basis of the records. For that purpose it has to apply its mind to the evidence already on record and thereafter decide whether it feels any additional evidence to be necessary. For that purpose, the Court has to come to a prima facie conclusion that an appeal cannot be decided on the basis of materials existing on record. Therefore, before dealing with an application under Section 391 the Court has to analyse the evidence already existing. Since the High Court in the instant case has analysed the evidence threadbare and come to the conclusion that the trial was fair and satisfactory and a positive conclusion has been arrived at after analysing the evidence, the question of pressing into service Section 391 of the Code does not arise.

28. In essence three points were urged by Mr. Tulsi. They are as follows:

For the purpose of exercise of power under Section 391 of the Code, the Court has to come to a conclusion about the necessity for additional evidence which only could be done after examining evidence on record. In other words the court must arrive at a conclusion that the existing material is insufficient for the purpose of arriving at a just decision.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power

under Section 311 of the Code. The section consists of two parts i.e (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any Court' 'at any stage', or 'any enquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court

feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

25. In the case of **Varsha Garg vs State of Madhya Pradesh and Others, reported in (2023) 19 Supreme Court Cases 646**, in **para 42**, the Hon’ble Supreme Court has held, “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 of the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311” and in **para 43**, the Hon’ble Supreme Court has held, “In the decision in *Zahira Habibullah Sheikh (5) 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: [*Zahira Habibullah Sheikh (5) case*, SCC p.393, para 28]-

“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”.

26. Upon considering this aspect of the case that the prosecution cannot be permitted to fill up the lacuna in prosecution evidence, from the judgments which are cited on behalf of the applicant and the aforesaid judgments, it is amply clear that it is not an absolute bar that the trial court cannot permit prosecution to fill up the lacuna in its case, and the lacuna has to be understood under the facts and circumstances of each case.

27. In the case of **Rajendra Prasad (Supra)**, the Hon’ble Supreme Court has deliberated in detail on this aspect and has held that 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.

28. After considering both the aspects of the case in this regard, the Court comes to the conclusion that so far as the aspect of filling of the lacuna in the case of the prosecution in the context of the present case is concerned, the trial court did not commit any error on this aspect, since in the application under Section 311 Cr.P.C., the prosecution has come out with a specific case that the contraband was detected in an additional tank near the diesel tank of the Bolero car, and during the evidence of PW-1, the said car could not be presented in evidence due to inadvertence. Therefore, this aspect cannot be read against the prosecution.

29. The learned counsel for the applicant has also submitted that the vehicle was lying with the prosecution for number of years, and if the vehicle was never released, and in the meantime, the prosecution has not taken any photographs, possibility of tampering with the evidence in the meantime cannot be ruled out.

30. After considering the submissions of the learned counsel for the applicant, the Court does not find any merit in the submission of the learned counsel for the applicant, inasmuch as it is for the prosecution to prove its case and at this stage, it is not proper to make any observation in this regard, and on this aspect, no fault is found in the impugned order in allowing the application under Section 311 of the Cr.P.C.

31. The learned counsel for the applicant has also stressed that the judgment of the Hon'ble Supreme Court in the case of **AG vs Shiv Kumar Yadav and Another**, which has been relied upon by the trial court for allowing the application under Section 311 Cr.P.C., the trial court has utterly misread and misinterpreted the said

judgment of the Hon'ble Supreme Court. In this regard, it needs to be stated that even if this judgment is not taken into consideration, and after considering the other judgments of the Hon'ble Supreme Court in the case of Zahira Habibullah Sheikh, Varsha Garg, and Rajendra Prasad (supra), the position of law as it emerges on the reading of the aforesaid judgments is that Section 311 of the Cr.P.C. gives immense scope for recalling of the witness if any error appears to have been committed on the part of the prosecution at the initial stage.

32. One of the other important aspects highlighted on behalf of the learned counsel for the applicant is that, in the impugned order, the trial court has not specifically stated whether the recall of the witness is for the just and proper decision of the case. He has invited the attention of the court to Section 311 of the CrPC and would submit that it should appear to the court that the recall and re-examination of a witness is essential to the just decision of the case, and in this case, this basic essential aspect of the case is missing from a bare perusal of the reading of the aforesaid impugned order dated 01.08.2019.

33. Perusal of the order dated 01.08.2019 reveals that after considering the aspect of the additional tank in the Bolero car, the trial court has considered that if the witness is permitted to be re-examined, then the court would be able to dispose of the case judicially. Hence, this contention raised by the learned counsel for the applicant also does not find favour with the court.

34. Another very important aspect which has been highlighted by the learned counsel for the applicant is that the impugned order does not specifically state whether by recalling the witness, the accused will be prejudiced in any manner.

35. Perusal of the impugned order would reveal that the learned trial court has specifically observed and considered that, in the present case, in allowing the application, rights of the of the accused are not affected, inasmuch as the accused will have the right of cross-examining the said witness. Thus, this challenge of the applicant also fails.

36. Lastly, the learned counsel for the applicant has also emphasized another aspect that the application under Section 311 does not specifically state that what is the necessity for recalling the witness.

37. A perusal of the said application under Section 311 Cr.P.C. would reveal that it has been specifically stated in it that PW-1 DSP Kailash Panwar is an important witness of the said Bolero car, and he wants to bring the said Bolero car as physical evidence. Therefore, from the reading of the said application itself, it is decipherable that there is a necessity for recalling the said witness.

38. After considering all the aspects of the case as have been deliberated hereinabove, and after considering the case law on the subject, it is evident that the trial court has not committed any error in passing the impugned order, and the this court does not find any error in the impugned order, and the application under Section 482 Cr.P.C. is devoid of merit and deserves to be dismissed, and the same is dismissed accordingly.

(Siddhartha Sah, J.)

06.08.2026

JKJ/