

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.45500 of 2012

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Vikash Kumar Singh, Son of Sri Surendra Kumar Singh, Resident of I.D.H. Quarter, Sai Takia, P.S. Alamganj, District Patna.

.... Petitioner

Versus

The State of Bihar

.... Opposite Party

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Appearance :

For the Petitioner : None

For the State : Shri Anuradha Singh, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA
ORAL ORDER

3 21-05-2015

No one appears on calls on behalf of the petitioner.

2. The present petition has been filed seeking the quashing of order dated 15.10.2011 by which the Assistant Sessions Judge, Patna chose to proceed under Section 311 Cr.P.C. by directing the issuance of warrant of arrest against witnesses, who could not be examined, due to their non-attendance, so as to procuring their appearance before him for evidence.

3. In spite of the fact that no one has appeared, what I find from the record is that a judgment of the Court in *Devendra Kumar Vs. State of Bihar* [2011 (4) BBCJ V-180] has been heavily relied upon by the petitioner and a copy of the text of the judgment has been placed on record. The learned Judge who passed that judgment held that it is true that Section 311



Cr.P.C. empowered a court to summon any witness at any stage of the proceedings before signing of the judgment, but while exercising that power the trial court is not entitled to commence *de novo* trial. Once the order of closure of the evidence was passed by a reasoned order, it was held by the learned Judge, the same was never to be challenged and once the order had attained finality the court was precluded from reopening the hearing of the case by virtue of Section 311 Cr.P.C.

4. The facts of the case of *Devendra Kumar* (supra) is narrated in paragraph-3 of the report and it appears from perusal of that particular paragraph of the report that the charges were framed on 06.11.2000 by a Magistrate for trial of offences under Sections 341, 323 and 325/34 of the Indian Penal Code and the evidence for the prosecution was closed on 27.03.2004. The statement of the accused was also recorded on 14.05.2004 and thereafter, an order under Section 311 Cr.P.C. was passed on 07.07.2004.

5. The present impugned order was passed by the Assistant Sessions Judge, Patna in Sessions Trial No. 1659 of 2007 and it appears from that particular order that the charges were framed on 28.01.2009. The evidence of prosecution was closed on 06.08.2011 due to the non-appearance of the



prosecution witness. This Court refers to the cases of "*Common Cause*", *A Registered Society Through Its Director Vs. Union of India & Ors.* [(1996) 6 SCC 775], *Raj Deo Sharma Vs. State of Bihar* [(1998) 7 SCC 507] and *Rajdeo Sharma (II) Vs. State of Bihar* [(1999) 7 SCC 604] and benefits itself by noting that in "*Common Cause*", *A Registered Society Through Its Director* (supra) the earlier decision in "*Common Cause*", *A Registered Society Through Its Director* (supra) was reversed and it was held that no time frame can be fixed in a criminal trial and the trial begins with the framing of charge. The earlier directions issued *Common Cause I* reported in (1996) 4 SCC 33 were revised and withdrawn in *Common Cause II* (supra). Thus, what appears from "*Common Cause*", *A Registered Society Through Its Director* (supra) is that the evidence for the prosecution in Sessions Trial No. 1659 of 2007 was closed in two years only after the framing of charges and it does not appear to this Court as to what steps had been taken by the court below for ensuring the appearance of the witnesses before it.

6. Powers under Section 311 Cr.P.C. and 165 of the Evidence Act have been vested in courts only to do substantial justice and also for the just decision of the case. Justice is not



only meant for the accused, justice is also catered by courts for the victim of the offence or its family members. It is never a *de novo* trial if a court acts under Section 311 Cr.P.C. to take evidence, rather it is an order which is deemed necessary to be passed by the trial court if it requires that the examination of a witness or taking any particular evidence was required in the interest of justice and specially for the just decision of the case. As such, I take a view different from the learned Judge who rendered the above decision. Passing an order under Section 311 Cr.P.C. is never a *de novo* trial. It is simply a step further in the same trial so as to procuring evidence of further witness or evidence which is deemed necessary to be recorded or taken by the trial court in the interest of justice and for the just decision of the case. Moreover, the parameters of three years which was fixed by the Supreme Court as regards the option of the court to close the evidence was never met in the present case. The charges were framed under Sections 366 and 376 of the Indian Penal Code and if I am permitted to note, the trial judge who closed the evidence on 06.08.2011 was acting in complete conflagration with the observations and directions of the Supreme Court in *Common Cause II* (supra).

7. If one had considered the provision of Section



311 Cr.P.C., one could have very well found that the first part of the Section, i.e., the decision to 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, is always a discretionary part of the jurisdiction of the Court. But, once the court had chosen to exercise its discretion and decided to summon or to recall a witness or to re-examine a witness already examined and discharge, then it becomes a mandate for the court to ensure that the first part of his order, i.e., the decision to summon a witness has to be complied with and the witness has got to be produced before it for purposes as indicated by the first part of the provision. In my opinion, if the learned trial judge had applied his discretion after taking into account all the situations attending on the first part of the provision to pass the order, then that decision of the judge should not ordinarily be disturbed by the High Court. It has always to be the out look of a trial judge who has the whole record before it to consider and judge the requirement and necessity for the just decision of the case to examine, recall or re-examine any person who was a witness or who had never been a witness. The question could not be answered by a superior court, like, the High Court or

Supreme Court unless it is shown from the record that the first part of the order, i.e., the exercise of discretionary powers to summon a witness, was without jurisdiction or was arbitrary or was not necessitated by other factors which could be appearing from the same record. I, as such, hold that the Court has a very little space left to interfere with the order challenged herein. As such, the petition appears not meritorious and the same is dismissed.

(Dharnidhar Jha, J.)

Sanjay/AFR

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