

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.6782 of 2017

Arising Out of PS.Case No. -233 Year- 2013 Thana -SUGAULI District-
EASTCHAMPARAN(MOTIHARI)

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Jawed Alam @ Bhuttu Son of Ashab Alam Resident of Baxa, P.S. - Sugauli,
District - East Champaran.

.... Petitioner

Versus

1. The State of Bihar.
2. Tuffail Ahmad Son of Abdul Gani Resident of Baxa, P.S. - Sugauli, District -
East Champaran.

.... Opposite Parties.

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Appearance :

For the Petitioner/s	:	Mr. Krishna Kant Singh, Advocate Mr. Anil Kumar Sinha, Advocate
For the State	:	Mr. Jharkhandi Upadhyaya, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 15-09-2017

In order to enable the court to find out the truth and render a just decision, the provision of Section 311 of the Code of Criminal Procedure (for short 'Cr.P.C.') are enacted wherein any court by exercising its discretionary authority at any stage of inquiry, trial or other proceedings can summon any person as witness or examine any person in attendance, though not summoned as a witness, or. recall and 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 accused and the prosecution, but also from the point of an orderly society. Such power is neither exercised to fill up any gap in the prosecution evidence nor to give it any unfair advantage against the accused. The fundamental thing is that the power conferred under Section 311 of the Cr.P.C. should be invoked by the court only in the ends of justice. Such power is to be exercised for strong and valid reasons and should be exercised with caution and circumspection.

2. In the present case, the petitioner has challenged the order dated 09.01.2017 passed by the learned Additional District and Session Judge-12, East Champaran, Motihari in Session Trial No. 85 of 2015 whereby the petition dated 03.03.2016 filed on behalf the prosecution to permit it to examine the witnesses named in the FIR, was allowed.

3. Learned counsel for the petitioner has submitted that when the evidence was to be closed, on 03.03.2016, the prosecution filed an application to permit it to get examined three witnesses, namely, Md. Iliyas, Md. Ajam and Bipin Kuwar, as they were named in the FIR. He has submitted that such petition ought to have been rejected by the trial court in view of the fact that the investigating officer had not recorded the statements of the



aforesaid three witnesses under Section 161(3) of the Cr.P.C. He has submitted that in absence of their statements being recorded under Section 161(3) of the Cr.P.C. being supplied to the accused in compliance with Section 207 of the Cr.P.C., the defence would be at an disadvantageous position in cross-examining them on the point of contradiction of statements before the police.

4. On the other hand, learned counsel for the State has submitted that the court had simply exercised its discretionary power under Section 311 of the Cr.P.C. He has submitted that it is an admitted position that the names of the aforesaid three witnesses find place in the FIR and the police ought to have examined them during investigation and named them as charge-sheet witnesses. As the investigating officer failed in his duty, the court would not be debarred from summoning and examining those witnesses in order to come to the correct finding regarding the guilt or otherwise of the accused persons facing trial.

5. I have heard learned counsel for the parties and perused the record.

6. The FIR has been instituted on the basis of written report of the informant Tufail Ahmad under Sections 147, 148, 149, 323, 324, 307, 302, 379, 504 and 506 of the Indian Penal Code and Section 27 of the Arms Act. In the written report, it has



been stated that on 23.07.2013, at about 7.30 pm, the informant and his cousin Md. Lal Babu were returning to their house after offering 'namaz' in the mosque. When they reached in front of the house of Shamin Ahmad, they saw Shamin Ahmad armed with country made pistol, Jawed Alam, Pravez Alam and Md. Hatim armed with iron rod, Nasim Ahmad, Firoz Alam and Md. Hasin armed with *lathi*, Mahtab Alam with *farsa* standing at the house of Shamim Ahmad. On seeing them coming, Shamim Ahmad ordered to kill them and opened fire on the informant, but he saved himself. Thereafter, the informant and his cousin ran into the house of their uncle where all the accused also entered. Jawed Alam assaulted his cousin Md. Lal Babu on his head and he fell down and became unconscious. Thereafter, Md. Hatim and Mahtab Alam started assaulting the informant with *lathi* and, at the same time, all the accused persons assaulted both of them with *lathi*, *phatha*, fist and leg. On alarm raised, several persons came including Md. Iliyas, Md. Azam and Bipin Kuwar and on intervention of the villagers the accused went away. Subsequently, Md. Lal Babu died.

7. Thus, I find from perusal of the FIR that Md. Iliyas, Md. Azam and Bipin Kuwar are said to be eye witnesses to the alleged occurrence. In such view of the matter, it was incumbent upon the investigating officer to have examined them in course of



investigation and recorded their statements under Section 161(3) of the Cr.P.C. They should have been made charge-sheet witnesses to the case. Learned Additional Public Prosecutor for the State has rightly pointed out that simply because, the investigating officer has made a perfunctory investigation and failed to record their statements during investigation, the court would not be denuded of its power to summon and examine them as court witnesses in order to arrive at a just decision in the case.

8. In my opinion, the court was absolutely justified in summoning them in exercise of its power conferred under Section 311 of the Cr.P.C. So far as compliance with the provisions under Section 207 of the Cr.P.C. is concerned, the same has no application in the present case, as the witnesses have been summoned under Section 311 of the Cr.P.C. which is discretionary power of the court.

9. Accordingly, the application, being devoid of any merit, is dismissed.

(Ashwani Kumar Singh, J.)

Kanchan/-

AFR/NAFR	NAFR
CAV DATE	NA
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