

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.5065 of 2017

Arising Out of PS.Case No. -921 Year- 2011 Thana -GOVERNMENT OFFICIAL COMP. District-
PATNA

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Ravindra Rai, Son of Sri Viral Rai, resident of village - Ram Krishna Nagar,
P.S. Ram Krishna Nagar, Distt. - Patna

.... Petitioner/s

Versus

1. The State of Bihar
2. Nishant Kumar, Inspector of Excise, Praver Bal, Patna, Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Rudra Deo

For the Opposite Party/s : Mr. Sri Jharkhandi Upadhyay

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**CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR
SINGH**

ORAL ORDER

02/ 19-05-2017

Heard learned counsel for the petitioner

and the State.

The present application has been filed for quashing the order dated 05.09.2016, passed by learned Judicial Magistrate, Ist Class, Patna in Case No. 921(C-2) of 2011, whereby the petition of the prosecution under Section 311 of the Code of Criminal Procedure (hereinafter called the 'Code') for examination of I.O. and other police officials has been rejected. Prayer has also been made for quashing the order dated 20.10.2016, passed in Criminal Revision No.657 of 2016, by learned Sessions Judge, Patna, whereby the order of the



learned Magistrate dated 05.09.2016, has been affirmed.

Hence, quashing of above-mentioned both the orders has been prayed.

It is submitted by learned counsel for the petitioner that the prosecution evidence was closed on 22.06.2016, and thereafter, prosecution filed a petition under Section 311 of the Code on 19.07.2016, but by the impugned order dated 05.09.2016 the learned Magistrate recalled its earlier order closing the prosecution evidence and allowed two occasions for examination of the prosecution witnesses. It is further submitted by learned counsel for the petitioner that the provisions under Section 311 of the Code does not give power to court to recall the earlier order which amounts to review which is not permissible under the Code. Moreover, the provisions under Section 311 of the Code cannot be exercised to the advantage of prosecution or to disadvantage of the accused. Reliance has been placed on the case of Keshav Choudhary and others versus The State of Bihar, reported in 2000 Criminal Law Journal, 3705.

Having heard learned counsel for the petitioner, in order to appreciate the contention of the counsel for the petitioner, it is relevant to quote the provisions of



Section 311 of Cr P C which reads as follows:

“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 the evidence appears to it to be essential to the just decision of the case.”

Section 311 of the Code consists of two parts, i.e.

(i) giving discretion to the court to examine witnesses at any stage and (ii) the mandatory position of the court to examine a witness if his evidence appears to be relevant for just decision of the case.

Section 311 of the Code enables any Court to summon any person at any stage of any inquiry, trial or proceeding under the Code of Criminal Procedure as witness or examine any person in attendance , though not summoned as witness to recall or re-examine any person, if his evidence



appears to be essential to the just decision of the case.

Section 311 of the Code is an enabling provision with only rider that the evidence of such witness or person to be called or recalled is essential for reaching to the just decision of the case. The parameters for exercise of jurisdiction under Section 311 Cr.P.C. has been laid down by the Apex Court in the case of Raja Ram Yadav Vs. State of Bihar reported in 2013(4) PLJR (SC) 34. Paragraph 23 of the judgment reads as follows:

“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 safe guard, 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 n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court 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.”

Though the discretion given to the court is very wide, it has been held by the Apex Court in the case of *Zahira Habibulla H. Sheikh and Anr. Vs. State of Gujarat and Ors.* reported in (2004) 4 Supreme Court Cases 158 that though the discretion is very wide but it should be exercised with caution and circumspection. Further, in the case of *Mohanlal Vs. Union of India* AIR 1991 SC 1346, the Apex Court, while considering the scope and ambit of section 311 of Cr.P.C., observed 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 persons’ clearly spells out that the section has been expressed in a widest possible terms and does not limit the discretion of the court in any manner.

Section 311 of the Code does not confer on any party, any right to examine, cross-examine or re-examine any witness rather the discretion is given to the court for reaching to a just decision. The Apex Court in the case of *Zahira Seikh (supra)* has described the role of the trial court to ensure the court to be alive to the realities realizing its width of power available under section 311 of Cr.P.C. read with 165 of



the Indian Evidence Act. Paragraph nos. 43,44 and 46 read as follows:

“The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

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 Courts 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* MANU/SC/0318/1991 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.

Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to



arrive at a justice decision in the case.”

The ratio of Zahira Sheikh (supra) has been reiterated by the Apex Court in a decision as reported in the case of Sister Mina Lalita Baruwa Vs. State of Orissa & Anr., reported in AIR 2014 SC 782.

The scope and object of section has also been dealt by the Apex Court in the case of Natasha Singh Vs. CBI (State) since reported in (2013) 5 Supreme Court Cases 741 wherein it has been held that an application under section 311 Cr.P.C. must not be allowed to fill up a lacunae in a case of prosecution or defence to the disadvantage of the accused and further this provision should not be exercised as a disguise for retrial or change the nature of the case.

Fair trial is the main object of Criminal Procedure Code, hence, the exercise of jurisdiction under section 311 should be resorted to achieve the fairness of trial and not to hamper or threaten the fairness in any manner. Paragraph 15 reads as follows:

“The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead



to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of 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 opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred 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 great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

The Apex Court in the case of *Zahira Habibullah Sheikh* (popularly known as *Best Bakery Case*) & Another Vs. *State of Gujarat & Others* (2006)3 SCC 374, emphasized that the role to be played by courts, witnesses, investigating officer, Public Prosecutors, has to be focused particularly, when eyebrows are raised about their role. Paragraph nos. 26 to 29 reads as :-

"26. In this context, reference may be made to



Section 311 of the Criminal Procedure Code
which reads as follows:-

“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.”

The Section is manifestly in two parts. Whereas the word used in the first part is “may”, the second part uses “shall”. In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (n) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court



the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake 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 is whether it is essential to the just decision of the case. The section 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 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. In Section 311 the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation; it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short “the Evidence Act”) are bases on this rule. 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.

29. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the



provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jamatraj Kewalji Govani v. State of Maharashtra.*”

Applying the aforesaid parameters, for exercise of jurisdiction under Section 311 of the Code, to the present case, it appears that on 16.11.2011 at 7.05 P.M., on confidential information, a search was made by the Excise Officials in the premises adjacent to South East of Ram Krishna Nagar, Police Station, when huge quantity of country made liquor, with packing equipments were recovered, leading to registration of Case No. 921(C-2) of 2011, under Section 47(a) of the Excise Act. On completion of investigation, the prosecution report was submitted and charge was framed on 13.07.2012. Thereafter, on 30.10.2012, prosecution witness, Abhimanyu Singh was examined. Thereafter, prosecution failed to examine any witness.

On 26.05.2016, the learned Magistrate,



adjourned the matter as a last chance for allowing the prosecution to produce witness, but no witness was produced. Ultimately the Learned Trial Court, closed the prosecution evidence on 22.06.2016. The matter was fixed for 30.06.2016, for recording the statement of accused under Section 313 of the Code but it was not recorded, since the Presiding Officer had gone to attend Judicial Training and ultimately the statement of the accused was recorded on 19.07.2016. On the same day, petition under Section 311 of the Code was filed by Learned Special P.P. for recalling the order dated 22.06.2016, whereby the prosecution evidence was closed for examination of the I.O., who was transferred from Patna to Bihar Sharif.

Consequently, vide order dated 05.09.2016, Learned Trial Court, in exercise of jurisdiction under Section 311 of the Code, permitted the prosecution to produce I.O. for evidence on next two dates.

Hence, the impugned order does not amount to review, since the provisions under Section 311 of the Code enables the Court, to summon material witness or examine persons present at any stage of enquiry, trial or proceeding under the Code.

It is true that the Learned Trial Court has



not recorded that examination of the I.O. is essential for reaching to the just decision of the case, but the learned Sessions Judge, in exercise of revisional jurisdiction has held that examination of the I.O. is essential for reaching to the just decision of the case.

This Court agrees with the findings of the learned Sessions Judge, who in exercise of the revisional jurisdiction held that examination of I.O. is essential for reaching to the just decision of the case. The provision of Section 311 of the Code permits the exercise of such power at any stage, meaning thereby till the trial concludes and in such a situation, on many occasions even after close of prosecution and defence witness and even after recording of statement of accused under Section 313 of the Code, such power can be exercised and that does not amount to review.

Merely because the petition filed by the prosecution under Section 311 of the Code and the order passed by the learned Trial Court are not happily worded that not required any interference in exercise of jurisdiction under Section 482 of the Code which mandates that nothing in the Code deemed to limit the inherent powers of this Court to make such orders as may be necessary to give effect to any order



under the Code, or to prevent the abuse of process of any court or otherwise to secure the ends of justice.

In view of the above discussion, this Court finds no merit in this application, accordingly, it is dismissed.

However, this Court is dismayed to notice the failure of the prosecution to produce the I.O. for examination till fag end of the trial.

(Dinesh Kumar Singh, J)

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