

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.3048 of 2016

Arising Out of PS. Case No. -101 Year- 1989 Thana -DAUDNAGAR District- AURANGABAD

- =====
1. Dina Nath Chamar son of late Ram Chandra Mochi
 2. Bishnudeo Barai @ Bishnudeo Prasad @ Bishnudeo Chaurasia son of late Ram Bilash Prasad @ Late Ram Bilash Barai
 3. Kameshwar Mochi @ Kameshwar Ram son of Late Triveni Mochi @ Late Triveni Ram
 4. Narain Paswan son of late Chandradeep Paswan
 5. Bhubneshwar Mochi @ Bhubneshwar Ram son of late Govind Mochi
 6. Bhalo Sao son of late Ram Prasad Sao
 7. Gama Sao @ Ram Ganesh Sao son of late Ram Prasad Sao All are residents of Village - Chauri, P.S. - Daudnagar, District - Aurangabad.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Ram Vinay Singh son of Ram Briksha Singh resident of Village - Chauri, P.S. - Daudnagar, District - Aurangabad.

.... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Chandra Mauli Chaurasia, Adv.
For the State	:	Mr. Ram Sevak Choudhary, APP
For the O.P. No.2	:	Mr. Bachan Jee Ojha, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
CAV JUDGMENT

Date: 07-03-2017

Heard learned counsel for the petitioners and counsel for the State as also counsel for the opposite party no.2.

The court below vide order dated 1.12.2015 allowed the petition of the prosecution under Section 311 Cr.P.C. to mark license of the gun as exhibit filed by Gajadhar Singh and also to examine Gajadhar Singh in this case in the interest of justice and repelled the argument of the respondent that the license of Gajadhar Singh which was known to the prosecution and the prosecution has not brought at



the appropriate stage but at the belated stage is noting but a filing up the lacuna in the prosecution and so much so that Section 311 Cr.P.C. does not envisage that the document will be exhibited as a piece of evidence at the stage of final argument.

In the present case, in the First Information Report, an allegation has been made by one Ram Vinay Singh, son of Ram Briksh Singh that on 8.6.1989 at 5 PM while he was standing at the Fodder Machine, about 6 to 6.15 PM, an alarm was raised that some dacoits have entered into the house of Ram Chandra Singh whereupon he started rushing to his house, found that instead of the house of Ram Chandra Singh, the unlawful persons entered into his house, some persons were standing outside the house whereupon he had gone to roof of the house and started brick bating against the dacoits, the dacoits after taking gun from his house, fled away towards northern side, raising slogan of Naxalwadi Jindabad Jindabad. He identified some persons, namely, Dina Nath Chama, Shivjatan Sao, Bhola Sao, Bhola Sao, Gama Sao who were holding gun and also identified Vishnu Deo Varai, Kameshwar Mochi, Narain Paswan wearing Lungi and Ganji and took away double barrel gun of his brother Gajadhar Singh bearing licence no. 8102391.

After investigation, the police submitted charge-sheet against the petitioners and put them on trial. The trial commenced



after commitment, the case was registered as Sessions Trial No. 23 of, 2014. The charge was framed, the petitioners are facing trial. Altogether 7 P.Ws. have been examined. On 16.8.2014, the court gave last chance to the prosecution to examine the rest witness and on 10.9.2014, the evidence of the prosecution witness was closed. On 18.11.2014, the court recorded the statement of accused under Section 313 Cr.P.C. and the defence was given time to examine the witness. The defence did not examine any witness in support of the case. It also appears that in between 5.10.2015 to 8.10.2015, the prosecution argued the case, from 28.10.2015 to 29.10.2015 the argument on behalf of the defence was led and the same was closed on 4.11.2015. 5.11.2015 was fixed for reply of the prosecution. On 6.11.2015, the prosecution made argument and the case was posted for further argument of prosecution on 10.11.2015.

On 10.11.2015, the prosecution filed an application under Section 311 Cr.P.C. making a prayer that Gajadhar Singh be examined as a prosecution witness along with the license of the gun. The defence raised objection. It has been raised that the said license was all through with Gajadhar Singh. Sufficient opportunities were given to the State to bring all prosecution witness and document in support of the case but, the same was not brought by the prosecution nor the license was exhibited. When the license is of the year 1982,



after lapse of so much time, the same cannot be allowed to be used by prosecution to prove the case against the petitioners. Learned counsel has raised a point that the license was all through along with Gajadhar Singh and, after such a delay, the prosecution cannot be allowed either to examine Gajadhar Singh or to exhibit the document in support of his case, raised a plea that the prosecution cannot, by way of examining the witness, fill up the lacuna left by the prosecution which is not permissible in the eye of law. Third point was raised that Section 311 Cr.P.C. does not envisage for the exhibition of document in exercise of power under Section 311 Cr.P.C.

To decide the present case, it will be apt to consider the parameter and contour of Section 311 of the Code of Criminal Procedure which empowers the trial court to summon any material witness for examine or re-examine the witness who has already been examined in the court. It will be relevant to quote Section 311 of the 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 his evidence



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

Section 311 of the Cr.P.C. has two parts. The first part grants discretion to the criminal court to enable it at any stage on enquiry, trial or other proceeding under the Code to act on three ways namely, (i) to summon any person as a witness, or (ii) to examine any person in attendance, though not summoned as a witness, or (iii) to recall and re-examine any person already examined.

The second part of section which is mandatory in nature imposes an obligation to the court to summon or examine or recall and re-examine any such person if it appears to be essential for the just decision of the case.

In the first part, the word "may" has been used and in the second part the word "shall" has been mentioned which itself indicates that the first part gives discretion to the court in a just and proper case applying the rationality may call upon the witnesses to examine him in the trial and the second part which qualifies with the word "shall" denotes that the same is no longer a discretion when the court arrives to a finding that it is essential for examination or re-examination of witnesses for the just decision of the case. In the second, the word has been used "any court", "at any stage", or "of any enquiry, trial or other proceedings", "any person" and "any such person" clearly indicates that the section is couched with widest possible terms and does not



circumscribe the discretion of the court in any manner. While exercising the power, Section 311 of the Cr.P.C. gives widest discretion to the court with the corresponding caution that the said power should be invoked for expediency of justice, requires exercise judicially with the circumspection in terms of provision of the Code. The discretion does not stand in the second part but it compels the court to take any of the aforesaid two steps if the fresh evidence to be obtained is found to be essential for just decision of the case. It will be relevant to examine some judgments of the Hon'ble Supreme Court and this Court for the purpose of better elucidation.

While exercising Section 311 of the Cr.P.C., the Court should not be oblivious that the prosecution should not be allowed to fill up the lacuna left by the prosecution. Section 311 is meant to advance justice and to suppress mischief, and arrive to a right conclusion. In the case of *Mohanlal Shamji Soni Vs. Union of India & Anr.* reported in *1991 Supp. (1) SCC 271*, the Hon'ble Apex Court has interpreted the provision of Section 311 of the Cr.P.C. and has delineated the power and function of the trial court in the matter of exercising the power under Section 311 of the Cr.P.C. It will be relevant to quote paragraph nos. 7, 8 and 9 of the aforesaid judgment which reads as follows:-

"7. Section 540 was found in Chapter XLVI of the old



Code of 1898 under the heading 'Miscellaneous'. But the present corresponding Section 311 of the new Code is found among other Sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'. Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word "essential" occurring in the old Section. This section is manifestly in two parts. Whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Code and enables it at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,

(1) to summon any person as a witness or

(2) to examine any person in attendance, though not summoned as a witness, or

(3) to recall and re-examine any person already examined.

8. The second part which is mandatory imposes an obligation on the Court-

(1) to summon and examine, or

(2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do



not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power 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 for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case."

Identical question was raised in the case of **Rajendra Prasad Vs. Narcotic Cell** reported in (1999) 6 SCC 110. There the Court has said that Section 311 of the Cr.P.C. will not be allowed to be used for filling up the lacuna left by the prosecution. The Court has held that lacuna in prosecution must be understood as inherent weakness or a latent wedge in the matrix of 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 and no party in the trial can be foreclosed from correcting errors. When the proper evidences are not brought on record due to inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. It will be relevant to quote paragraph nos. 7 & 8 of the judgment which reads as follows:-

"7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under



Section 165 of the Evidence Act by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proved. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

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.

In the case of ***Zahira Habibullah Sheikh (5) & Anr. Vs. State of Gujarat & Ors.*** reported in (2006) 3 SCC 374, the Hon'ble Supreme Court has considered the object and scope of exercising the power under Section 311 of the Cr.P.C. The Court has said that the object



underlying Section 311 Cr.P.C. 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 provision of Section 311 of the Cr.P.C. is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the trial court to issue summon to any witness at any stage of such proceedings, trial or enquiry. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. It will be relevant to quote paragraph nos. 27, 28 and 30 of the aforesaid judgment which reads as follows:-

"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 for 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 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 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 Indian Evidence Act, 1872 (in short, 'Evidence Act') are based 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.

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences."

The principle of Section 311 came for consideration in the case of *State of Haryana Vs. Ram Mehar & Ors.* reported in (2016) 8 SCC 762 has exposted the framework of Section 311. While examining the formulation, contour and terms of the said section, a markable ethos has been provided as a guideline of the basic thought of the criminal trial. The Court has said in the following manner:-



"Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."

The Court has considered all the earlier judgments on the principle of fairness of trial and has put an emphasis that the trial court should find out the realty of the truth by allowing the witnesses to disclose the real materials involved in the commission of the crime. Our judicial system should behave in such a manner to earn reputation of faith of the people and the society, that they would get justice in the criminal adjudicatory process. It will be relevant to quote paragraph



nos. 28, 30, 31, 32, 33, 34 and 35 of the aforesaid judgment which reads as follows:-

"28. In the said authority the Court referred to the earlier pronouncements in Rameshwar Dayal and others v. State of U.P. [(1978) 2 SCC 518], State of W. B. v. Tulsidas Mundhra [(1963) 2 SCJ 204], Jamatraj Kewalji Govani v. State of Maharashtra [AIR 1968 SC 178] and proceeded to opine that:-

"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."

[Emphasis supplied]

It is important to note here in the said case, it was also observed that:-

"Though Section 540 (Section 311 of the new Code) is, 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 they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, 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. 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”.

[emphasis supplied]

29. In **Rajendra Prasad v. Narcotic Cell** (1999) 6 SCC 110 occasion arose to appreciate the principles stated in **Mohanlal Shamji Soni** (supra). The two-Judge Bench took note of the observations made in the said case which was to the effect that while exercising the power Under Section 311 of Code of Criminal Procedure, the court shall not use such power "for filling up the lacuna left by the prosecution". Explaining the said observation Thomas, J. speaking for the Court observed:

"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 added)

30. After so stating the two-Judge bench referred to the exigencies of the situation and the ample power of the court as has been laid in **Mohanlal Shamji Soni** (supra) [1991 Supp (1) SCC 271] and further referred to the authority in **Jamatraj Kewalji Govani** (supra) [AIR 1968 SC 178] and opined thus:-

“12. 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 defence 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.”

[Emphasis supplied]

31. The aforesaid decision has to be appropriately



*understood. It reiterates the principle stated in **Mohanlal Shamji Soni's** case. It has only explained the sphere of lacuna by elaborating the same which has taken place due to oversight and non-production of material evidence due to inadvertence. It is significant to note that it has also reiterated the principle that such evidence is necessary for a just decision by the Court.*

*32. In **U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan [(2006) 7 SCC 529]**, the Court was dealing with an order passed by the High court whereby it had allowed the revision and set aside the order passed by the learned trial judge who had exercised the power under Section 311 CrPC to summon certain witnesses. The Court referred to the earlier authorities and ruled that it is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, as it is the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the 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. Be it stated, in the said case the court came to held that summoning of the witnesses was necessary for just and fair decision of the case and accordingly it allowed the appeal and set aside the order passed by the High court.*

*33. In **Rajaram Prasad Yadav v. State of Bihar and***



another [(2013) 14 SCC 461], the Court after referring to Section 311 CrPC and Section 138 of the Evidence Act observed that Section 311 CrPC vest widest powers in the court when it comes to the issue of summoning a witness or to recall or re-examine any witness already examined. Analysing further with regard to “trial”, “proceeding”, “person already examined”, the Court ruled that invocation of Section 311 CrPC 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 Court observed that 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 for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, 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. The learned Judges further ruled that 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 was also stated that while such a widest power is invested with the court, exercise of such power should be made judicially and also with extreme care and caution.

34. The Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 CrPC. We think it



seemly to reproduce some of them: (Rajaram Prasad case, SCC pp. 473-74, para 17)

“17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. 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.

17.4. The exercise of power under Section 311 CrPC 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.

17.5. 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.

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

17.7. 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.

** * **

17.10. 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.

17.11. 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.

* * *

17.14. The power under Section 311 CrPC 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.”

[Emphasis supplied]

*35. Recently in **Shiv Kumar Yadav** (supra) [(2016) 2 SCC 402], the Court reproduced the principles culled out in **Rajaram Prasad Yadav’s** case [(2013) 14 SCC 461 and*



thereafter referred to the authority in **Hoffman Andreas** (supra) [(2000) 10 SCC 430] wherein it has been laid down that:-

“The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible”.

The Court in **Shiv Kumar Yadav** (supra) case explained the said authority by opining thus:-

“15.While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on



conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. 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."

We respectfully agree with the aforesaid exposition of law."

This Court in the case of **Rajendra Pd. Singh alias Khiru Singh & Ors. Vs. Ramuchit Singh alias Chhotan Singh** reported in 1984 **BBCJ 657** has held that Section 311 of the Cr.P.C., cannot be used for filling up the lacuna in the prosecution case. Power under Section 311 can only be exercised if the Court while hearing the case deems fit and proper to examine some witness in the ends of justice and to appreciate the prosecution case and to clarify any doubt in his mind. This power cannot be exercised for the aid prosecutor. This Court has opined the view that in order to outdo the arguments of the defence, the Court seeks to examine a material witness. It is relevant to quote paragraph nos. 2 & 3 of the aforesaid judgment which reads as follows:-

"2. *It is well settled that the jurisdiction conferred under section 311 of the Code of Criminal Procedure cannot be used for filling up the lacuna in the prosecution case in view of the decision of the Supreme Court*



reported in 1980 Criminal Law Reports, 84. Learned counsel for the petitioners has also cited other decisions of the different High Courts. The power under section 311 of the Code of Criminal Procedure can only be exercised if the Court while hearing the case deems fit and proper to examine some witness in the ends of justice and to appreciate the prosecution case and to clarify any doubt in his mind. This power cannot be exercised for the prosecutor.

3. *It is submitted on behalf of the petitioners that oral arguments have already been made, written arguments filed and the date for judgment was also fixed, but on the date fixed for delivering the judgment, the impugned order has been passed. This clearly shows that in order to outdo the arguments of the defence, the Court seeks to examine a material witness. This is impermissible."*

The extent of exercise of power of Section 311 of the Cr.P.C. again came for consideration before this Court in the case of ***Keshav Choudhary & Ors. Vs. The State of Bihar*** reported in 2000(3) PLJR 220, there the Court held that the cardinal principle in law of evidence that the best available evidence would be brought before the Court to prove the fact or the point in issue with a liberty to the prosecution and defence to establish their respective cases by adducing the best evidence but the Court has not been empowered to compel either the prosecution or the defence to examine of witness or witnesses on their side. It is the duty of the Court not only to do justice but also ensure



that the justice is being done. The duty of the Court is to find out the truth and render a just decision. The salutary provision of Section 311 are enacted wherefrom and whereunder any court by exercising its discretionary jurisdiction at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or reexamine any person in attendance. That is the second part of Section, does not allow for any discretion by its binds and compels the Court to take any of the aforesaid two steps if the fresh evidence to be obtained is essential to just decision of the case. The Court has concluded that Section 311 is meant for the just decision of the case. For just decision in the case, it means just decision for both on the point of view of the prosecution as well as for the accused. Section 311 of the Cr.P.C. does not give a long rope to prosecution to make it a tool for harassment of the accused to be used or abused in any manner that they like. It has also been held that 311 of the Cr.P.C. cannot be exercised to fill up the lacuna left by the prosecution. In this case, only formal witnesses were examined, even after lapse of long time, the prosecution has not brought the material witness and later on the application of Section 311 Cr.P.C. was filed to examine the prosecution witness after waking up from the deep slumber and the Court has held that by and large the Sessions Judge should not have



recalled the earlier order closing the case of prosecution exercising the power under Section 311 of the Code. It is relevant to quote paragraph no.6 of the aforesaid judgment which reads as follows:-

"6. *It, thus, becomes clear that this provision under Section 311 of the Code has been made for the just decision of the case. A just decision in a case will mean just decision both from the point of view of the prosecution as well as the accused. Section 311 of the Code does not give a long rope to the prosecution to make it a tool for the harassment of the accused to be used or abused in any manner that they like. In the present case it, however, appears that the charge sheet in this case was submitted on 15-6-1993 and thereafter 24-6-1993, 25-6-1993, 26-6-1993 and 28-6-1993 were the dates fixed for the examination of the witnesses. In spite of so many dates not a single witness turned up. By the orders dated 3-2-1994, 11-1-1995 and 7-3-1995 bailable as also non-bailable warrants of arrest were issued against the witnesses. The warrants of arrest were issued through the Superintendent of Police, Samastipur but in spite of these attempts made by the Court not a single witness turned up for his examination for more than two years. From the impugned order it appears that lastly only a formal witness was examined to prove the FIR (Ext. 1). When in spite of non-bailable warrants of arrest not, a single witness could be produced before the learned trial Court it was left with no alternative but to close the case of the*



prosecution on 31-5-1995 and it proceeded to record the statements of the accused persons under Section 313 of the Code. Under the aforesaid circumstances it is clear that the action of the prosecution as also of the police machinery can be said to be highly negligent and the prosecution singularly failed to produce any witness in spite of the non-bailable warrants of arrest issued against them. Under the aforesaid circumstances I do not think that the provision of Section 311 of the Code could be attracted. It is not one of those cases in which some important witnesses on the question of fact could not be examined for any reason whatsoever. In the present case except for a formal witnesses not a single witness could be examined. It is only after the examination of the accused under Section 313 of the Code that the prosecution has come forward with a prayer to examine prosecution witnesses after waking up from the deep slumber. It is well settled that the jurisdiction conferred under Section 311 of the Code cannot be used for filling up a lacuna in the prosecution case. The power under Section 311 of the Code can only be exercised if the Court while hearing the case deems fit and proper to examine some witnesses for the ends of justice, to appreciate the prosecution case and to clarify any doubt in his mind. This power cannot be exercised with the aid of the prosecutor this view finds support from the case of Rajendra Prasad Singh alias Khiru Singh v. Ramuchit Singh alias Chhotak Singh 1984 BBCJ 657."



In the case of *Vindyawashini Prasad @ Vindhyaashini Pd. Verma Vs. Shashi Kant Verma and Anr.* reported in 2002 (1) PLJR 236, the Court held that there is no mention in the provision for the production of document. As a matter of fact, the Section does not at all refer to any document or documentary evidence. Under this circumstance, can it be said that the Court can order production of document in exercise of power conferred by this Section. It is obvious that this could not be done as there is no provision in this case for recalling of any of the document whatsoever. The entire Section is only for examination of a person as a witness not production of witness but held that in a situation when the Court feels that examination of witness is essential to the just decision of the case, it is the duty of the Court to summon and examine or recall or re-examine any such person and the Court has set aside the order of the court below giving direction for production of the document in exercise of power under Section 311 of the Cr.P.C. It is relevant to quote relevant portion of the aforesaid judgment which reads as follows:-

"16. ----- Perusal of this section will clearly show that under its provisions the law authorises the Court to examine any witness or any person in attendance or to recall and re-examine any person already examined. There is no mention of production of any document in this section. As a matter of fact this section does not at all refer to any document or



documentary evidence. Under this circumstance can it be said that a Court can order the production of a document in exercise of the powers conferred by this section? it is obvious that this could not be done inasmuch as there is no provision in this section for calling for any document whatsoever. The whole section mentions only the examination of any person as a witness and not of production of any document.

20. *Also reliance has been placed on the case of Raj Deo Sharma v. State of Bihar (A.I.R. 1899 S.C. 3524). It appears that in this case direction for speedy trial of criminal case was given by Hon'ble Supreme Court in the main judgment in the case of Rajdeo Sharma v. State of Bihar (A.I.R. 1998 SC 3281 : 1998 (3) PLJR (SC) 57). In view of the directions given by the Hon'ble Supreme Court for the speedy trial the prosecution case was closed. However, subsequently it was found that the evidence of some other witnesses was essential. A petition was filed before the Hon'ble Supreme Court for clarification and modification of the directions given in the case of Raj Deo Sharma (supra) (A.I.R. 1998 SC 3281 : 1998 (3) PLJR (SC) 57). The Hon'ble Supreme Court observed that the directions given in the said case do not curtail the power of the Court under Section 311 of the Code. It was further held that if evidence of any witness appears to the Court to be essential to the just decision of the case it is the duty of the Court to summon and examine or recall and re-examine any such person. In this decision also the question before the Court was to examine further witnesses under Section [311](#) of the*



Code and not the production and proving of any document. Hence this decision is also of no help. In Paragraph 9 of the judgment it has been observed as follows:

"We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case it is the duty of the Court to summon and examine or recall and re-examine any such person."

21. *In this connection a reference may also be made to a judgment delivered by me in the case of Keshab Choudhary v. State of Bihar [2000 (2) B.B.C.J. 276 : 2000 (3) PLJR 220]. Here in this case also I had examined the scope of Section 311 of the Code and it was held that under the facts and circumstances of the said case the provisions of Section 311 of the Code were not attracted.*
22. *From the detailed discussions made above it becomes clear that the learned trial Court had exceeded his power under Section 311 of the Code by calling for certain documents from the parties and the registration office since under the provisions of Section 311 of the Code documents could not be called, produced or prove in a trial. In my judgment in Cr. Revision No. 684/96 also I had taken the same view. I had held in Paragraph 5 of that judgment that Section 311 of the Code does not empower the Court to call for any documentary evidence."*



In the case of *Nesar Ahmed @ Nasser @ Ors. Vs. The State of Bihar & Anr.* reported in 2007 (1) PLJR 216, the Court has held that Section 311 of the Cr.P.C. consists two parts firstly giving a discretion to the Court to examine the witness at any stage and secondly 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 wide power casts duty to exercise the power with circumspection and judicially but the Court has held that Section 311 Cr.P.C. does not give power to direct production of documentary evidence. It is relevant to quote paragraph no.4 and 5 of the aforesaid judgment which reads as follows:-

"4. Section 311 of Cr.P.C. 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 --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. Therefore, this power has to be exercised in exceptional case or extraordinary situation. 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.

5. *What calls for pointed attention is the language of Section 311 of Cr.P.C. What the Section says is that the court may 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 (underlining is mine for emphasis). Therefore, what Section 311 of Cr.P.C. talks of is the evidence of the witnesses and evidence would mean material evidence and does not include documentary evidence."*

Again in the case of ***Gangu Ram & Ors. Vs. State of Bihar*** reported in ***2009 (2) PLJR 481*** the Court has reiterated the same issue and held that it cannot be used to fill up the lacuna. It would be relevant to quote paragraph no.4 of the aforesaid judgment which reads as follows:-

- "3. *As observed by the Supreme Court in the case of Jahira Habibulla vs. State of Gujarat, reported in 2004(4) SCC 158 it was held that the power under Section 311 Cr.P.C. is exercised and the evidence is examined neither to help the prosecution nor the defence and the 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 adduce some evidence which is necessary for a just and proper disposal of the case and to uphold the truth and if the prosecutor is remiss in some way the court can control the proceedings effectively so that the ultimate object of truth is arrived at. It is also well established that the power under Section 311 Cr.P.C. can be exercised at any stage of the proceeding provided the examination of such person is essential for just decision of the case. However, the same cannot be used to fill up the lacuna or loopholes in either prosecution or defence case."

In the present case, the point has been raised by the petitioner that an application has been filed at a very belated stage after closure of the evidence including argument of the defence. Second ground has been taken that the trial court cannot exercise the power to fill up lacuna left by the prosecution including the court does not hold power to give direction for allowing the prosecution to produce the license of the gun when the same was all through available with the prosecution and they have not produced the same when the plea of absence of licence was taken by the defence, then an application has been filed which is impermissible in law. Let us examine the case in the light of principle enunciated in the judgments explained herein above.



The very emphasis has been given by the petitioner that the argument on behalf of the defence was finally closed on 5.11.2015. The prosecution made part argument on 6.11.2015. The case was placed for final argument on 10.11.2015 but on that day, the application under Section 311 of the Cr.P.C. was filed. The thrust of the submission of the petitioner is that the alleged offence has been committed on 8.6.1989, the prosecution had sufficient opportunity rather the document was very much available with Sri Gajadhar Singh. It is not the case he had gone outside or was not available but the prosecution deliberately neither examined Gajadhar Singh nor the license of gun was produced. So the application was filed with an intention to fill up the lacuna. In view of the judgment as cited hereinabove, Section 311 Cr.P.C. is in two parts and second part is mandatorily required that when the court feels for the end justice the evidence of witness is required to be recorded, in such circumstances, he is mandatorily obliged to take evidence of such witness. In the present case, the order which has been passed indicates that the court below in his impugned order has specifically mentioned that though much time had already elapsed but the document is an important one for just decision of the case and owner of the aforesaid licence is essential for just decision of the case. So this order has been passed in exercise of second part of Section 311 of the Cr.P.C. and this Court



and the Hon'ble Apex Court has held that in a case when the Court feels for the examination of the witness is for end of justice, he or she can be examined at any stage of the trial. So this argument of the petitioner cannot be accepted.

In the present case, the second question has been raised that Section 311 Cr.P.C. does not envisage for calling the document for being exhibited but only talks about the examination of the witness and he has placed reliance on the two judgments this Court as has been explained hereinabove which is not required to be repeated again but in view of the judgment of the Hon'ble Apex Court in the case of Ram Mehar (supra) wherein in the case of Rajendra Prasad (supra), the Hon'ble Apex Court has held that if proper evidence was not adduced or relevant material was not brought on record due to inadvertence, the court should be magnanimous in permitting such mistake to be rectified. This part of excerpts of judgment of the Hon'ble Apex Court itself indicates that Section 311 Cr.P.C. includes power for examining the witnesses as well as admitting the relevant material which were not brought on record. This view is also supported by Section 91 of the Cr.P.C. which empowers the court to give direction for production of any document or other thing which is necessary or desirable for the purpose of investigation, enquiry or other proceeding under the Code or before such court or officer. So if



Section 311 of the Cr.P.C. is read with Section 91 of the Cr.P.C. in that circumstances, it cannot be said that the trial court is bereft of power to call the witness as well as material document for its admission during course of trial. Section 311 of the Cr.P.C. is couched in widest term which has been interpreted by the Hon'ble Apex Court that at any stage this power can be used for the ends of justice. In such circumstances, when the court below has already directed for examination of the licence holder including production of the gun license, in such circumstances, the interference with the order of the court below will not sub serve the justice.

In that view of the matter, this Court does not find any merit in this case. Accordingly, the present application is dismissed with a direction to the court below to conclude the trial within a period of three months from the date of receipt/production of a copy of this order. If the witness is produced along with the record, the other side will have a liberty to cross-examine the witness.

(Shivaji Pandey, J)

Rishi/-

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