

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.15194 of 2016

Arising Out of PS.Case No. -70 Year- 2006 Thana -AKBARNAGAR District- BHAGALPUR

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1. Shailendra Rai Son of Late Jai Narain Rai
2. Ashish Kumar @ Ashish Rai
3. Banti Rai @ Anurag Kumar Both Sons of Shailendra Rai All residents of village - Hario, P.S. - Akbar Nagar, District - Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Jharkhandi Upadhyaya, Advocate

For the Opposite Party/s : Mr. Akhileshwar Dayal (APP)

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL ORDER

3 11-04-2017 Heard Mr. Jharkhandi Upadhyaya, learned counsel for the petitioner and Mr. Akhileshwar Dayal, learned counsel for the State.

The present application has been filed for quashing the order dated 8.3.2016 passed by the learned 3rd Additional District & Sessions Judge, Bhagalpur in Sessions Case No. 998 of 2007 arising out of Akbar Nagar P.S. Case No. 70 of 2006, whereby the petitioners' application for recall of the informant (P.W.3) for examination on the basis of compromise entered into between the parties, has been rejected.

The prosecution case would unveil that on 16.2.2006 the informant was going to repay the loan amount of



rupees ten thousand to Bindu Rai but as soon as he reached Hario Diyara at 9 A.M., the FIR named accused began to assault him with lathi and bhala and asked to withdraw the case otherwise the informant was threatened to be killed. The informant sustained serious injuries on his leg, back and head. It is also alleged that the accused persons picked out the amount of Rupees ten thousand from the pocket of the informant. Muralidhar who was accompanying the informant, raised alarm and informed the villagers. When the villagers assembled, the accused persons escaped from the scene after resorting to fire. The FIR was registered under sections 341,323,324,307,504 and 379/34 of the Indian Penal Code.

On conclusion of investigation, charge sheet was submitted, consequently order of cognizance was passed and after framing of charge, the petitioners were put on trial. It appears that charges were framed on 4.1.2008 and the prosecution examined altogether eight witnesses. Thereafter, the prosecution evidence was closed. The matter remained pending from 14.6.2012 to 12.8.2014 for the statement of the accused. On 2.9.2014 the statement of accused was recorded and on 7.4.2015 the matter was posted for defence evidence. Thereafter, on 4.5.2015 the matter was fixed for argument. The argument was heard till 30.11.2015



but the judgment was not delivered by the learned trial court. Thereafter, the successor court heard argument of the prosecution on 18.2.2016 and on 19.2.2016 posted for defence argument and on the same day, i.e., 19.2.2016, a petition was filed for recall of P.W. 3, the informant Mithilesh Nandan Rai on the ground that the accused and the informant are agnates and they have compromised the issue.

Learned 3rd Additional Sessions Judge, Bhagalpur, vide order dated 8.3.2016 passed in Sessions Trial No. 998 of 2007 rejected the prayer of the petitioner for recall of P.W. 3 on the ground that the trial is on the verge of conclusion and the case is continuing since 2006.

Learned counsel for the petitioners submits that the FIR was lodged in the background of family dispute and now the issue has been resolved between the parties, hence, an application was preferred for recall of the informant P.W.3.

Learned APP, appearing on behalf of the State, submits that on the ground of compromise, the witness cannot be recalled in exercise of jurisdiction under section 311 Cr.P.C. Moreover, the trial is at the verge of conclusion. Hence, the impugned order needs no interference.

Considering the rival submissions of the parties, for



better appreciation of the issue involved, it is necessary to analyze the provision of section 311 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.”

From bare perusal of the above provision, it appears that Section 311 Cr.P.C. is in two parts; first part suggests that any Court may, at any stage of enquiry, trial or other proceeding under this Code, 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. Hence, with the use of word ‘may’, it is discretionary jurisdiction entrusted to the trial court. It is more in a sense of enabling provision which enables the trial court to exercise the jurisdiction under section 311 Cr.P.C. The second part is mandatory, which suggests that the court shall summon and examine or recall and re-examine any person if his evidence appears to be essential for just decision of the case.



Hence, where the witness is required to be recalled under section 311 Cr.P.C. if it appears that his evidence is essential for just decision of the case then it becomes mandatory for the court to recall the witness. Though both parts of the provision is conjuncted with 'and' but usually the first part is exercised at the discretion of the Court concerned but it becomes mandatory if the evidence of such person appears to be essential for reaching to the just decision of the case.

From the conspicuous reading of the provision under Section 311 Cr.P.C., it appears that widest power has been entrusted with the court when it comes to the question of summoning a witness or to recall or re-examine any witness. A plain reading of the provision shows that widest power is invested with the court as the expression 'any' has been used as a prefix to 'court', 'state of any inquiry', 'trial', 'other proceeding', 'person as a witness', 'person in attendance though not summoned as a witness' and 'person already examined'. Hence, it suggests that all that is required by the court is to be satisfied only in relation to such evidence that it appears to the court to be essential for the just decision of the case. Therefore, 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. While such a



widest power is invested with the court, it has been held by the Apex Court in the case of Rajaram Prasad Yadav Vs. State of Bihar and Anr. (2013) 14 Supreme court Cases 461, that exercise of such power should be made judicially and also with extreme care and caution. Paragraph 13 and 14 of the judgment reads as follows:

“13. Having heard the learned counsel for the respective parties and having bestowed our serious consideration to the issue involved, we find force in the submission of the counsel for the appellant, as the same merits acceptance. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 Cr.P.C., as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure

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 138, Evidence Act

138. Order of examinations- witnesses shall



be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-



examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, in so far as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138 of Evidence Act, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. 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 as noted by us earlier. 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, 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. Therefore, 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. To put it differently, while such a widest



power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

The prime object in exercise of power under section 311 Cr.P.C. should be only with an object of finding out truth or obtaining proper proof of such facts which leads to the just and correct decision of the case. It has been held in the case of Iddar and Ors. Vs. Aabid and Anr. (2007) 11 Supreme Court Cases 211 that 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 witness examined from either side. The Apex Court in the case of Zahira Habibullah Seikh Vs. State of Gujrat (2006) 3 SCC 374 examined the extent and object of section 311 of the Code. Paragraph 26 to 29 read as:

“26. In this context, reference may be made to Section 311 of the 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 any one as a witness, or (b) to examine any person present in 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 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.

29. The object of the 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 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 provision 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* AIR 1968 SC 178.”

In the instant case, it is not the case either of the accused or of the prosecution that due to some inadvertence some valuable evidence could not be brought on record or either side failed to ask some important question which ought to have been asked during examination of P.W.3, the informant, rather, in the present case, P.W. 3 is sought to be called since the parties have entered into compromise, hence, recall of the informant is not for reaching to the just decision of the case, but to allow the complainant to retract from his evidence since the parties have compromised a non-compoundable offence, which amounts to filling up of a lacuna, which has been deprecated by the Apex Court in the case of *U.T. of Dadra & Nagar Haveli & Anr. Vs. Fatehsinh Mohansinh Chauhan* (2006) 7 Supreme Court Cases 529. Paragraph 15 reads as follows:

“15. A conspectus of authorities referred to above



would show that the principle is well settled that 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 of such facts which lead to a just and correct decision of the case, this being 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 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.”

The lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of prosecution case as has been held in the case of Rajendra Prasad Vs. Narcotic Cell through its Officer In Charge, Delhi (1999) 6 Supreme Court Cases 110. Paragraph 12 reads as follows:

“12. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches 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 re-summoning certain witnesses cannot therefore be spurned down nor frowned at.”

The exercise of power under section 311 Cr.P.C. should not be allowed as disguise for retrial, or to change the nature of the case against either of the parties. Hence, the jurisdiction under section 311 Cr.P.C. must be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and not for filling up lacuna, as has been held by the Apex Court in the case of Natasha Singh Vs. Central Bureau of Investigation (State) (2013) 5 Supreme Court Cases 741. Paragraph 15 of the judgment reads as follows:

“15. 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 while considering the various



decisions dealing with the scope of section 311 Cr.P.C. read with the provision under section 138 of the Evidence Act laid down certain parameters to be borne in mind by the court while exercising such jurisdiction. Paragraph 17 of Rajaram Prasad Yadav (supra) reads as follows:

“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:

17.1 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?

17.2 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.

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 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.

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.

17.8 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.

17.9 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.

17.10 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.

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.

17.12 The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13 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.

17.14 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 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.”

The fair trial is the main object of the Code of Criminal Procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned and the same must be ensured as this is a constitutional, as well as a human right. Hence, in no circumstance, a person’s right to fair trial should be allowed to be jeopardized.

In the present case, the recall of P.W. 3 to retract from his initial evidence in the guise of compromise cannot come within the ambit of the provision of section 311 Cr.P.C. or the parameters as laid down by the Apex Court in exercise of jurisdiction under section 311 Cr.P.C. in the case of Rajaram Prasad Yadav (supra).

The petition filed under section 311 Cr.P.C. on



19.2.2016 clearly states that since the accused persons and the informant are agnates and hence they have entered into compromise, hence, the informant does not want to pursue the case. Paragraph 4 of the compromise petition under section 311 Cr.P.C. reads as follows:

“यह कि उक्त वाद में उभय पक्ष में सुलह हो जाने के कारण सौहार्दपूर्ण वातावरण कायम हो गया है एवं उक्त वाद के सूचक अब मुकदमा लड़ना नहीं चाहते हैं और न ही अब वाद आगे बढ़ाना चाहते हैं।”

Hence, the petitioners wanted to recall P.W. 3 the informant not for reaching to the just decision of the case but to change the nature of the trial as they wanted to get rid of the prosecution net by virtue of a compromise in a non-compoundable offence which is absolutely not the scope of section 311 Cr.P.C.

Above all, the petition of recall was filed on 19.2.2016 when the prosecution evidence got closed on 22.5.2012 and the prosecution argument was closed on 18.2.2016 and the petition for recall of witness, i.e., P.W. 3 was filed only on 19.2.2016 when it was posted for defence argument. Though, the learned trial court by the impugned order has rejected the prayer of the petitioner for recall of P.W. 3 only on the ground that the trial is on the verge of conclusion and the case is about nine years old,



without recording the fact that such a recall on the basis of compromise is not permissible under section 311 Cr.P.C. as it amounts to filling up the lacuna and such recall will not be, in any manner, a step forward towards reaching to the just decision of the case.

In the circumstances, this Court finds no infirmity in the impugned order. This application is, accordingly, dismissed.

(Dinesh Kumar Singh, J)

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