

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Miscellaneous No.29279 of 2016**

Arising Out of PS.Case No. -252 Year- 2010 Thana -BARACHATTI District- GAYA

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Kanchan Devi Wife of Vijay Paswan resident of village- Amsaut, P.S.-  
Mohanpur, District- Gaya

.... .... Petitioner/s

Versus

1. The State of Bihar
2. Rajendra Yadav Son of Munshi Yadav
3. Badal Yadav Son of Rajendra Yadav
4. Dashrath Yadav Son of Munshi Yadav
5. Puran Yadav Son of Munshi Yadav
6. Ram Chandra Yadav @ Raju Son of Dashrath Yadav
7. Jagdeo Yadav Son of Mahesh Yadav
8. Suresh Yadav Son of Karmu Yadav
9. Basudeo Yadav Son of Gobardhan Yadav
10. Ram Awtar Yadav Son of Komal Yadav
11. Baleshwar Yadav Son of Late Mahavir Yadav
12. Kamlesh Yadav Son of Arjun Yadav All resident of village- Amsaut,  
P.S.- Mohanpur, District- Gaya

.... .... Opposite Party/s

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**Appearance :**

For the Petitioner/s : Mr. Sudha Chandra

For the Opposite Party/s : Mr. Sri Ram Shankar Das

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

**ORAL ORDER**

02/ 27-04-2017

Heard learned counsel for the petitioners and

Mr. J.N. Thakur, learned counsel for the State.

The present application has been filed for quashing the order dated 30.05.2016, passed by learned Special Judge, SC/ST Act, Gaya in SC/ST Case No. 284 of 2015, arising out of Barachati P.S. Case No. 252 of 2010, whereby the application filed by the informant under Section 311 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') for



examining the witnesses named in the complaint but were never examined during investigation nor were named as witness in the chargesheet, since the I.O. has examined only those witnesses who are not eye witnesses to the occurrence.

The factual matrix of the case is that initially Complaint Case No. 646 of 2010 was filed which ultimately got transferred under section 156(3) of the Code to the police station and consequently was registered as Barachatti (Mohanpur) P.S. Case No. 252 of 2010, under sections 147, 148, 149, 341, 343, 344, 379, 504 and 506 of the Indian Penal Code and section 3(1)(x) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act.

The prosecution case is that on 2.11.2010, the accused persons being variously armed, came to the agricultural field of the informant and abused and assaulted her. The accused also tried to outrage the modesty of the informant. On protest being made, the informant, her sister-in-law and parents-in-law were assaulted.

On conclusion of investigation, final form (charge sheet) was filed on 30.9.2011, under sections 147,148,149,341,343,344,379,504 and 506 of the Indian Penal Code and section 3(1)(x) of the Scheduled Caste and Scheduled



Tribe (Prevention of Atrocities) Act.

There were eight chargesheet witnesses, out of which only two were examined. On 30.5.2016, the petitioner being informant of the case filed an application under section 311 of the Code for examining the witnesses cited as witnesses in the complaint petition as their examination is essential for just decision of the case.

Learned Special Judge, SC/ST, Gaya, vide order dated 30.5.2016, rejected the prayer of the petitioner on the ground that charges were framed on 2.11.2012 for the occurrence of 2.11.2010 and in four years time, after framing of charge, only two prosecution witnesses were examined. The last witness, i.e., P.W. 2, Kanchan Devi, was examined on 2.4.2014 and, thereafter, all processes were exhausted for production of witnesses but the prosecution measurably failed to produce the same. The petitioner never filed any petition for examination of the witnesses cited in the complaint. The prosecution was given last indulgence on 1.4.2016, with a stipulation that if the witnesses will not be produced, the evidence will be closed, and accordingly, the evidence was closed on 26.5.2016. The matter was fixed on 30.5.2016 for recording statement of accused under section 313 of the Code, then the petition under section 311 of the Code was



filed. Hence, the court came to the conclusion that such petition was filed just to delay the conclusion of the trial. Hence, the present application.

Learned counsel for the petitioner submits that in the complaint petition the eye witnesses were cited as witnesses but the police did not examine them under section 161 of the Code. There are eight charge sheet witnesses but out of them, only two were examined, hence the petitioner's prayer for examination of the witnesses cited in the complaint petition is essential for reaching to the just decision of the case.

Learned counsel for the State submits that the petitioner never protested for non-examination of the witnesses cited in the complaint, under section 161 of the Code, either during investigation or at the stage of taking cognizance. The trial commenced in 2012 but till 2016 no such application was preferred by the petitioner before the learned trial court.

Having heard learned counsels for the parties, this Court is of the view that fair trial is the main object of the Code and it is the duty of the court to ensure that such fairness is neither hampered nor threatened in any manner. The fair trial entails interest of the accused, victim and of the society. Therefore, the fair trial includes the grant of fair and proper opportunity to the



person concerned and the same must be ensured as this is a constitutional as well as human right issue, 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. It is relevant to quote the provision of section 311 of the Code and section 165 of the Indian Evidence Act, which read 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.”

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***“165. Judge’s power to put questions or order production --***The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.



Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.”

Both the provisions give discretion to the court to call or recall any person as a witness or to elicit answer by asking question in order to reveal the truth to reach to the just decision in 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 it will be exercised at the discretion of the Court concerned but it becomes mandatory if the evidence of such person appears to be essential to the just decision of the case. In the case of Zahira Habibulla H. Sheikh and Anr. Vs. State of Gujarat and Ors. (2004) 4 Supreme Court Cases 158, the Apex Court emphasized the role played by the court that the court is alight to the realities realizing its width of power under section 311 of the Code read with section 165 of the Evidence Act. Paragraph nos. 43,44 and 46 read as follows:

**“43.** 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.

**44.** 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* 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.

**46.** 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.”

A plain reading of Section 311 of the Code 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 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 vested 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 14 of the judgment reads as follows:

“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, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, 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 jurisdiction 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. The Apex Court while considering the case of *Zahira Habibullah Sheikh & Another Vs. State of Gujarat & Others* (popularly known as Best Bakery Case) (2006)3 SCC 374, paragraph nos. 26 to 29 read 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.*”

The Apex Court has 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.

Applying the above legal propositions to the present case, it is admitted by the petitioner that the witnesses cited in the complaint were not examined under section 161 of the Code. The petitioner neither made any protest during investigation nor on conclusion of investigation after submission of final form. The trial commenced after framing of charge on 2.11.2012 and prosecution evidence was closed on 26.5.2016 but no such application was filed. The petition filed under section 311 of the Code does not suggest specific name of any witness cited in the complaint which the petitioner sought to examine which suggests that at such a belated stage, the petition was casually filed. Hence,



this court finds that there was nothing on record on the basis of which the trial court could come to a conclusion that the examination of such witness cited in the complaint was essential for reaching to the just decision of the case.

The provision under section 311 of the Code has a very wide amplitude which suggests that the court can call any person as a witness or examine any person as a witness, who is in attendance or recall any person who has already been examined as a witness. Hence, there is no embargo before the learned trial court to call the witness cited in the complaint in exercise of jurisdiction under section 311 of the Code. The present application or the petition under section 311 of the Code filed before the learned trial court neither stipulates the witnesses who are sought to be examined or the witnesses who have been cited as witnesses in the chargesheet nor the specific reason suggesting that their examination would unravel the truth for reaching to the just decision in the case.

Hence, this court is of the view that only as a delaying tactics, the application was filed casually at a very belated stage.

In view of the above discussions made, this court finds no merit in this application. It is, accordingly, dismissed.



However, this court is dismayed that the prosecution has failed to produce the chargesheet witnesses. Hence, if the trial has still not been concluded then the learned trial court can still make an effort to examine the chargesheeted witnesses after giving due opportunity of hearing to the prosecution and the accused. It is expected from the District Magistrate and Superintendent of Police, Gaya to take notice of the casual manner in which the prosecution is conducting trial for offences under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act.

Let a copy of this order be transmitted to the District Magistrate, Gaya and the Superintendent of Police, Gaya.

**(Dinesh Kumar Singh, J)**

DKS/-Anil/

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