

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No 3191 of 2017

Arising Out of PS.Case No. -39 Year- 1998 Thana -GHANSHYAMPUR District- DARBHANGA

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Indrakant Jha @ Indrakana Jha Son of late Bhuvneshwar Jha Resident of Village:
Kanhai, Police Station: Ghanshyampur, District: Darbhanga.

.... Petitioner/s

Versus

1. The State of Bihar
2. Ram Vishesh Thakur, son of late Bam Bhola Thakur, R/o Village – Kanhai, PS
– Ghanshyampur, District - Darbhanga

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr Praful Chandra Jha, Advocate
For O P No 2 : Mr Girish Chandra Jha, Advocate
For the S t a t e : Mr S M Rahman, APP

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CORAM: HON'BLE MR JUSTICE DINESH KUMAR SINGH

ORAL JUDGMENT

Date: 06-04-2017

Learned counsel for the petitioner is permitted to
implead Ram Vishesh Thakur as Opposite Party No 2 in the case.

Heard learned counsels for the petitioner, State and
Opposite Party No 2.

The present application has been filed on behalf of the
petitioner, being informant of the case, with a prayer for quashing the
order dated 06.12.2016, passed by learned Additional Sessions Judge
II, Benipur, Darbhanga, whereby, the informant-petitioner's
application dated 02.12.2016, under Section 311 of Criminal
Procedure Code for examination of Amar Nath Jha and Deo Chandra
Jha, seizure list witnesses, Jai Narayan Jha and Manikant Mishra,



inquest report witnesses and Dr Akhauri Ravindra Kishore, who conducted the postmortem on the dead body of the victim (the father of the informant) has been rejected.

The prosecution case is that on the basis of Fardbayan of the petitioner recorded on 11.04.1998, Ghanshyampur Police Station Case No 39 of 1998 was registered on 11.04.1998, under Section 302 of Indian Penal Code, wherein, it was alleged that Ram Vishesh Thakur, Udgar Thakur, Samarjee Thakur, Krishna Mohan Kunwar, Bam Shankar Kumar, Joga Jha, Lalit Jha, Pankaj Kumar Jha, Sanjay Kumar Jha, Lalan Jha were armed with gun and rifle. Ram Vishesh Thakur, Ram Udgar Thakur and Krishna Mohan Thakur fired at the father of the informant who died on the spot. Chargesheet was submitted on 12.03.1999, vide Chargesheet No 22, under Sections 302/34 of IPC and Section 26 of the Arms Act. On commitment, charges were framed on 16.03.2004. Initially, the prosecution evidence was closed on 15.04.2011 and, thereafter, statements of accused under Section 313 of Cr P C were recorded. Being the informant of the case, the petitioner filed the initial application under Section 311 of Cr P C on 01.06.2011 for examination of four witnesses including himself. The said application was allowed by the learned trial Court vide order dated 10.08.2011. The same was challenged by accused Ram Vishesh Thakur in Cr Misc No 33967 of



2011. The same was disposed of by a coordinate Bench of this Court, vide order dated 21.10.2011, with a direction to the learned trial Court to record and conclude the examination of witnesses within a span of four dates failing which no further opportunity will be made available to the informant/prosecution. The petitioner again filed an application under Section 311 of Cr P C for examination of the official witnesses and the same was allowed by the learned trial Court on 05.09.2014. Thereafter, the third application under Section 311 of Cr P C was filed on 02.12.2016, for examination of Amar Nath Jha, Deo Chandra Jha, the seizure list witnesses, Jai Narain Jha and Mani Kant Mishra, the inquest report witnesses and Dr Akhauri Ravindra Kishore who conducted the post mortem on the dead body of the victim, the father of the informant. The prayer of petitioner was rejected by learned Additional Sessions Judge II, Benipur, in Sessions Trial No 129 of 1999, vide order dated 06.12.2016, on the ground that none appeared on behalf of the informant to press the application dated 02.12.2016, under Section 311 of Cr P C, which suggests that the petitioner/informant has no interest in the matter and the trial is pending since 1999.

Learned counsel for the O.P. No. 2, accused, submits that the trial is pending since 1999. This is the third application under Section 311 of Cr P C filed by the petitioner, when the earlier



application under Section 311 of Cr P C dated 01.06.2011 was allowed by the learned trial Court, vide order dated 10.08.2011, the accused Ram Vishesh Thakur challenged the same in Cr Misc No 33967 of 2011, which was disposed of by a coordinate Bench of this Court. Same is annexed as Annexure B to the counter affidavit, filed by Opposite Party No 2 - Ram Vishesh Thakur, wherein, this Court specifically directed to conclude the examination of the witnesses within four dates failing which no further opportunity will be given to the prosecution. Hence, the present application has been filed in order to just delay the conclusion of the trial wherein evidence of the prosecution has already been closed and the matter is fixed for argument. Hence, there is no need of interference with the impugned order.

Having heard the learned counsel for the parties, there is no doubt that the petitioner has filed the application at a very belated stage and was not present to press his application on the date fixed but to appreciate the issue involved, it is relevant to quote the provisions of Section 311 of Cr P C which reads as follows:

“311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if the evidence appears to it to



be essential to the just decision of the case.”

Section 311 of Cr P C gives power to the trial Court to summon material witness or examine the persons present. This power can be exercised at any stage of enquiry or trial to summon any person as a witness or any person in attendance, though to recall any person already examined.

The Apex Court in the case of Raja Ram Yadav Vs. State of Bihar reported in 2013(4) PLJR (SC) 34, laid down the parameters for exercise of the jurisdiction under section 311 of the Cr.P.C. Paragraph 23 of the judgment reads as follows:

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to



the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

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

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.



j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

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

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to



meet the ends of justice for strong and valid reasons and 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.”

Testing the present case on the aforesaid parameters, I find that in the present case the learned court below has completely ignored the principal objective for which Section 311 Cr.P.C. has been brought in the statute book.

So far the first part of Section 311 Cr.P.C. is concerned, it is a discretionary and enabling provision. The second part of Section 311 of Cr P C mandates that the Court shall summon, examine or recall, reexamine any person, if his evidence appears to be essential for the just decision of the case. There is no doubt that the witnesses which the petitioner wants to examine have not been examined. They are seizure list witnesses, inquest witnesses and the doctor who had conducted the post mortem on the dead body of the father of the informant. The petition no doubt was filed on 02.12.2016 at a very belated stage when the case was fixed for argument. The said petition was rejected vide order dated 06.12.2016 only on the ground that the trial is pending since 1999 and neither the



petitioner nor his counsel was present to press the application under Section 311 of Cr P C. The impugned order does not suggest that the learned trial Court ought to have considered whether calling of all such witnesses whom the informant wanted to examine, whether this examination is essential for reaching to the just decision of the case.

Hence, in view of this Court, the learned trial Court has failed to exercise its jurisdiction in the manner which is mandated under Section 311 of Cr P C.

The petition filed under Section 311 Cr.P.C. for examining the witnesses, as contained in Annexure 3, also suggests that the same has also been casually drafted, as therein it has also not been pleaded that the examination of said witnesses is essential for reaching to the just decision in the case but since Section 311 of Cr P C gives discretion to the Court for examining or recalling the witnesses at any stage of enquiry or trial, hence, the impugned order dated 06.12.2016 is set aside.

Keeping in view, the advanced stage of the trial and the fact that the trial is of the year, 1999, it is expected that the learned Court below will pass a fresh order on the application of the petitioner, dated 02.12.2016, within two weeks of the receipt/production of a copy of this order if the trial has not been concluded as yet. The learned trial Court will pass such order even if



the petitioner fails to appear after giving due opportunity to prosecution and defence.

This application is, accordingly, disposed of.

(Dinesh Kumar Singh, J)

M.E.H./-Anil/

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