

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.238 of 2018

Arising Out of PS. Case No.-165 Year-2005 Thana- BARUN District- Aurangabad

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Uday Kumar Singh S/o Late Shree Narayan Singh, R/o Village- Barun , P.S.-
Barun , District- Aurangabad, Bihar.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Bihar, Patna
2. The Director General of Police, Patna.
3. The Inspector General of Police, Patna.
4. The Senior Superintendent of Police Vigilance, Patna.
5. The Senior Superintendent of Police, Patna.
6. Sunil Kumar Singh, Police Inspector earlier Town P.S.-Nawada at present
deputed Vigilance, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Surendra Kumar Singh, Sr. Advocate
	:	Mr. Ranjit Kumar, Advocate
For the State	:	Mr. Iqbal Asif Niazi, AC to GP-V

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT

Date : 09-04-2019

This application under Articles 226 and 227 of the Constitution of India has been filed by the petitioner for quashing of the order dated 16.11.2017 passed in Sessions Trial No.302-C/2006/194/2017 by the learned 1st Additional Sessions Judge, Aurangabad arising out of Barun P.S. Case No. 165 of 2005 whereby a petition dated 16.11.2017 for examination of Sunil Kumar Singh, Police Inspector in exercise of power conferred under Section 311 of the Code of Criminal Procedure (for short 'Cr.P.C') has been rejected.

2. It is submitted by Mr. Surendra Kumar



Singh, learned Senior Advocate appearing for the informant that the order impugned dated 16.11.2017 passed by the learned 1st Additional Sessions Judge, Aurangabad is bad in law as well as on facts. The court below erred in not deciding the case on merit. It has dismissed the application solely on the ground that a similar type of petition for examination of the same witness was earlier filed on 23.02.2016 and was rejected by him, which was challenged before the High Court, but the order passed by the trial court has not been quashed. He contended that the earlier application challenging the order passed by the trial court vide Cr.Misc. No. 12584 of 2016 was dismissed as infructuous on an erroneous submission made by the learned counsel appearing for the petitioner in that case that the proposed witness Sunil Kumar Singh has already been examined in trial. He submitted that it is a case of kidnapping of a minor boy and it was the police inspector Sunil Kumar Singh, who had collected the call detail record of the mobile phone used by the accused at the time of commission of crime. He pleaded that the scope and object of Section 311 of the Cr.P.C is to enable the court to determine the truth and to render a just decision after discovering the relevant fact and obtaining a proper proof of such facts to arrive at the just decision of the case. In order to



arrive at the just decision of the case, the trial court ought to have summoned the proposed witness Sunil Kumar Singh as a witness in exercise of powers conferred under Section 311 of the Cr.P.C.

3. Per contra, learned counsel appearing for the State submitted that in a session triable case, the informant has no locus standi. The court below had earlier rejected a similar prayer made on behalf of the prosecution long back. The order passed by the trial court was never challenged by the State. The informant had challenged the earlier order rejecting the application filed by the prosecution for summoning Sunil Kumar Singh as a witness in exercise of powers conferred under Section 311 of the Cr.P.C., but the same was dismissed as infructuous by this Court on the assertion of the learned counsel for the informant that since Sunil Kumar Singh has already been examined by the trial court, the application has become infructuous. On these submissions, he urged that the instant application is fit to be dismissed.

4. I have heard learned counsel for the parties and carefully perused the materials on record.

5. Before I proceed further, it would be pertinent to take note of the admitted facts of the case.



6. The prosecution story of the case, in brief, is that the minor son of the petitioner aged 6 years, namely, Teju @Teju Pratap Singh went to the grocery shop of one Rekha Devi on 13.12.2005 at about 10:30 a.m. to buy mixture. When he did not return even after an hour, he went in search of him. He enquired from the grocery shop owner and others about his son, but could not get his whereabouts till 10 in the night. Then he realized that someone had abducted him while he was returning from the grocery shop. Accordingly, a written report was submitted by the petitioner to the Officer-in-charge of Barun police station on the basis of which the first information report (for short 'FIR') of Barun P.S. Case No. 165 of 2005 was initially registered under Section 364 of the Indian Penal Code (for short 'IPC') on 30.12.2005. Later on, vide order dated 02.02.2006 passed by the learned Chief Judicial Magistrate, Sections 364A, 302 read with 34 and 120B of the I.P.C. was added in the F.I.R.

7. After investigation, the police submitted charge-sheet against certain accused persons including one Kail Baitha.

8. After taking cognizance of the offence, the case was committed to the Court of Session for trial.



9. On 19.02.2013, charges were framed against accused Kail Baitha. Thereafter, eight witnesses including the informant, doctor and investigating officer of the case were examined.

10. After the examination of the aforesaid eight witnesses, the prosecution did not examine any other witnesses. Hence, after giving sufficient opportunity to the prosecution, the case of the prosecution was closed vide order dated 21.12.2015 passed by the trial court.

11. Thereafter, the case was fixed for recording the statement of the accused under Section 313 of the Cr.P.C.

12. At this stage, a petition dated 07.01.2016 was filed on behalf of the prosecution under Section 311 of the Cr.P.C. stating therein that one witness, namely, Sunil Kumar Singh, a police inspector posted at Nawada Town police station is an important witness, who had collected the call detail record of mobile phone used by the accused persons in commission of the crime. Hence, his examination is essential for just decision of the case.

13. On the aforesaid submissions, a prayer was made to summon the said Sunil Kumar Singh under Section 311 of the Cr.P.C.



14. The accused persons contested the application filed on behalf of the prosecution.

15. After hearing the parties, vide order dated 23.02.2016, the trial court rejected the prayer made on behalf of the prosecution.

16. Being aggrieved by the aforesaid order dated 23.02.2016 passed by the trial court, the informant preferred an application under Section 482 of Cr.P.C before this Court vide Cr.Misc. No. 12584 of 2016.

17. When the said Cr. Misc. No.12584 of 2016 was taken up for hearing by this Court on 23.08.2017, learned counsel for the petitioner submitted that since Sunil Kumar Singh has already been examined by the trial court, the application has become infructuous. In view of the above submissions, vide order dated 23.08.2017, Cr.Misc. No. 12584 of 2016 was dismissed as infructuous.

18. After dismissal of the aforesaid application filed on behalf of the prosecution under Section 482 of the Cr.P.C. on 16.10.2017, once again the prosecution filed an application before the trial court under Section 311 of the Cr.P.C. for summoning Sunil Kumar Singh. The said application has been rejected by the trial court vide impugned order dated



16.11.2017 on the ground that a similar petition had already been rejected earlier and the order passed by it was challenged before the High Court, but the same has not been set aside. Against the aforesaid order dated 16.11.2017, the petitioner has preferred the instant application under Articles 226 and 227 of the Constitution of India.

19. Having discussed the facts of the case, since the application filed by the petitioner before the trial court was under Section 311 of the Cr.P.C., it would be proper at this stage to reproduce Section 311 of the Cr.P.C. hereunder:-

"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."

20. It would be manifest from the reading of Section 311 of the Cr.P.C that it is in two parts. The first part



gives discretionary authority to the criminal court and confers upon it at any stage of inquiry, trial or other proceeding to summon any person as a witness or to examine any person in attendance, though not summoned as a witness or to recall and re-examine any person already examined whereas the second part mandates the court to summon and examine or to recall or re-examine any such person if his evidence appears to be essential for the just decision of the case.

21. While interpreting the ambit and scope of Section 311 Cr.P.C., the Supreme Court in **Jamatraj Kewalji Govani vs. State of Maharashtra [AIR1968 SC 178]**, held in paragraph 14 as follows:-

“14. It would appear that in our criminal jurisprudence, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witnesses already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but



whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

22. In **U.T. of Dadra Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan [(2006) 7 SCC 529]**, the Supreme Court observed as follows:-

"A conspectus of authorities referred to above would show that the principle 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 fact 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 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."



23. In **Natasha Singh vs. Central Bureau of Investigation (State) [(2013) 5 SCC 741]**, a three judge Bench of the Supreme Court took note of its earlier decisions rendered in respect of the scope of Section 311 of the Cr.P.C. and observed 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 311Cr.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 311Cr.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.

16. Fair trial is the main object 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 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. Thus, under no circumstances can a persons right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same."

24. In **Rajaram Prasad Yadav vs. State of Bihar & Anr. [(2013) 14 SCC 461]**, the Supreme Court while explaining the nature and scope of Section 311 Cr.P.C. reiterated that the power can be exercised at any stage as per the principles laid down thereunder and the paramount consideration should be for just decision of the case and observed 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...."

25. It would be manifest from the above decision of the Supreme Court that Section 311 of the Cr.P.C. empowers the court at any stage of inquiry, trial or other proceeding to summon any person as a witness or examine any person in attendance, though not summoned as a witness and recall any person already examined as a witness. However, summoning and examining or recalling or re-examining any such person should be made only if his evidence appears to be essential to the just decision of the case. It should not cause prejudice to the accused and it should not permit the prosecution to fill-up



lacunae. It should also not be for the purpose of delaying the trial. Whether summoning is for filling up to a lacunae or it is for the just decision of a case would depend on the facts and circumstances of the case. Indisputably, fair trial is the main object of the criminal jurisprudence. It is the duty of the court to ensure fairness during the entire proceeding of a criminal trial. The width of the power of the Court under Section 311 of the Cr.P.C. is beyond doubt.

26. Apart from the argument advanced on behalf of the petitioner that the earlier application was dismissed as infructuous on an erroneous submission made by the learned counsel appearing for the petitioner in that case, it has also been argued by Mr. Surendra Kumar Singh, learned Senior Advocate that the examination of the witness Sunil Kumar Singh, a police inspector, is essential for the just decision of the case. It was he, who had collected the call detail record of the mobile phone used in commission of the crime by the accused persons. Hence, inspite of the fact that the earlier challenge to the order passed by the court below rejecting the application filed on behalf of the prosecution under Section 311 of the Cr.P.C. was dismissed as infructuous, it has been argued that the court below ought to have allowed the application for summoning Sunil Kumar Singh



in the interest of justice.

27. Having regard to the submissions made above, firstly, I am of the opinion that if an erroneous submission was made by a lawyer appearing for the petitioner in the earlier case, the petitioner ought to have approached this Court for modification of the order. Having not done so, the order passed by the trial court had attained finality. The subsequent application filed on behalf of the State before the court below for summoning Sunil Kumar Singh under Section 311 of the Cr.P.C. could not have been allowed, as the same would have amounted to review of the earlier order after the challenge of the same before the superior court had failed. It is well settled position in law that a criminal court cannot review or alter its order except to correct a clerical or arithmetical error.

28. Having said so, since an argument has been advanced that the technicality should not come in the way of the court in exercising the powers under Section 311 of the Cr.P.C., if summoning of the witness is required for the just decision of the case, this Court would like to examine as to whether the examination of Sunil Kumar Singh is essential for the just decision of the case.

29. It has been argued by the learned Senior



Advocate appearing for the petitioner that his examination is necessary as he had collected call detail record of the mobile phone used by the accused in commission of crime.

30. It would be relevant to note that prior to 2000 electronically stored information was dealt with as documents and secondary evidence of electronic records were adduced as documents in accordance with Section 63 of the Indian Evidence Act. In the year 2000, the Parliament enacted the Information and Technology Act, 2000 (for short 'IT Act') to allow the admissibility of digital evidence. By virtue of Section 92 of the IT Act, the Indian Evidence Act has been amended. The most important amendment to the Indian Evidence Act is the introduction of Sections 65-A and 65-B under the second schedule of the IT Act, which provides for a special procedure for adducing evidence in relation to electronic records.

31. Sections 65-A and 65-B, which would be relevant for consideration in the present case read as under:-

“65-A. Special provisions as to evidence relating to electronic record.-The contents of electronic records may be proved in accordance with the provisions of section 65-B.

65-B. Admissibility of electronic records.-

(1) Notwithstanding anything contained in this Act, any information contained in an electronic



record which is printed on a paper, stored, recorded or copied in optical and magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;



(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that



purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this Section, a certificate doing any of the following things, that is to say,-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the



knowledge and belief of the person stating it.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.”



32. Section 65 of the Indian Evidence Act provides for cases in which secondary evidence relating to documents may be given whereas Section 65-A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65-B of the Indian Evidence Act. Section 65-B provides that notwithstanding anything contained in the Indian Evidence Act any information contained in any electronic record, i.e., the contents of a computer output is deemed to be a document and is admissible in evidence without proving of the originals production, provided that the conditions set out in Section 65-B(2) for the admissibility of evidence are satisfied.

33. Thus, the certificate under sub-section (4), must identify the original conditions of sub-section (2) of Section 65-B of the Indian Evidence Act.

34. In **Anvar P.V. vs. P.K. Basheer and others [(2014)10 SCC 473]**, a Constitution Bench of the Supreme Court conclusively decided that documentary evidence in the form of an electronic record can be proved only in accordance with the procedure set out under Section 65-B of the Indian Evidence Act. The Bench held as under:-

“That for any electronic evidence to be



admissible in its secondary form, it is necessary to meet the mandatory requirements of Section 65-B, which includes giving a certificate as per terms of Section 65-B(4) at the time of proving the record and not any time later, failing which the electronic record will be considered inadmissible”.

35. As seen above, Section 65-A of the Indian Evidence Act mandates special procedure for adducing evidence in relation to electronic records and documentary evidence in the form of an electronic records and they can be proved only in accordance with the procedure set out under Section 65-B of the Indian Evidence Act. It is necessary to have certificate as per terms of Section 65-B(4) of the Indian Evidence Act at the time of proving the electronic records in their secondary form. Thus, the proposed witness, a police officer or the Investigating Officer of the case is not legally competent to prove an electronic record. Such proof would not meet the requirement of law. Hence, even if aforesaid Sunil Kumar Singh is summoned under Section 311 of the Cr.P.C. for proving the call detail record, such proof would be considered inadmissible in view of ration laid down by the Constitution Bench of Supreme Court in *Anvar P.V. (supra)*,



36 Thus, I am of the opinion that even for the just decision of the case also the examination of aforesaid Sunil Kumar Singh is not essential.

37 In view of the discussions made above, I see no merit in this case. The application is dismissed.

38. The trial court is directed to proceed with the trial on day-to-day basis and conclude the same as early as possible and preferably within four weeks from the date of receipt/production of a copy of this order, as the prosecution case was closed on 21.12.2015 and since then the trial has not proceeded further on account of application filed by the prosecution for summoning Sunil Kumar Singh under Section 311 of the Cr.P.C..

39. In case, the trial court fails to dispose of the trial within four weeks, it shall be required to submit a report to this Court giving reason as to why the trial could not conclude within the stipulated period.

(Ashwani Kumar Singh, J)

Md. S/SK Suman.

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