

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.6795 of 2015

Arising Out of PS. Case No.-62 Year-1994 Thana- ADAPUR District- East Champaran

Md. Shani, Son of Late Habibulla, Resident of Village-Inarba, P.S.-Adapur,
District-East Champaran. Petitioner/s

Versus

1. The State Of Bihar.
 2. Bashir Mian Son of Late Mohi Uddin
 3. Jaheer Mian Son of Fate Urddin Mian
 4. Yunus Mian Son of Mohi Uddin
 5. Anwar Mian Son of Majid Mian.
- All are residents of Village-Inarwa, P.S.-Adapur, District-East Champaran.
... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr.Shailendra Kumar Bhartee, Advocate
For the State	:	Mr. M.K. Nirala, APP.

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT

Date : 16-05-2019

Heard learned counsel for the petitioner and learned
counsel for the State.

No one appears for private opposite parties to whom
notices have been validly served and power has also been filed by
one Kundan Kumar, Advocate. On the last date, counsel for the
private opposite parties was not present, even today, on one is
appearing on behalf of the opposite party nos. 2 to 5, in such
circumstances, this case is finally disposed of on the assistance
given by the counsel for the petitioner and counsel for the State.

One Md. Shani (present petitioner) has lodged an FIR
with respect to the incident that had been taken place on
12.10.1994 at about 09.30 A.M. stating therein that his grandson
Arman, aged about 5 years and son of Anwar, who is neighbour,



aged about 6 years were playing. While they were playing, son of Anwar snatched a nail cutter from his grandson and fled away from there and his grandson followed him caught hold of his shirt even then he fled away from there and he did not return the nail cutter. His grandson Arman tried to enter into his house, but Anwar did not allow the grandson to enter into his house and he returned weeping. The son of the petitioner-informant, namely, Saifullah had said to Anwar that the nail cutter is his and he demanded to return the same. For small dispute, the accused sides came armed with different weapons and caused injuries to Saifullah, as a result of which, his son, Saifullah succumbed to the injury. They also assaulted another son of the informant. Certain villagers interfered in the matter and save his life. It is further said that out of vengeance, they did not allow to bury the body of his son in the graveyard.

On that basis, a case was lodged under Sections 302, 307, 323/34 of the Indian Penal Code vide Adapur P.S. Case No.62/94. After investigation, charge sheet was submitted, cognizance was taken, charges were framed and the trial started.

An application dated 27.11.2014 under Section 311 of the Code of Criminal Procedure has been filed at the fag end of the trial when the proceeding was just near for conclusion as it was



argument stage, they have filed an application for examination of additional five witnesses and the same has been allowed by the court below on payment of cost of Rs.2000/- vide order dated 15.12.2014.

Counsel for the petitioner submits that already the stage of 313 Cr.P.C. was over, the defence has already examined its witnesses inasmuch as the defence was also allowed to re-examine eight witnesses, further two witnesses were examined and altogether ten witnesses have been examined and the application for examination of 5 witnesses has been allowed at the stage of conclusion of trial, which is itself reflected from the impugned order dated 15.12.2014. He further submits that the court below allowed the application in a mechanical manner without application of mind, without giving any reason and purpose for allowing the witnesses to be examined from the defence side. Merely in *ipso dixit* manner on payment of Rs.2000/-, application of defence has been allowed for examination of additional witnesses.

Counsel for the petitioner has submitted that though the power lies in the court below for examination of witnesses for the ends of justice, but it will have to be recorded the reason on what ground additional examination of five witnesses would be securing the ends of justice, if the basic premise is absent, the court below



would not like to exercise the power in such manner, the witnesses can be recalled and examined or cross-examined invoking the provision of 311 Cr.P.C. The order must reflect that the court is satisfied that examination of the witnesses will be essential to just decision of the case. The witness cannot be recalled or recross-examined without any rightful purpose. The court has not been given unfettered power to recall or re-examine any witness, but the order of court has to justify that the recall of the witness is essential for the just decision of the case or such recall was necessary as the re-examination/cross-examination of such a witness are material to the facts of the case. In support of submission, he has placed reliance on the judgment in the case of ***Bishun Mukhiya & Anr. Vs. The State of Bihar reported in 2015(2) BBCJ 544 (V)***. It will be relevant to quote paragraph 17 of the said judgment.

“The recall of prosecution witness for re-examination or recross-examination is not at the sweet-will of a party or the court. The witness can be recalled or re-summoned and examined or cross-examined in case there is alteration or addition to charge under Section 217 and under Section 311 of the Code of Criminal Procedure, when the evidence of such witness appeared to the court to be essential to the just decision of the case, meaning thereby, a witness cannot be recalled or recross-



examined without any rightful purpose. It appears that the court has not been given the unfettered power to recall or re-examine any witness. The court has to justify that the recall of the witness is essential for the just decision of the case or such recall was necessary as the re-examination/cross-examination of such a witness was material to the facts of the case as appears from Section 217(b) Cr. P.C. In the present case, it appears that P.W.3 Shivnarayan Mehta was examined on 23.8.1989. He was cross-examined in part on 23rd of August 1989 itself and his cross-examination was completed on 4.9.1989 after giving sufficient time to the accused for preparation of cross-examination or consultation with his learned counsel. But a petition was filed on behalf of the accused on 5.2.1991, on the ground that the accused could not instruct his lawyer on certain important aspects of his defence, but no such ground has been mentioned in the petition to justify the recall of P.W.3. This prayer was opposed by the prosecution vide its objection petition dated 20.2.1991 in which it has been mentioned that the defence was allowed ample and sufficient time for taking instructions from the accused persons on any important aspect of defence and the cross-examination of the witnesses has been made in detail on two different dates. As such, the petition was fit to be rejected. But the learned Sessions Judge allowed the petition without appreciating the provisions of Section



217 and Section 311 of the Code of Criminal Procedure. As such, the cross-examination of P.W.3 on recall is non est in the eye of law and no benefit can be given to the defence on the deposition made in the cross-examination on recall of P.W.3. Thus, the submission of the appellants that P.W.3 did not appear for cross-examination on recall order is not correct”.

In the present case, the order impugned does not disclose the reason for allowing the petition for examination of additional five witnesses when ten witnesses have already been examined by the defence, in such circumstances, the court below has not exercised the discretion for the purpose to be achieved as has been engrafted in Section 311 Cr.P.C.

Accordingly, the order dated 15.12.2014 passed by 10th Additional Sessions Judge, East Champaran, Motihari in Sessions Trial No.103 of 1995 is quashed. The Court below is directed to complete the entire proceeding within a period of six months from the date of receipt/production of a copy of this order.

Let the order be communicated to the court below forthwith.

(Shivaji Pandey, J)

V.K.Pandey/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	20.05.2019
Transmission Date	20.05.2019

