

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.151 OF 2019.

State of Goa,
Through Police Inspector/IO,
Valpoi Police Station,
Valpoi Goa.

.... Petitioner.

Vs.

Shankar Venkatram Reddy,
Presently lodged at Modern Jail,
Colvale, Goa.

.... Respondent.

Mr. S. R. Rivankar, Public Prosecutor for the petitioner.
Mr. Rohan Desai, Advocate for the respondent.

Coram:- PRITHVIRAJ K. CHAVAN,J.

Date :-22nd July 2019.

ORAL JUDGMENT:-

Rule. Rule made returnable forthwith.

2. Learned Counsel for the respondent waives services.

3. Heard finally with the consent of the learned Public
Prosecutor and the learned Counsel for the respondent.

4. The State has challenged two orders of the trial Court dated 4.2.2019 and 12.2.2019 by which the learned President Children's Court rejected the prayer of the prosecution for production of particulars of registration of a vehicle bearing No.GA-07-V-7507.

5. Facts in brief are that the respondent is being prosecuted for the offences punishable under Sections 354, 302, 307 of IPC and under Section 8(2) (a) of the Goa Children's Act vide FIR No.32/2016. It is alleged that the respondent has committed murder of his elder daughter and seriously injured his younger daughter by means of *Koita*. The respondent thereafter approached the police station on his scooter bearing registration no.GA-07-V-7507 and surrendered himself. Subsequently, his neighbour lodged an FIR.

6. It is submitted that during the course of evidence of the Investigating Officer, the prosecution has moved an application on 4.2.2019 seeking permission to rely on certain documents *inter alia* vehicles particulars of the aforesaid scooter of the respondent.

7. The learned President Children's Court granted the application except the prayer in respect of production of documents, viz. registration details of aforesaid scooter in question. The application was moved under Sections 230 and 311 of Cr.P.C.

8. It reveals from the impugned order that only because the defence has objected for production of said document, as it was printed on 24.1.2019 and it being not the part of the original investigation by the Investigating Officer, prayer was rejected.

9. Another application preferred by the prosecution on 5.2.2019 requesting the Children's Court for allowing the production of the said documents and its proof through the Assistant Director of Transport who had issued the said document, also came to be rejected by simply referring the order passed on 4.2.2019.

10. Shri S. R. Rivankar, learned Public Prosecutor contends that document in question is required to meet the ends of justice as the

respondent himself while surrendering before the police station drove the said vehicle and, therefore, there is no question of any investigation to be carried out on that aspect. It is also pointed out that as per the registration document with the said Transport Department, it is clear that the said vehicle was registered in the name of the respondent on 22.6.2015 i.e much prior to the date of the incident.

11. On the other hand, Shri Rohan Desai, learned counsel for the respondent contends that production of the said documents at the stage of recording the evidence of Investigating Officer would cause serious prejudice to the accused since document does not form part of the chargesheet. He submits that prosecution has not applied under Section 173(8) of Cr.P.C. for carrying out further investigation and, therefore, collection of such documents at the fag end of the trial is illegal. It is also pointed out by Mr. Desai that the said document was printed on 24.1.2019. According to the learned Counsel, as per the instructions, the vehicle does not belong to the respondent.

12. In support of his contention he placed reliance on a

judgment of Supreme Court in the case of ***Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel and ors.***¹ Paragraph 48 of the judgment reads thus:-

“The un-amended and the amended sub-Section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone.”

It is manifest from the ratio that it is only the Investigating Officer who has been authorised to conduct further investigation without limiting the stage of the proceedings relatable thereto. Thus the ratio would be applicable to the present case wherein power of investigating officer qua the investigation are available at any stage of the proceedings.

13. The scope of Section 311 f Cr.P.C. as enunciated by the

¹ 2017 2 SCC (Cri) 331

Supreme Court in the case of **AG Vs. Shiv Kumar Yadav and anr.** ² at

paragraphs 13 to 15 can be reproduced for advantage which read thus:-

13. *After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :*

“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 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and 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 CrPC 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 CrPC 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 safeguard, 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 CrPC 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.”

14. *In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :*

“6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly

when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

15. *The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.”*

14. The object of Section 311 of Cr.P.C. is to find out the truth or obtaining for proper truth of such facts which will lead to just and correct decision of the case. Power under Section 311 of Cr.P.C. are discretionary which are to be exercised only to avoid miscarriage of justice. No doubt such powers are exercised not to fill up the lacuna in

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the prosecution case and, therefore, are to be exercised judiciously and not arbitrarily. Similar is the view taken by the Supreme Court in the case of ***Iddar & Ors vs Aabida & Anr***³. The principles culled out by the Supreme Court in paragraph 9 of the judgment are as follows:-

9. "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

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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*

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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*

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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 Jagat Rai v. State of Maharashtra AIR 1968 SC 178.”

15. It is observed by the Supreme Court that 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 a prerogative of the Court and it is the duty to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject.

16. Argument of the learned Counsel for the respondent,

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therefore, does not hold water that at the stage of examining the Investigating Officer, the prosecution could not have applied for production of documents in question or examination of the registration authority. It is significant in the light of the fact that it has been sufficiently brought on record that the respondent himself, while surrendering before the police, approached by riding the said vehicle. The ratio laid down by the Supreme Court in the ruling cited supra would be applicable to the present set of facts.

17. Even otherwise, document in question is a public document as per Section 74 of the Evidence Act. The trial Court could have, on its own directed for production of said documents for finding out the truth. Section 136 of the Evidence Act empowers the Judge to decide the admissibility of the documents after its production.

18. Section 136 of the Evidence Act reads thus:-

Judge to decide as to admissibility of evidence- when either party proposes to give evidence of any fact, the Judge may ask

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the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

19. Similarly Section 165 of the Evidence Act gives wide discretion to the Judge in order to discover or to obtain proper proof of relevant facts, ask any questions or to obtain proper proof of relevant

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fact for production of any document or thing at any time or in any form at any stage and it further clarifies that once the Court exercise its jurisdiction under Section 165 of Evidence Act, neither parties nor their agent shall be entitled to make any objection to any of such evidence being produced.

20. Having considered the ratio laid down by the Supreme Court as well as powers of trial Judge, the impugned orders would not sustain and, therefore, required to be quashed and set aside.

21. Thus, the impugned orders dated 4.2.2019 and 12.7.2019 are quashed and set aside.

22. Prosecution is at liberty to examine the Assistant Director of Transport at Mapusa for production and proof of registration details of the scooter bearing registration No.GA-07-V-7507. Respondent would be at liberty to cross examine the said witness.

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23. Rule is made absolute in the above terms with no order as to costs.

PRITHVIRAJ K. CHAVAN, J.

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