

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD
CORAM:**

*** THE HON'BLE SRI JUSTICE K. LAKSHMAN**

+ CRIMINAL PETITION Nos.828 AND 945 OF 2020

% Delivered on: 09-11-2020

Between in Crl.P. No.828 & 945 of 2020:

Y. Ramesh

.. Petitioner/
Accused

Vs.

\$ The State of Telangana, rep.by its Public
Prosecutor & another

.. Respondents

! For Petitioners - Accused

: Mr. M. Radha Krishna,
Advocate, representing
Mr. Pushadapu Subba Rao

^ For Respondent No.1

: Public Prosecutor

For Respondent No.2

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? Cases Referred

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1. 2018 (0) Supreme (J&K) 631
2. (2013) 14 SCC 461
3. 2012 (3) ALT (Crl.) 131 (A.P.)
4. 2002 (1) ALT (Crl.) 333 (A.P.)
5. 2005 CrL.L.J. 1474
6. 2004 CrL.L.J. 150
7. 2005 CrL.L.J. 716
8. (2007) 11 SCC 191
9. (2014) 13 SCC 59
10. 2018 CrL.L.J. 150 (Utt)
11. AIR 2016 SC 3942

THE HONOURABLE SRI JUSTICE K. LAKSHMAN

CRIMINAL PETITION Nos.828 AND 945 OF 2020

COMMON ORDER:

Mr. Y. Ramesh, sole accused in S.C. No.12 of 2014 on the file of the XIII Additional District & Sessions Judge - cum - XIII Additional Metropolitan Sessions Judge, Ranga Reddy District, Cyberabad at L.B. Nagar, has filed Crl.P. No.828 of 2020 under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), to quash the order dated 16.12.2019 passed in Crl.M.P. No.154 of 2019 in S.C. No.12 of 2014 filed under Section 311 of Cr.P.C. to recall PW.3 for re-examination. Whereas, Crl.P. No.945 of 2020 is filed by the very same accused under Section 482 of Cr.P.C. to quash the order dated 16.12.2019 passed in Crl.M.P. No.153 of 2019 in S.C. No.12 of 2014 filed under Section 311 of Cr.P.C. to summon Ms. Y. Pavani for examination.

2. Heard Mr. M. Radha Krishna, learned counsel representing Mr. Pushadapu Subba Rao, learned counsel for the petitioner in both petitions, and learned Public Prosecutor appearing on behalf of respondent No.1 - State. Despite service of notice, none appears for respondent No.2. Perused the entire material available on record.

3. The petitioner herein is the sole accused in S.C. 12 of 2014. The offence alleged against him is under Section 302 of IPC. The wife of petitioner - accused deposited herself as PW.3 and turned hostile, addressed a letter on 24.09.2019 to the Public Prosecutor

stating that on the date of her examination, she was threatened by the accused that he would kill her children, who were studying by staying in the Hostel and, therefore, she could not support the case of prosecution. Since her children are staying with her now, she wants to give further evidence. Basing on the said letter, the prosecution has filed a petition under Section 311 of Cr.P.C. vide Crl.M.P. No.154 of 2019 to recall her for further examination. The prosecution has also filed another application vide Crl.M.P. No.153 of 2019 to summon PW.3's daughter, Y. Pavani, for her examination stating that daughter of PW.3 is an eye-witness to the incident and, therefore, her evidence is very much important and crucial to the case of prosecution.

4. The present petitioner being sole accused opposed the said petitions on the grounds that the prosecution filed the said petitions with an intention to protract the proceedings and to get the evidence in its favour and in the event the petitions are allowed, much prejudice would be caused to him.

5. The trial Court, after hearing both sides, allowed the said two petitions vide order dated 16.12.2019 in Crl.P. Nos.153 and 154 of 2019.

6. Aggrieved by the said orders, the sole accused preferred the present petitions to quash the said orders.

7. Since the parties are one and the same and facts of the case arise out of the very same crime, both the Criminal Petitions are being disposed of by way of a common order.

8. As far as Crl.P. No.828 of 2020 is concerned, Mr. M. Radha Krishna, learned counsel for the petitioner, would submit that Crl.M.P. No.154 of 2019 filed under Section 311 of Cr.P.C. is not maintainable as the prosecution has failed to produce any document and filed the said petition at the stage of hearing. But, the trial Court allowed the application without appreciating the fact that PW.3 turned hostile, cross-examined by the Public Prosecutor and without there-being any sufficient cause for filing said application after the lapse of six months. Therefore, according to the learned counsel for the petitioner, the impugned order is erroneous in law and, accordingly, he sought to quash the same. In support of his contentions, the learned counsel for the petitioner has placed reliance on the decision rendered by the High Court of Jammu and Kashmir at Jammu in **Masoom Hussain Shah v. State**¹ and the principle held by the Hon'ble Supreme Court in **Rajaram Prasad Yadav v. State of Bihar**².

9. As far as Crl.P. No.945 of 2020 is concerned, the learned counsel for the petitioner would submit that the daughter of PW.3, Ms. Y. Pavani, is neither a listed witness, nor shown her name either

¹. 2018 (0) Supreme (J&K) 631

². (2013) 14 SCC 461

in the complaint or in the charge sheet. Despite the same and without appreciating the fact that she is not an eye-witness, the trial Court has allowed Crl.M.P. No.153 of 2019, which is contrary to the scope and ambit of Section 311 of Cr.P.C. In support of his contention, the learned counsel for the petitioner has placed reliance on the decisions in: i) **V. Vani v. V.B.V.S.M.K. Prasad**³; ii) **Laveti Kamala v. State of A.P., rep.by P.S. Alwal**⁴; and iii) **State by Inspector of Police v. S. Sankaran**⁵.

10. On the other hand, the learned Public Prosecutor would submit that in both the Criminal Petitions, the trial Court has rightly allowed the said applications to recall PW.3 for further evidence and to summon her daughter for better adjudication of the case. The offence alleged against the petitioner herein is under Section 302 of IPC, which is a serious offence. The said orders are reasoned and the trial Court by relying upon the principle held by the Apex Court in **Rajaram Prasad Yadav**², allowed the said applications. He would further submit that the trial Court having considered the scope and ambit of Section 311 of Cr.P.C. only, allowed the said applications and there is no error in it and accordingly he sought to dismiss the present petitions. In support of his contentions, the learned Public Prosecutor has relied upon the decisions in **Fatehsinh Mohansinh Chauhan v. Union Territory of Dadra and Nagar**⁶, **Chemo Steels**

³. 2012 (3) ALT (Crl.) 131 (A.P.)

⁴. 2002 (1) ALT (Crl.) 333 (A.P.)

⁵. 2005 Crl.L.J. 1474

⁶. 2004 Crl.L.J. 150

Limited v. State of Andhra Pradesh⁷ and Rama Paswan v. State of Jharkhand⁸

11. In view of the above rival submissions, the question that arises for consideration by this Court is:

Whether the impugned orders, both dated 16.12.2019 passed by the trial Court in Crl.M.P. Nos.153 and 154 of 2019 in S.C. No.12 of 2014 allowing the same filed under Section 311 of Cr.P.C. are sustainable in law and on facts?

12. As stated supra, the petitioner herein is sole accused in S.C. No.12 of 2014 and the offence alleged against him is under Section 302 of IPC. During trial, PW.3, wife of the petitioner - sole accused was examined on 05.03.2019 and she was declared hostile. The learned Public Prosecutor cross-examined her. Thereafter, she has addressed a letter dated 24.09.2019 informing the Public Prosecutor that she intends to give further evidence. Basing on the said letter, the Prosecution has filed an application under Section 311 of Cr.P.C. vide Crl.P. No.154 of 2020 in S.C. No.12 of 2014 to recall her for re-examination. Vide order dated 16.12.2019, the trial Court allowed the said application. Feeling aggrieved by the same, the petitioner - accused filed Crl.P. No.828 of 2020 contending that PW.3 was declared hostile on 05.03.2019, cross-examined by the Public Prosecutor, nothing incriminating was found against the accused. After the lapse of six months, the very same witness i.e., PW.3 cannot

⁷. 2005 CrL.L.J. 716

⁸. (2007) 11 SCC 191

be recalled under Section 311 of Cr.P.C. to give further evidence by way of re-examination retracting her statement under Section 164 of Cr.P.C.

13. Perusal of the petitions filed under Section 311 of Cr.P.C. vide Crl.M.P. No.153 and 154 of 2019 would reveal that the prosecution has examined all the witnesses on its behalf except the Investigating Officer. The prosecution examined the wife of accused as PW.3. Since she did not support the case of prosecution, she was declared hostile. After the lapse of six months, she has addressed a letter dated 24.09.2019 to the Public Prosecutor stating that she intends to give further evidence. The petitions would further reveal that on the date of examination of PW.3, she was under the influence of threat caused by the accused, that her children were studying in Hostel at Vijayawada and her eldest daughter was studying 9th Class and was attacked by the accused. She was threatened by the accused that he would kill them if she deposes against him in the Court. Now, her children are in her custody and out of threat and, therefore, she wants to depose the fact about the commission of offence before the Court as herself and her children are eye-witnesses. Thus, the evidence of PW.3 and her eldest daughter are vital and important for the prosecution to meet ends of justice. Whereas, in Crl.M.P. No.153 of 2020, it is stated by the prosecution that at the time of offence, eldest daughter of PW.3, Y. Pavani, who is also eye-witness, was aged only 9 years and she was not cited as a witness by the police,. But,

now she is 14 years and in a fit position to depose about the commission of offence and the threat caused by the accused and, therefore, her evidence is just and necessary.

14. With the said contentions, the prosecution has filed the said petitions under Section 311 of Cr.P.C. to recall PW.3 for re-examination, and to summon the daughter of PW.3, Y. Pavani, for examination.

15. The petitioner herein has filed counters in both the petitions, contending that earlier the prosecution has filed similar application before the trial Court on 25.09.2019 vide Crl.M.P. No.131 of 2019 to recall PW.1 for re-examination and to permit the prosecution to examine Ms. Y. Pavani. The accused has also filed counter resisting the said application and relief sought therein. But, at the stage of hearing, the prosecution has withdrawn the said application on 13.11.2019 endorsing it not pressed and, accordingly, the same was dismissed as not pressed. Now, again the prosecution has filed the similar petitions, which are not maintainable in law.

16. The allegation levelled against the petitioner - accused is that he has murdered the second husband of PW.3 - Smt. P. Susheela (LW.4). The accused is the first husband of PW.3. Therefore, the police have filed charge sheet against the petitioner - accused for the offence under Section 302 of IPC.

17. The Apex Court had an occasion to deal with the scope and ambit of Section 311 of Cr.P.C. in **Rajaram Prasad Yadav**², wherein the offences alleged against the accused are under Sections 324 and 307 read with 34 of IPC. During trial, the *de facto* complainant examined as a witness and gave evidence categorically stating that he never gave any statement to the police; that nobody beat him on the date of occurrence and that he was not hit by any bullet. He further stated in his evidence that he accidentally fell into the hole of the latrine, while looking into it and that some instrument, which was lying inside the hole, caused the injury on his body. He further stated that his sons were not present at the place of occurrence. The evidence of the prosecution was closed and thereafter the evidence of the defence was commenced. At that stage, the *de facto* complainant has filed an application under Section 311 of Cr.P.C. five months after his examination stating that the evidence given by him earlier was not out of his own free will and volition, but due to threat and coercion at the instance of the accused persons, including the appellant therein.

18. It was contended on behalf of the *de facto* complainant that the accused persons posed a threat by going to the extent of eliminating him and that such threat was meted out to him on 15.3.2007, when he was kidnapped from his wheat field by the accused, along with two unknown persons. With the said grounds and contentions, the *de facto* complainant has filed the application, and the trial Court has dismissed the said application. The matter was carried

to the High Court, and the High Court has set aside the order passed by the trial Court and allowed the petition filed under Section 311 of Cr.P.C. Then, the matter carried to the Hon'ble Supreme Court, and the Hon'ble Supreme Court upheld the order of the trial Court by setting aside the order passed by the High Court. The Apex Court further held that there are no *bona fides* in the application of the *de facto* complainant, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused.

19. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place subsequently which resulted in the registration of the FIR seem to have weighed with the *de facto* complainant to come forward with application under Section 311 Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant - accused and the other accused, as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the accused, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the *de facto* complainant and the categorical statement made before the Court below in his evidence as appreciated by the

Court below was in the proper perspective, while rejecting the application of the *de facto* complainant filed under Section 311 Cr.P.C. In the considered opinion of Hon'ble Supreme Court, the trial Court, had the opportunity to observe the *demeanour* of the *de facto* complainant, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court. By observing so, the Apex Court has quashed the order of the High Court and upheld the order passed by the trial Court rejecting the application under Section 311 of Cr.P.C. to recall the witness.

20. In **Masoom Hussain Shah¹**, the High Court of Jammu and Kashmir had an occasion to deal with the scope and ambit of Section 311 of Cr.P.C. In the said case, the offences alleged against the accused are under Sections 376, 452 and 323 of the Jammu and Kashmir State Ranbir Penal Code, 1989. The prosecutrix was declared Hostile and she was also later on cross-examined by the learned Public Prosecutor. In the cross-examination, she fairly stated that the accused has neither committed any offence nor she knows the accused. After a period of two months, the prosecutrix moved an application through Public Prosecutor under Section 540 Cr.P.C. The said application was strongly opposed by the accused by way of objections and also on the basis of record annexed, and the same was allowed by the trial Court. The said order was carried to the High Court of Jammu and Kashmir. The High Court relying on the

principle laid down by the Apex Court in **Rajaram Prasad Yadav**² held is as under:

“15. 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 person's 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.”

21. In the said case also, the application filed under Section 311 of Cr.P.C. was on the ground that witness gave her previous statement under force and threat to life under the influence of drugs. The High Court of Jammu and Kashmir has also relied upon the principles laid down by the Apex Court while dealing with application under Section 311 of Cr.P.C. which are 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.”

22. The High Court of Jammu and Kashmir also held that it is evident that plea of victim on the earlier occasion, she turned hostile under coercion and threat meted out to her at the instance of accused, cannot be a ground for recalling her and re-examine her; as already noted that she was identified by her husband and another at the time of recording of her previous statement before Court below. At the time of her evidence in Court or subsequent to her evidence she never made any complaint to the Court or any police officer that accused persons had yielded any pressure upon her to turn hostile to the prosecution and to give a go by to the prosecution case. When there is no ambiguity in previous statement or nothing to explain, to put question in re-examination, the witness cannot be recalled or re-examined. The sole object of witness to give change to the version

already given in the Court is not the object of Section 540 Cr.P.C. The re-trial cannot be asked under the provisions of Section 540 Cr.P.C. With the said observations, the High Court of Jammu and Kashmir has set aside the order passed by the trial Court allowing the application filed under Section 311 of Cr.P.C.

23. In **Fatehsinh Mohansinh Chauhan**⁶ relied upon by the learned Public Prosecutor, the Bombay High Court had an occasion to deal with the power of Court below to summon material witness or examine person present under Section 311 of Cr.P.C., and also *lacunas* of prosecution. In the said case also, the application was filed under Section 311 of Cr.P.C. by the prosecution on the grounds that the witnesses sought to be recalled were threatened by the accused. In the said context, the Bombay High Court held as under:

“18. The main grievance with regard to the impugned order was that if the witnesses are recalled and examined again in support of the prosecution, it would be filling up lacuna in the prosecution case which, according to the learned Counsel for the petitioners, is not permissible under the provisions of Section 311 of the Cr.P.C. Section 311 of Cr.P.C. is as under :-

"311. Power to summon material witness, or examine person present.

Any court may, at any stage of any inquiry, trial or other proceeding under the 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."

In view of these provisions, it is the discretion of the Court could be exercise at any stage of any inquiry, trial or other proceeding to summon any person as the witness or examine any person in attendance, though not summoned as a witness or recall and re-examine any witness. The second part of Section 311 is mandatory in the sense that the Court shall have to summon and examine or recall and e-examine any person if his evidence appears to the Court to be essential to the just decision of the case. Thus, the Sessions Court has powers to recall and re-examine witness already examined at any stage of the proceedings. In the first part, it is the discretion of the court. But in second part when it appears to the Court that the evidence of particular person is essential to the just decision of the case, then the Court shall have to summon or re-call and re-examine such person. Therefore, the order of the Sessions Court in recalling and re-examining the aforesaid four witnesses was within his discretion.

19. The submission made on behalf of the petitioners however is that the exercise of this discretion by the learned Sessions Judge was not only pre-judicial to the petitioners - accused persons, but was also helped the prosecution to fill up the lacuna in the prosecution case. It would, therefore, be necessary to understand what is meant by lacuna in the prosecution case. The Apex Court had occasion to explain the meaning of the lacuna. In the case of *Rajendra Prasad v. Narcotic Cell*. The relevant observations of the Apex Court are as under :-

"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. In 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. After all, function of the crimina court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

Thus, it is clear that the lacuna is not something which is through oversight in the management of the prosecution or inadvertence with which proper evidence was not adduced where in such cases the Court is expected to be magnanimous in permitting such mistakes or inadvertence. The lacuna in the prosecution case has a meaning of inherent weakness in the prosecution case. The prosecution case is one which is submitted along with the charge-sheet. If such lacuna is left at the level of the filing of charge-sheet, that means if there is any lacuna in the investigation, that lacuna cannot be overcome by the prosecution during the course of trial or by taking recourse to the provisions of Section 311 of Cr.P.C.

20. What was happened in the instant case is that the witnesses had turned hostile by reason of the fact that they were threatened by the accused persons. Now those very witnesses are coming forward by making affidavits as to why they did not support the prosecution earlier and as to why they now want to support the prosecution. What is material to be noted is that their statement recorded under Section 161 of the code stands as they are submitted along with the charge-sheet. Therefore, if these witnesses are allowed to depose before the Court as they have stated before the police in their statement under Section 161 of the code, that would not be filling up the lacuna in the prosecution case. Therefore, the submissions made by the learned Counsel for the petitioners that recalling the witnesses and re-examining them would be allowing filling up lacuna in the prosecution case is not acceptable."

24. In **Rama Paswan**⁸, the Hon'ble Supreme Court had an occasion to examine the scope and ambit of Section 311 of Cr.P.C. and held as under:

“5. The scope and ambit of Section 311 of the Code, which reads as follows, needs to be noted:

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 a 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.

6. 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 (b) 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 enabling provision, 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.

7. 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.

8. 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 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.

9. 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* [1968CriLJ231].

10. Considering the ambit of Section 311 of the Code, it does not appear to be a case where any interference is

called for. What is the effect of evidence already recorded shall be considered by the trial court. Since Section 376 IPC is not compoundable in terms of Section 320 of the Code, the trial court and the High Court rightly rejected the prayer. We find no scope for interference in the appeal. Our non-interference shall not be construed as we have expressed any opinion on the merits of the case.

25. In view of the above stated authoritative pronouncements on legal principle, coming to the case on hand, admittedly, PW.3, wife of the accused, turned hostile. After the lapse of six months, she has addressed a letter to the Public Prosecutor informing that she intends to give further evidence. Based on the said letter, the Public Prosecutor has filed an application under Section 311 of Cr.P.C. In the said petition, the Public Prosecutor has stated that PW.3 has given her evidence not on her own free will and volition and she has given her evidence under the threat of accused. But, the Public Prosecutor has not filed any document. PW.3 did not lodge any complaint against her first husband i.e., petitioner - accused complaining about the alleged threat. There is no other evidence to show that the petitioner - accused has threatened PW.3. She neither lodged complaint to the Court below, nor brought to the notice of the Court below about the alleged threat. PW.3 has addressed the letter dated 24.09.2019 merely stating that he has given her evidence earlier under threat, but not out of her own free will and volition. Except the said mere statement, there is no other evidence to show that she was threatened by the petitioner - accused.

26. Section 311 of Cr.P.C. deals with power to summon material witness, or examine person present, and as per which, 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.

27. The Apex Court in **Mannan Shaikh v. State of West Bengal**⁹, held that the wide power to recall the witness is to be exercised with circumspection and only with the object of arriving at a just decision of the case and the same should not prejudice the accused and should not permit to fill up the *lacuna* by the prosecution. The said principle was also reiterated by the Apex Court in **Vipin alias Nanhe v. State of Uttarakhand**¹⁰. The Apex Court in **State of Haryana v. Ram Mehar**¹¹, held that merely because accused persons are in prison and change of counsel by defence and their failure to put certain questions to witnesses is no ground to recall witness.

28. The Apex Court in **Rajaram Prasad Yadav**² held that in the absence of any complaint either to the trial Court or to the police with regard to alleged threat by the accused to a witness, application to recall a witness under section 311 of Cr.P.C. cannot be allowed.

⁹. (2014) 13 SCC 59

¹⁰. 2018 Cr.L.J. 150 (Utt)

¹¹. AIR 2016 SC 3942

Re-trial is not permissible under Section 311 of Cr.P.C. The said principle was also held by the High Court of Jammu and Kashmir in **Masoom Hussain Shah**¹.

29. In the present case also, except stating that PW.3 has given her evidence earlier under threat and coercion and not with her own free will and volition, there is no material to support her contention. Even in **Rama Paswan**⁸, the Hon'ble Supreme Court examined the scope of Section 311 of Cr.P.C. and held that 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 only under the provisions of Section 311, but also 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. Discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

30. In the present case also, it is not a fit case to permit PW.3 for re-examination by the trial Court exercising its power under Section 311 of Cr.P.C. The trial Court simply reiterated certain paragraphs in **Rajaram Prasad Yadav**² and other decisions and held

that when a witness intends to examine herself to bring out true facts, witness should be given an opportunity to depose the said facts. However, it is observed that the accused even have an opportunity to cross-examine the witness and disprove her contention and it does not cause any prejudice to the accused. Hence, the petitioner is entitled to recall PW.3 for further examination. There is no reasoning at all. Thus, according to this Court, the impugned order is contrary to the scope and ambit of Section 311 of Cr.P.C. and the principle held by the Apex Court in **Rajaram Prasad Yadav²**, **Masoom Hussain Shah¹** and **Rama Paswan⁸**. Therefore, the impugned order dated 16.12.2019 passed by the trial Court in Crl.M.P. No.154 of 2019 is liable to be quashed.

Crl.P. No.945 of 2020

31. Now, coming to this petition, as already discussed above, the prosecution has filed another application under Section 311 of Cr.P.C. vide Crl.M.P. No.153 of 2019 to summon Ms. Y. Pavani, eldest daughter of PW.3, for examination for better adjudication of justice in S.C. No.12 of 2014. The said application was also filed on the strength of the letter addressed by PW.3 dated 24.09.2019 stating that her eldest daughter was in hostel at Vijayawada and studying 9th Class and that she was threatened by the accused that if she gives evidence in Court against him, he would kill her children. Now, her children are in her custody and out of threat. Therefore, she and her eldest daughter want to depose about the commission of offence

before the Court as they are eye-witnesses. At the time of offence since daughter of PW.3 was nine years, she was not cited as a witness by the police and now she is 14 years and in a fit position to depose about the commission of offence and also the threat caused by the accused. In view of the same, the prosecution has sought to summon the daughter of PW.3 as a witness to depose the commission of offence. It is apt to mention herein that no-where, the name of Ms. Y. Pavani, daughter of PW.3, is mentioned including the complaint, charge sheet and statements recorded by the police under Section 161 of Cr.P.C. Even PW.3 did not speak about the presence of her daughter in her earlier statement. The petition was filed under Section 311 of Cr.P.C. only on the ground that daughter of PW.3 was under threat of accused and she is an eye witness. But, the name of eldest daughter of PW.3 does not find place anywhere.

32. The learned counsel for the petitioner - accused has relied upon the principle held in **Vani**³, wherein the High Court of Andhra Pradesh at Hyderabad had an occasion to deal with summoning of witness who is not listed witness under Section 311 of Cr.P.C. The offence alleged against the accused was under Section 498-A of IPC. The Public Prosecutor filed an application under Section 311 of Cr.P.C. to examine three witnesses. None of the witnesses were listed witnesses. The Court observed as under:

“3. Right of a party to invoke Section 311 Cr.P.C at any stage of the proceeding has to be tested as against prejudice if any that is going to be caused to the accused.

Names of the above three witnesses are not found at any stage of the investigation and they were also not disclosed by the petitioner in her evidence. It is contended by the petitioner's counsel that K.Saritha accompanied the petitioner to the police station at the time of giving report to the police and that the police recorded her statement under Section 161 Cr.P.C also and that in spite of it, she was not shown as witness for the prosecution and her statement under Section 161 Cr.P.C was removed by the police. This submission of the petitioner's counsel is nothing but a cock and bull story which has no basis in the record. Neither P.W-1 stated so in her evidence nor the record has any indication about the same. It is further contended by the petitioner's counsel that names of the above three witnesses were kept as secret by the defacto-complainant as there is every likelihood of the accused influencing those witnesses. This is what is prohibited in a criminal trial. The accused cannot be put to surprise by bringing names of witnesses and witnesses as and when the prosecution or the defacto-complainant wants to introduce. In a fair criminal trial the defacto-complainant as well as the prosecution has to disclose the entire prosecution evidence that is proposed to be let in during trial and furnish copies of documents relating to the said witnesses to the accused before starting of trial. In the absence of the same, the prosecution cannot be permitted to examine surprise witnesses or secret witnesses to the detriment or to the prejudice of the defence case. In the light of the above discussion, the lower Court rightly dismissed the petition filed by the Assistant Public Prosecutor under Section 311 Cr.P.C. There is no infirmity in the order passed by the lower Court muchless any miscarriage of justice flowing from it."

33. In **Laveti Kamala**⁴, the High Court of Andhra Pradesh at Hyderabad had an occasion to examine the scope and ambit of Section 311 of Cr.P.C. In the said case also, prosecution has filed an application under Section 311 of Cr.P.C. requesting the Court to summon two additional witnesses instead of listed witnesses. The High Court held as under:

“7. Apropos the other impugned order in crl. M. P. 1929 of 2000, the prosecution seeks to examine two persons as additional witnesses who are the legal heirs of the two deceased list witnesses of the case. Since both the list witnesses died during the pendency of the proceedings that cannot be a ground for requesting the Court to examine the witnesses who are now proposed to be examined. The previous statements of these witnesses have not been recorded obviously for the reason that there was no opportunity to examine those witnesses by the investigating Agency during the course of the investigation. Merely because two of the list witnesses died their legal heirs cannot be the relevant witnesses in the case. In that view of the matter the request of the prosecution to examine those witnesses appears to be quite unreasonable. I therefore see no illegality or material irregularity that has been committed by the Court below in having refused to consider the request of the prosecution to examine the additional witnesses under Section 311 of Cr. P. C. For the foregoing reasons the impugned order in crl. M. P. 1929 of 2000 cannot be legitimately set aside.”

34. In **Sankaran**⁵, the Madras High Court had an occasion to examine the scope of Section 311 of Cr.P.C. and held as under:

“9. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that in a case of misappropriation filed by the petitioner-prosecution having exhausted the opportunity afforded for it for examination of its witnesses, at the fag end of the trial it has filed a petition under Section 311 of Cr.P.C. for examination of four witnesses as additional evidence to prove the entrustment of the provisions with the respondents.

10. It would be argued on the part of the petitioner-prosecution that these four witnesses sought to be examined as additional evidence are the authors of the records which have to be proved before the Court and it should be done only through them and these witnesses are material witnesses. The further argument of the petitioner-prosecution is that since the documents which are sought to be marked through these witnesses are already forming part of the documents filed in the court along with the charge sheet and therefore, no prejudice would be caused to the accused in permitting the petitioner-prosecution to examine these witnesses as additional evidence.

11. On the other hand on the part of the respondent it would be argued that after the lapse of ten years the petitioner-prosecution has come forward to examine these witnesses as additional evidence as though at the time when they filed the charge sheet and the documents they were not aware of the situation, which cannot be proper ground and therefore, the learned special Judge has dismissed the said petition on ground that the prosecution has come forward seeking to examine these witnesses who have not been examined during investigation nor their statements recorded and the reasons for not examining the witnesses during the time of investigation has not also been

given by the Investigating Officer but only by the Public Prosecutor who has nothing to do regarding the examination of witnesses and since the Investigating Officer has been satisfied himself with the witnesses cited in the list of witnesses to prove the entrustment it is not up to the Public Prosecutor now to come forward to say that what evidence was earlier collected are inconsistent and the Court should permit them to examine these witnesses as additional evidence.”

35. On the other hand, the learned Public Prosecutor has relied upon a decision in **Chemo Steels Limited**⁷, wherein the High Court of Andhra Pradesh at Hyderabad had an occasion to deal with the scope of Section 311 of Cr.P.C. and held that a person whose statement under Section 161 Cr.P.C was not recorded cannot be permitted to be examined as witness under Section 311 Cr.P.C is not the ratio in that decision. Even assuming that it is held so in that decision in view of the ratio in *Mohanlal Shamji Soni v. Union of India* [1991 Cri.L.J. 1521] that fact per se cannot be a ground for dismissing a petition under Section 311 Cr.P.C. In fact, in *Bhikya Balu v. State of Andhra Pradesh* [1997 (2) ALD 819] it was held that if the evidence proposed to be adduced appears to be essential to render a just decision in the case, additional witness can be examined, especially when his name was spoken to by the other prosecution witnesses already examined, and if there is nothing to show that the he is planted in the garb of additional witness to support the prosecution case. With the said findings, the High Court has allowed the

application filed under Section 311 of Cr.P.C. permitting the witness, who was not listed by the prosecution, to give evidence.

36. In view of the above stated authoritative pronouncements on legal principle, coming to the case on hand, admittedly, the name of Ms. Y. Pavani, daughter of PW.3 and accused, was not referred to anywhere or at any stage including in the complaint, charge sheet and also statements recorded by the police under Section 161 Cr.P.C. At the cost of repetition, it is trite to note that even PW.3, mother of Ms. Y. Pavani and wife of petitioner - accused, did not speak about the presence of her daughter in her earlier statement.

37. The only ground mentioned in the petition filed under Section 311 of Cr.P.C. by the prosecution is that, Ms. Y. Pavani, was an eye-witness and she was unable to depose earlier and police unable to record her statement since she was staying in the Hostel and she was under the threat of accused. But, PW.3, mother of Ms. Y. Pavani, did not lodge any complaint with the police with regard to the alleged threat. She did not even bring the said fact to the notice of trial Court. The said application was filed after the lapse of six months. There is no supporting evidence to show that Ms. Y. Pavani was an eye-witness. Even, there is no explanation by the prosecution about the police in not recording statement of daughter of PW.3. Thus, there is no explanation, much less plausible explanation offered by the prosecution for non-examination of Ms. Y. Pavani. In view of the same and also the principle laid down in the aforesaid decisions, the

impugned order in Crl.M.P. No.153 of 2019 is also liable to be quashed.

38. Accordingly, the Criminal Petition Nos.828 and 945 of 2020 are allowed, and the impugned orders, both dated 16.12.2019 passed by the trial Court in Crl.M.P. Nos.154 and 153 of 2019 in S.C. No.12 of 2014 respectively, are hereby quashed.

As a sequel, miscellaneous petitions, if any, pending in the Criminal Petitions shall stand closed.

09th November, 2020

Note: L.R. copy may be marked
(B/O.) Mgr

K. LAKSHMAN, J

