

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.720 of 2018

Arising Out of PS. Case No.-50 Year-2005 Thana- PATNA CITY CHOWK District- Patna

1. Munna Yadav, son of Sharma Nand Yadav, Resident of Kachighat, P.O. - Jahuganj, P.S. - Chowk, District - Patna.
2. Soni Yadav, son of Laxmi Gope @ Lakshmi Prasad Yadav, Resident of Langur Gali, P.O. - Jhauganj, P.S. - Chowk, District - Patna.

... .. Petitioner/s

Versus

1. The State Of Bihar
2. Manoj Kumar Yadav @ Manoj Kumar, son of Biraj Kishore Resident of Village - Puwagali, P.S. - Chowk, District - Patna.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Ms. Vaishnavi Singh, Adv.
For the Opposite Party No.1:		Mr.Akhileshwar Dayal, APP
For the Opposite Party No.2:		Mr. Santosh Kumar Singh, Adv.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

5 06-07-2022 Heard learned counsel for the petitioners, learned counsel for the informant-opposite party no.2 and learned APP for the State.

Petitioners in the present case are aggrieved by and dissatisfied with the order dated 02.06.2018 passed by learned 6th Additional District and Sessions Judge, Patna City in Sessions Trial No.48(A) of 2007 arising out of Chowk P.S. Case No.50 of 2005 by which the application filed on behalf of the informant-opposite party no.2 for recalling a witness (PW-6) namely Manoj Kumar Gupta @ Pappu Gupta has been allowed by the learned trial court.



It appears on perusal of the records that the informant filed an application after discharge of P.W.-6 for recalling him with a purpose to declare him hostile and to cross-examine him by the prosecution. A reading of the petition (Annexure-2) would show that PW-6 was examined in course of trial and in course of his examination-in-chief while this witness supported the prosecution case and named all the participating accused, on the point of identification of the accused Soni Yadav this witness falsely named him Jitendra, an another accused who was not in dock. In front of PW-6 it was only the accused Shyam Babu Yadav and co-accused Soni Yadav in the dock. The informant claimed that PW-6 resiled from his earlier version, he is fully known to the accused Soni Yadav but he wrongly named him as Jitendra the another accused. The informant claimed in his petition that the witness has turned hostile, therefore, he should be recalled.

The application preferred on behalf of the informant was contested by the accused persons-petitioners. It is submitted that the provision of Section 311 Cr.P.C. is not meant to give an opportunity to the either parties to fill in the gap of the prosecution case. It is only when the court finds that recall is necessary in the interest of justice or to remove any vagueness



in the evidence of the witness, such recall is permissible.

The learned trial court in its order impugned in the present revision application in fact simply recorded the stand of the informant as disclosed in his petition and went on to record that PW-6 identified Soni Yadav as accused Jitendra and thereby resiled from his earlier version as this witness is fully known to the identification of the accused Soni Yadav and there is no other person of the name of the said accused of the locality, therefore it is clear that the witness has turned hostile on the point of identification of the accused Soni Yadav.

Learned counsel for the petitioners has submitted before this Court that the impugned order is likely to prejudice the case of the accused-petitioners. The prosecution had not declared PW-6 a hostile witness and at this stage the attempt is only to fill in the gap which is not permissible in the garb of an application under Section 311 Cr.P.C.

Learned counsel for the informant-opposite party no.2 has relied upon a judgment of the Hon'ble Apex Court in the case of **Ratanlal vs. Prahlad Jat & Ors.** reported in **(2017) 9 SCC 340**. Reference has been made to paragraph '17' and '19' of the judgment of the Hon'ble Apex Court and it has been submitted that the recall of PW-6 is necessary in the interest of



justice and to remove the vagueness in the evidence of PW-6.

Learned APP for the State has also opposed this application but by simply endorsing the submissions made on behalf of the informant.

This Court has heard learned counsel for the parties and perused the records as also the judgment cited at the bar. On facts, this Court understands that the application (Annexure-2) was filed in the learned trial court not to remove any vagueness in the deposition of PW-6, it was also not in the interest of justice because the learned trial court could have very well appreciated the evidence of PW-6 and would have determined the issues arising out in course of trial on the basis of the prosecution evidence. What exactly the prosecution wanted is to declare the PW-6 as hostile witness just to disown him which the prosecution had failed to do at the time of evidence of PW-6. The attempt was thus nothing but an effort to fill in the gap of the prosecution case.

In the case of Ratanlal (supra), the Hon'ble Apex Court has reiterated the settled proposition of law with regard to the application of Section 311 Cr.P.C. The Apex Court has in paragraph '17' and '19' of the judgment observed thus:-

“17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder



any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

19. In Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8], this Court has considered the concept underlying under Section 311 as under: (SCC p. 392, para 27)

“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 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.”

At this stage, this Court is reminded of a judgment of the Hon’ble Supreme Court in the case of **Bharat Petroleum Corporation & Anr. Vs. N.R. Vairamani & Anr.** reported in **(2004) 8 SCC 579** in which the Hon’ble Apex Court has put a word of caution while citing the judgments of the Apex Court to support the contention of a party. The Hon’ble Apex Court says that “the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorem nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated.”

This Court finds that the observations of the Hon’ble Apex Court in paragraph ‘17’ and ‘19’ of the said judgment are crystal clear, the determinative factor for exercise of power under Section 311 Cr.P.C. is as to whether it is essential to the just decision of the case. In my opinion to say that declaration of PW-6 as a hostile witness is necessary/essential for a just



decision of the case would amount to suggesting something to the prosecution at this stage by the court or to endorsing their attempt to fill in the gap which is otherwise not permissible in exercise of power under Section 311 Cr.P.C.

In the opinion of this Court the kind of observations given by the learned trial court was not desired and warranted. The trial court had no material before it to say so and this Court understands that the trial court has simply reiterated what has been the statement of the informant in his petition.

This Court, therefore, finds that the impugned order cannot sustain the test of law. The exercise of power by the learned trial court being contrary to the scope and ambit of Section 311 Cr.P.C., this Court sets aside the impugned order and allows the revision application.

This application stands disposed of accordingly.

(Rajeev Ranjan Prasad, J)

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Note: The ordersheet duly signed has been attached with the record. However, in view of the present arrangements, during Pandemic period all concerned shall act on the basis of the copy of the order uploaded on the High Court website under the heading 'Judicial Orders Passed During The Pandemic Period'.

