

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.891 of 2016

Jayanta Behera and others

Petitioners
....
Mr. S. Mohanty, Advocate

-versus-

State of Orissa

Opp. Party
....
Mr. J. Katikia, AGA

**CORAM:
JUSTICE CHITTARANJAN DASH**

**ORDER
14.10.2022**

Order No.

05. 1. Learned counsel for the Petitioners is present.
2. By means of this application, the Petitioners seeks to challenge the order dated 9th March, 2016 passed by the learned Additional Sessions Judge, Athagarh in S.T. Case No.223 of 2013 whereby the learned court below allowed the prosecution to examine the brother of the deceased who appeared to be a material witness in connection with the case where the accused Petitioners are alleged to have been committed the offences under Sections 498-A/304-B/306/34 IPC and Section 4 of the D.P. Act.
3. Having regard to the fact that there appears several circumstances within the knowledge of the witness in question who is none but the brother of the deceased, allowing the examination of such witness in the opinion of the learned court appear relevant that apparently does not call for an interference., Allahabad High Court in ***Bheem Singh Vrs. State of U.P through Secretary Home, Govt. of U.P. Lucknow*** summarized the Law in respect to Section 311 Cr.P.C referring to the principles enunciated by the Apex Court as under:

“Section 311 is manifestly in two parts, the first part of the Section has given discretion to the Court and enables it any stage of an inquiry, trial, or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person 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 of the Section is mandatory and imposes an obligation on the Court, to do one of aforesaid three things if the new evidence appears to it essential to the just decision of the case. In order to appreciate the submission of the applicant it will be worthwhile to refer to Section 311 of the Code, which reads 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 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."

In this backdrop, it would be useful to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 of the Code, wherein the Apex Court highlighted the basic principles which are to be borne in mind while dealing with an application under Section 311 of the Code. In *Natasa Singh v. C.B.I.*, (2013) 5 SCC 741, the Apex Court, after referring the various decisions of the Supreme Court, has observed and held as under:

(SCC, p. 748-49, para 15,16) "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 311 of Cr.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 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 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 interest 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 jeopardised. 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." (Vide: *Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.*¹, *Zahira Habibulla H. Sheikh & Anr. V. State of Gujarat & Ors.* 2. *Zahira Habibullah & Anr. State of Gujarat & Ors.* 3. *Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.)*, 4. *Vijay Kumar v. State of U.P. & Anr.* 5. *and Sudevanand v. State through C.B.I.*⁶)

21. In *Rajaram Prasad Yadav v. State of Bihar*, (2013) 14 SCC 461, the Supreme Court held as under: (SCC, p. 473-74, para 17) "17. 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:

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 Cr. PC. 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 Cr.PC. 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 Cr. PC. 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 Cr.PC. 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. In *Swapan Kumar Chattarjee v CBI*, (2019) 14 SCC 328, the Supreme Court observed as under: (SCC p. 331, para 11 & 12) "11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of

successive applications for recall of a witness under this provision."

23. Section 311 of the Code gives a wide power to the court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers a wide discretion on the court to act as the exigencies of justice require. The word "just" cautions the court against taking any action which may result in injustice either to the accused or to the prosecution. Where the court exercises the power under the second part, the inquiry cannot be as to 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. [Vide: **Jamatraj Kewalji Govani v. The State of Maharashtra**, AIR 1978 SC 178 (3 Judge Bench)].

24. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the court. But the second part does not allow any discretion; it binds the court to examine fresh evidence and the only condition prescribed is that this evidence must be essential to the just decision of the case. 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. (Vide: **Ram Jeet and 8 others v. State of U.P.**, AIR 1958 All 439)

25. In the case of The State represented by the **Deputy Superintendent of Police v. Tr. N. Seenivasagan**, in this case, the prosecution had sought to produce a copy of the Approval order granted the authority on record and had it marked as an exhibit in the evidence, for which purpose witnesses were sought to be recalled. In its applications, the prosecution noted that the witnesses were required to mark the relevant

document, which was crucial for the decision of the case. It was submitted that Exhibit. P-1 the order of sanction itself shows that the order was issued by the Board and at the time of filing the charge sheet the Investigation Officer had obtained the Approval Order of the Board but not submitted it before the court. With great respect to the judgment of the Apex Court, which does not help the applicant in the present case, because the documentary evidence had been obtained at the time of filing of charge sheet which had not been filed before the court.”

4. As discussed in the preceding paragraph, from the impugned order it seems the witness sought to be examined is the brother of the deceased who might throw light on the circumstances in order to bring clarity as regards the allegations against the deceased touching her chastity and integrity as complained of by the in-laws. Consequently, keeping in view the facts and circumstances and the position of law in mind there appears substantial material necessitating examination of the witness. It is, however, made clear that the examination of the witness concerned shall under no circumstances be stretched on facts beyond his direct knowledge on the issue in specific and the court would be free to deal with the same according to law while appreciating the testimony of the witness in the given fact and circumstances after hearing the parties on the point. The impugned order, therefore, requires no interference in the present. The CRLMC accordingly stands dismissed.

(Chittaranjan Dash)
Judge