

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3338 of 2019

Saiful Mandal & Ors.

Vs

Fortaj Sk. & Anr.

For the Petitioners : Mr. Anshunath Chakraborty.

For the State : Ms. Baisali Basu.

For the Opposite Party No. 1 : None.

Hearing concluded on : 06.03.2024

Judgment on : 16.04.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 17.10.2019 passed by the Learned Additional Chief Judicial Magistrate, Kalna in G.R. Case No. 272/2004 arising out of P.S. Case No. 60/04 dated 27.05.2004 under Sections 326/34 of I.P.C.
2. The petitioners state that one Sk. Rasidul filed a written complaint before the Officer-in-Charge Monteswar at 1 p.m. on 27.05.2004. After receiving the alleged complaint, the Officer-in-Charge started Monteswar P.S. Case No. 60 of 2004 dated 27.05.2004 under Sections 326/34 I.P.C. The investigation resulted in a final report (**FRT**).
3. Vide order dated 19.04.2005 upon hearing the 'Naraji' petition, the Learned S.D.J.M. directed S.P. Burdwan for reinvestigation in the above case.
4. The reinvestigation ended in a **charge sheet** but the trial has not been concluded till date.
5. After completion of the examination all of the prosecution witness and examination of the petitioners under Section 313 of the Code of Criminal Procedure Code, the case was fixed for argument.
6. The petitioner states that after a long gap, the opposite party has filed an application under Section 311 of the Cr.P.C.
7. The Learned Judge was pleased to hear the application and pass an order to the recall the prosecution witnesses on 17.10.2019.

8. It is submitted by the petitioner that the Learned A.C.J.M. failed to appreciate that the provision under Section 311 of the Code of Criminal Procedure cannot be invoked to fill up the lacuna in the prosecution case.
9. Hence the revision.
10. **The order under revision is reproduced here:-**

“GR 272 of 04

Order No. 67
Dt. 17-10-2019

Ld. APP is present.

Out of 3 accused on CB, one accused namely Saiful Mondal is present and the other two accused are absent by petition.

This is a fifteen years old case. At the stage of argument, on 15-10-2019, Ld. APP filed a petition u/s 311 of Cr.P.C. praying for recall of PW1 as well as for examination of CSWs 7, 8, 9 being medical witnesses and of Sri R. Bhattacharya Ex-SDPO, Kalna, being the last IO of the instant case. Having heard both the sides at length on 15-10-2019, I take up the record today for passing order.

The main dispute between the adversaries, relates to summoning CSWs 7, 8 and 9, all being medical witnesses. The record shows that evidence of CSWs 7 to 9 and 11 to 12 stood closed on 10-06-2019. But it is clear from the order sheet that the said witnesses were not summoned in compliance with the immediately preceding order dt. 17-04-2019. Hence closure of evidence owing to non-appearance of witnesses on the appointed day imports manifest irregularity. Further, as contended by Ld. Counsel for the accused, Ld. APP submitted on 17-04-2019 that he did not intend to produce his remaining witnesses. But it is settled position of law that “irresponsible act on the part of the Government Advocate, who gave up witness when he was in attendance, cannot be allowed to be made a ground so as to curtail the powers of the court u/s 311 IPC or to defeat the cause of justice.” [Bhim Sen Vs State of H.P. 2004 Cr.L.J

3992]. Although in the instant case, the witnesses in question were not in attendance, the irresponsible submission of Ld. APP purportedly made on 17-04-2019 cannot, in the same analogy, tie the hands of the court. The paramount question to be considered is whether the testimony of the witnesses in question appears to this court to be essential to the just decision of the case. This is a case of acid burning and given the fact that there is already evidence of ocular witnesses including that of the victim on record, the evidence of medical witnesses seems to be indispensable for effective adjudication of the case. It is a cardinal principle of jurisprudence that procedural law is the handmaid of substantive justice and none can have a vested right in the form of procedure. Hence, in spite of the question of delay, I think that summoning the medical witnesses at this stage, for the sake of just and proper decision of the case, will not cause substantial prejudice to the accused persons specially when they will have the opportunity to present their face of the case in the form of cross examination or if required, by producing D.Ws.

The prosecution seeks recall of PW1, the victim, for ascertaining whether he has some medical documents still lying in his custody. The reason does not seem convincing to me and hence I cannot allow such prayer for recall.

As for CSW 16 Sri Rabindra Nath Bhattacharya, I observe that it was he who submitted the CS dt. 22.10.2005. Hence his evidence seems to be essential for effective adjudication of the case as well. It appears from the record that he was never summoned before closure of evidence on 10-06-2019. Hence in the light of the discussion already made herein above, I am inclined to call CSW 16 as well for giving his testimony.

It may be noted in the end the trial of this case commenced from **24-03-09**, therefore, abundant precaution must be taken to get the four witnesses in question viz. CSWs 7, 8, 9 and 16 summoned and examined as expeditiously as possible.

Fixing 18-11-2019 for S.R./evidence of CSW 7.
 19-11-2019 for S.R./evidence of CSW 8.
 20-11-2019 for S.R./evidence of CSW9 and
 21-11-2019 for S.R./evidence of CSW 16.

Accordingly, B.C.II to issue summons forthwith.

D/C by me

**Sd/-
A.C.J.M., Kalna.”**

11. In *Godrej Pecific Tech. Ltd. vs Computer Joint India Ltd., in Criminal Appeal No. 1181 of 2008 (arising out of SLP (Crl.) No. 6396 of 2006), decided on July 30, 2008*, the Supreme Court held:-

“6. In this context, reference may be made to Section 311 of the Criminal Procedure 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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case.”

7. 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 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 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.

8. *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.*

9. *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.

10. 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* (1967 (3) SCR 415).

11. The above position was highlighted in *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.* [(2006) 3 SCC 374].”

12. In ***Varsha Garg vs The State of Madhya Pradesh & Ors., in Criminal Appeal No. 1021 of 2022 with MA 1144 of 2022 in SLP (Crl) No. 2239 of 2022, decided on August 08, 2022,*** the Supreme Court held:-

“28. Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue

this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court “may”:

- (i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and*
- (ii) Recall and re-examine any person who has already been examined.*

This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court “shall” summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case”. Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

29. *The first part of the statutory provision which uses the expression “may” postulates that **the power can be exercised at any stage of an inquiry, trial or other proceeding.** The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “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**”. **Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.***

30. *A two judge Bench of this Court in **Mohanlal Shamji Soni** (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed:-*

“16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the

desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.”

Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the “evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means.” In that context the Court observed:-

“18 ...Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by 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 rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”

31. *Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra**, the Court held:-*

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of

the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.”

32. *The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.*

39. *In the decision in **Zahira Habibullah Sheikh (5) v. State of Gujarat**, which was more recently reiterated in **Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.**, the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court’s determination of the application should only be based on the test of the essentiality of the evidence. It noted that:-*

*“28. 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.*

(emphasis supplied)

40. The right of the accused to a fair trial is constitutionally protected under Article 21. However, in **Mina Lalita Baruwa** (supra), while reiterating **Rajendra Prasad** (supra), the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In **Rajendra Prasad** (supra), the Court had held that:-

“8. 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. 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.** After all, function of the criminal 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.”

(emphasis supplied)

In the present case, the importance of the decoding registers was raised in the examination of PW-41. Accordingly, the decoding registers merely being additional documents required to be able to appreciate the existing evidence in form of the call details which are already on record but use codes to signify the location of accused, a crucial detail, which can be decoded only through the decoding registers, the right of the accused to a fair trial is not prejudiced. The production of the decoding registers fits into the requirement of being relevant material which was not brought on record due to inadvertence.

41. Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on **Swapan Kumar** (supra), a two judge Bench decision of this Court, to argue that the application should

not be allowed as it has been made at a belated stage. The Court in **Swapan Kumar** (supra) observed:-

“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.”

In the present appeal, the argument that the application was filed after the closure of the evidence of the prosecution is manifestly erroneous. As already noted above, the closure of the evidence of the prosecution took place after the application for the production of the decoding register and for summoning of the witness under Section 311 was dismissed. Though the dismissal of the application and the closure of the prosecution evidence both took place on 13 November 2021, the application by the prosecution had been filed on 15 March 2021 nearly eight months earlier. As a matter of fact, another witness for the prosecution, Rajesh Kumar Singh, was also released after examination and cross-examination on the same day as recorded in the order dated 13 November 2021 of the trial court.

42. The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in **Zahira Habibulla H. Sheikh** (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses

under Section 311 CrPC explained the role of the court, in the following terms:-

“43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence- collecting process. **They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency.** The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.”

(emphasis supplied)

Further, in **Zahira Habibullah Sheikh (5)** (supra), the Court reiterated the extent of powers under Section 311 and held that:-

“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.”

(emphasis supplied)

43. The Court while reiterating the principle enunciated in **Mohanlal Shamji Soni** (supra) stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:-

“44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. **The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some**

evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

(emphasis supplied)

While reiterating the decisions of this Court in **Karnel Singh v. State of M.P., Paras Yadav v. State of Bihar, Ram Bihari Yadav v. State of Bihar** and **Amar Singh v. Balwinder Singh** this Court held that the court may interfere even at the stage of appeal:-

“64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the so- called findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals.”

- 13. In *Satbir Singh vs State of Haryana & Ors., in Criminal Appeal No. Of 2023 @ out of SLP (Crl.) No. 1258 of 2022, decided on August 29, 2023*, the Supreme Court held:-**

“9. Section 311 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "CrPC") has engaged this Court's attention before. We will advert to a few decisions of recent vintage. While overturning an order of the High Court allowing an application for recall of a witness, which was rejected by the trial Court, this Court held as under, in *Ratanlal v Prahlad Jat*, (2017) 9 SCC 340:

'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- 1

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. 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.

18. In Vijay Kumar v.State of U.P.[Vijay Kumar v.State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240], this Court while explaining scope and ambit of Section 311 has held as under: (SCC p. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of [CrPC] and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially

for reasons stated by the court and not arbitrarily or capriciously."

19. In *Zahira Habibullah Sheikh (5) v. State of Gujarat* [*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."

20. In *State (NCT of Delhi) v. Shiv Kumar Yadav* [*State (NCT of Delhi) v. Shiv Kumar Yadav*, (2016) 2 SCC 402 : (2016) 1 SCC (Cri) 510], it was held thus: (SCC pp. 404g-405a) *"Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall.*

Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of

justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined."

21. The delay in filing the application is one of the important factors which has to be explained in the application. In Umar Mohammad v. State of Rajasthan [Umar Mohammad v. State of Rajasthan, (2007) 14 SCC 711 : (2009) 3 SCC (Cri) 244] , this Court has held as under: (SCC p. 719, para 38)

"38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention.

It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in- chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed."

10. *In Manju Devi v State of Rajasthan, (2019) 6 SCC 203, this Court emphasized that a discretionary power like Section 311, CrPC is to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, **whilst also ensuring no prejudice is caused to anyone.** A note of caution was sounded in Swapan Kumar*

Chatterjee v Central Bureau of Investigation, (2019) 14 SCC 328 as under:

'10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

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 vide 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.'

11. In Harendra Rai v State of Bihar, 2023 SCC OnLine SC 1023, a 3-Judge Bench of this Court was of the opinion that Section 311, CrPC should be invoked when 'it is essential for the just decision of the case'."

14. From the materials on record it appears that:-

- i) The case was initiated on 27.05.2004 under Sections 326/34 of IPC.
- ii) The evidence in the trial was closed on 10.06.2019.
- iii) The petition under Section 311 Cr.P.C. has been filed on 15.10.2019 (a delay of about four months) at the stage of argument.

15. Though the trial in this case has proceeded for a long period, the Learned trial Court has rightly considered that the testimony of the said witnesses (medical witnesses) in question is essential to the just decision of the case, this being a case of **acid attack** and the evidence (ocular witnesses) including that of the victim already being on record. It is also on record that no summons was issued in the first place upon these witnesses who are all vital witnesses to the case.

16. That being the case, the order under revision requires no interference, being in accordance with law.

17. CRR 3338 of 2019 is dismissed.

18. The order dated 17.10.2019 passed by the Learned Additional Chief Judicial Magistrate, Kalna in G.R. Case No. 272/2004 arising out of Monteswar P.S. Case No. 60/04 dated 27.05.2004 under Sections 326/34 of I.P.C., **is affirmed.**

- 19. The trial court is directed to make all efforts to dispose of the case within six months from the date of communication of this order.**
- 20.** All connected applications, if any, stand disposed of.
- 21.** Interim order, if any, stands vacated.
- 22.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 23.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)