

**.IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side**

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 846 of 2022

With

CRAN 7/2023

Sandhyarani Das

Versus

The State of West Bengal & Another

For the Petitioner : Mr. Satadru Lahiri, Adv.
Mr. Safdar Azam, Adv.
Mr. Syed Wasim Faruque, Adv.
Mr. Jyotirmoy Talukder, Adv.

For the Opposite Party No. 2 : Mr. Swapan Kumar Mallick, Adv.
Mr. Amitava Karmakar, Adv.

For the State : Md. Anwar Hossain, Adv.

Heard on : 11.04.2025

Judgment on : 25.06.2025

Ajay Kumar Gupta, J:

1. Petitioner being the complainant has filed this Criminal Revisional application under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 (in short 'CrPC') challenging the correctness, legality and propriety of the impugned order dated 18th February, 2022 passed by the Learned Judicial Magistrate, 1st Court, Contai, Purba Medinipur in connection with G.R. Case No. 83 of 2006 arising out of Contai Police Station Case No. 28/06 dated 15.02.2006 under Sections 323/324/506/34 of the Indian Penal Code, 1860 whereby the Learned Magistrate allowed the prayer of the accused/opposite party no. 2 to recall the prosecution witnesses being P.Ws. 1, 2, 3 and 5 at a belated stage i.e., after 7 to 14 years for only re-examination to contradict and confront the witnesses by the accused persons.

2. Originally, a complaint was lodged by the father of the present petitioner, namely, Asim Kumar Das (since deceased) with an allegation, inter alia, that on 8th February, 2006, while he was on his way to visit a nearby doctor, the accused/opposite party no. 2 abused him using filthy languages and threatened him with dire consequences on the way. Again, on 14th February, 2006 at about 6:30 hour, while the complainant went to arrange for masons, the opposite party no. 2 and another accused (since deceased) assaulted

him with Lathi, Katan etc. and attempted to kill him due to previous grudge. However, local people rescued the complainant and he was treated in Contai Sub-Divisional Hospital and, thereafter, at NRS Medical Collage and Hospital.

3. On the basis of said complaint, an FIR was registered being Contai Police Station Case No. 28/06 dated 15.02.2006 under Sections 323/506/307/34 of the Indian Penal Code, 1860 and caused investigation.

4. Upon completion of investigation, the Investigating Officer submitted charge sheet being Charge Sheet No. 52/06 dated 31st March, 2006 against the accused/opposite party no. 2 and another individual for commission of offence punishable under Sections 323/324/506/34 of the IPC. During investigation, the Investigating Officer has recorded the statement of the witnesses under Sections 161 of the CrPC and also collected the injury report. On the basis of charge sheet submitted by the Investigating Officer, the Learned Trial Court framed charge against the accused/opposite party no. 2 and another for commission of offence punishable under Sections 323/324/506/34 of the IPC and trial commenced.

5. P.W. 1 was examined on 6th December, 2008 and cross-examined at length by all accused persons. P.W. 2 was examined in

full and discharged on 18th June, 2009. P.W. 3 was examined and discharged on 16th August, 2010. P.Ws. 4 and 5 were examined and discharged on 16th May, 2014. Finally, several dates were fixed between 6th May, 2015 to 14th June, 2019 for adducing evidence of C.S.W. 10 and C.S.W. 11, who were the treating doctors of the complainant. However, despite multiple opportunities, the prosecution failed to ensure their presence on the dates fixed by the Learned Trial Court. Ultimately, on 14th June, 2019, the Learned Trial Court closed the evidence of the prosecution as several opportunities were already given to the prosecution and fixed 19.06.2019 for examination of the accused under Section 313 of CrPC. Though, two witnesses i.e. C.S.Ws. 10 and 11 were vital witnesses for proper and effective adjudication of the case.

6. Feeling aggrieved and dissatisfied with the approach of the Learned Trial Court for closing the evidence of vital witnesses, the complainant filed a Revisional application being CRR No. 1691 of 2019 before this Hon'ble High Court. Upon hearing the parties on 27.09.2021, a Co-Ordinate Bench of this Court set aside the aforesaid impugned order dated 14.06.2019 and directed the Learned Trial Court to fix a date for recording of evidence of the remaining prosecution witnesses by November 2021 and, thereafter, to examine the accused under Section 313 of the CrPC and permit him to adduce

defence witnesses if he wants and to complete the entire process of criminal prosecution by 15th February, 2022 considering the long pendency of the case. Several dates were fixed by the Learned Trial Court till 15.02.2022 for adducing the evidence of C.S.Ws. 10 to 13 but they failed to appear before the Learned Trial Court.

7. In the meantime, accused/opposite party no. 2 filed an application under Section 311 of the CrPC to recall the P.Ws. 1, 2, 3 and 5 on 15.02.2022 on the ground that certain questions are left to put to them which needed to be contradicted or confronted with their earlier evidence.

8. The Learned Trial Court, after hearing both the parties, casually and mechanically allowed the application for recalling of the P.Ws. 1, 2, 3 and 5 and fixed dates on 23rd March, 2022, 25th March, 2022 and 28th March, 2022 for re-examination of P.Ws. 1, 2, 3 and 5 respectively simply citing reason that it is necessary to come to a just decision after expiry of 7 to 14 years of their examination and cross examination in full. Hence, this application.

SUBMISSION ON BEHALF OF THE PETITIONER:

9. Learned counsel appearing on behalf of the petitioner vehemently argued and submitted on two-fold grounds. **Firstly**, the Learned Trial Court ignored to follow the mandatory order passed by

the Hon'ble Co-Ordinate Bench of this Hon'ble High Court on 27.09.2021 in Revisional application, by fixing a particular period for disposal of the case.

10. Secondly, the Learned Trial Court undermined and frustrated the order passed by allowing the recall of prosecution witnesses at a belated stage after expiry of 7 to 14 years of their examinations and cross-examinations without any valid or sufficient reason. Accused/opposite party no. 2 did not even disclose the particular reason for further cross-examination of the witnesses on recall.

11. The Learned Trial Court, without properly assessing the reason or properly explaining on behalf of the accused/opposite party no. 2, allowed the application, completely mis-construed the direction issued by the Hon'ble Co-Ordinate Bench and also avoided settled principle of law for recalling of the witnesses and ignored nefarious conduct of the accused/opposite party only to frustrate and to make delay the trial which is not at all permissible in law. The trial started in the year 2006 and, the frivolous application was filed in the year 2022 by the opposite party no. 2 to re-examine the P.Ws. 1, 2, 3 and 5 only on the ground that few questions were left and that is required to cross-examine.

12. Learned counsel further submitted that by catena of judgments passed by the Hon'ble Supreme Court as well as various High Courts, time and again it has been reiterated that the power under Section 311 of the CrPC can be invoked very sparingly, only in exceptional circumstances to meet the ends of justice. However, the Learned Trial Court has recorded his satisfaction in a perfunctory manner, by citing for reaching a just decision and allowed the recall application casually without fulfilling the conditions stipulated under Section 311 of the CrPC.

13. Learned counsel has placed reliance on judgments to support of his contention that the recalling application cannot be allowed mechanically or casually without sufficient reason or grounds. No specific reason was mentioned in the application filed by the accused/opposite party no. 2. Despite the said facts, the Learned Trial Court allowed the said application for recalling of P.Ws. 1, 2, 3 and 5 only to re-examine at the belated stage i.e., after 7 to 14 years of their full examination, cross-examination and discharge for contradiction and confrontation. Those judgments are as under: -

i. *Ratanlal Vs. Prahlad Jat and Others*¹ particularly paragraph nos. 16 to 24;

ii. *T.S.K. Ashwin Kumar Vs. Tubati Srivalli and Others*² particularly paragraph nos. 6 to 15;

iii. *Rajaram Prasad Yadav Vs. State of Bihar & Anr.*³ particularly paragraph nos. 8, 13, 14, 17, 23 and 24;

iv. *State (NCT of Delhi) Vs. Shiv Kumar Yadav and Anr.*⁴ particularly paragraph nos. 8, 27 and 29.

14. In ***Ratanlal v. Prahlad Jat and Others***, the Hon'ble Supreme Court held in paragraph nos. 16 to 24 as under: -

“16. That brings us to the next question as to whether the High Court was justified in setting aside the order of the Sessions Judge and allowing the application filed by PWs 4 and 5 for their re-examination. For ready reference Section 311 CrPC 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 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

¹ (2017) 9 SCC 340;

² (2021) 15 SCC 395;

³ (2013) 14 SCC 461;

⁴ (2016) 2 SCC 402;

evidence appears to it to be essential to the just decision of the case.”

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.*

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 there against 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.”

22. *Coming to the facts of the present case, PWs 4 and 5 were examined between 29-11-2010 and 11-3-2011. They were cross-examined at length during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has recorded a finding that they were not under any pressure while recording their evidence. After a passage of 14 months, they have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over. We do not find any reasons to allow such an application. The Sessions Judge, therefore, was justified in rejecting the application. In our view, the High Court was not right in setting aside the said order.*

23. *In the result, the appeal succeeds and it is accordingly allowed. The order of the High Court in Prahlad Jat v. State of Rajasthan [Prahlad Jat v. State of Rajasthan, Criminal Misc. Petition No. 1679 of 2012, order dated 22-5-2012 (Raj)], dated 22-5-2012 is hereby set aside. All pending applications also stand disposed of.*

24. *We find from the records that after the order of the High Court, PWs 4 and 5 were re-examined before the trial court. The trial court is directed to proceed with the*

matter without taking into consideration the evidence of PWs 4 and 5 recorded after the order of the High Court.”

15. In **T.S.K. Ashwin Kumar v. Tubati Srivalli and Others**, the Hon’ble Supreme Court held in paragraph nos. 6 to 15 as under:

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“6. Apart from the party/parties responsible for protracting the proceedings, it is unfortunate that the State, the trial court as well as the High Court have also omitted to take note of the time-frame fixed by this Court. The State represented by the Prosecutor filed an application in Criminal MP No. 56 of 2020 for recalling PWs 1 to 4 for further examination and for the issue of summons to several other persons. This application was filed on the ground that a supplementary charge-sheet was filed later.

7. But the trial court dismissed the application filed by the Prosecutor on 23-1-2020 on the ground that the supplementary charge-sheet related only to A-4 to A-6 and that inasmuch as the charges against A-4 to A-6 have been quashed, the reason for seeking recall was not convincing. The trial court also recorded that PWs 1 to 4 were supposed to speak about their grievances at length even when they were examined in the first instance and that therefore the petition

filed by the prosecution was only an attempt to delay the proceedings.

8. *As against the well-considered order of the trial court, the 1st respondent wife moved a petition before the High Court under Section 482CrPC. This petition was entertained by the High Court and stay of further proceedings was granted. The High Court should not have granted such a stay [Tubati Srivalli v. T.S.K. Ashwin Kumar, 2020 SCC OnLine TS 1513] on 7-2-2020, in the teeth of the order passed by this Court on 16-7-2019 [Tubati Srivalli v. State of Telangana, 2019 SCC OnLine SC 1933] for the disposal of the proceedings within two months.*

9. *It is relevant to point out that the 1st respondent wife was PW 1 and she was examined-in-chief on 9-10-2019 and 15-10-2019 long after the filing of the supplementary charge-sheet. She was cross-examined on 18-11-2019, 20-11-2019 and 28-11-2019. After conclusion of such extensive cross-examination, the prosecution reported no re-examination.*

10. *Similarly, the 1st respondent's mother was examined as PW 2. Her chief examination took place on 22-10-2019 and her cross-examination took place on 9-12-2019. There was no re-examination. The father of the 1st respondent was examined as PW 3*

and the brother of the 1st respondent was examined as PW 4. These two witnesses were also examined during the very same period of time, namely, October-December 2019.

11. *It appears that after the recording of evidence of all prosecution witnesses was over, the trial court closed the evidence on the side of the prosecution on 8-1-2020 and posted the case for questioning under Section 313CrPC on 17-1-2020. On 30-1-2020, the questioning under Section 313 was also over.*

12. *Therefore, it is surprising that the prosecution filed an application in Criminal MP No. 56 of 2020 for recalling PWs 1 to 4, on the basis of the supplementary charge-sheet. PWs 1 to 4 are not strangers or third parties. All of them are aggrieved persons and hence they should have spoken about all the facts even in the first instance. After having prevented the 1st petitioner husband from travelling to USA, by inviting an order on consent before this Court, neither the parties nor the prosecution should give any room for suspicion that they are protracting the proceedings.*

13. *Our attention was drawn to the certified copies of the deposition of PWs 1, 2 and 4, where the trial court has recorded the demeanor of these witnesses. We do*

not wish to make any observation regarding the same, lest it may prejudice the outcome of the trial.

14. *Suffice it to point out that any attempt to overreach an order of this Court passed by consent should be discouraged and deprecated. Therefore, the order of stay [Tubati Srivalli v. T.S.K. Ashwin Kumar, 2020 SCC OnLine TS 1513] granted by the High Court is liable to be vacated and the trial directed to be proceeded. The contempt petition, in our considered view can be closed without going into the rival claims.*

15. *Accordingly, the special leave petition and the contempt petition are disposed of to the following effect:*

15.1. *The contempt petition is closed without going into the rival contentions.*

15.2. *The special leave petition is allowed and the order of stay of further proceedings granted [Tubati Srivalli v. T.S.K. Ashwin Kumar, 2020 SCC OnLine TS 1513] by the High Court in Tubati Srivalli v. T.S.K. Ashwin Kumar [Tubati Srivalli v. T.S.K. Ashwin Kumar, 2020 SCC OnLine TS 1513] is set aside.*

15.3. *The trial court is directed to proceed further with the trial of the criminal case, from the stage where it got struck due to the stay order [Tubati Srivalli v. T.S.K. Ashwin Kumar,*

*2020 SCC OnLine TS 1513] of the High Court.
The trial court may endeavour to dispose of
the matter within a period of two months.”*

16. In ***Rajaram Prasad Yadav v. State of Bihar and Another***, the Hon’ble Supreme Court held in paragraph nos. 8, 13, 14, 17, 23 and 24 as under: -

“8. Pursuant to the said issue, it is stated that the father of the appellant was beaten with bamboo sticks, injuring him seriously. In connection with the said incident, Bindeshwar Yadav filed a complaint before the police on 7-6-2007, leading to the registration of the FIR on the same date in Khizersarai Police Station in Case No. 78 of 2007. Subsequently, the second respondent came forward with a petition dated 24-8-2007, under Section 311 CrPC and sought for permission for his re-examination. For the same purpose, the Additional Public Prosecutor also filed a petition on 5-12-2007, in the above applications. The trial court passed a common order on 18-11-2009, dismissing both the applications and posted the case for evidence of the investigation officers and the doctors on 18-12-2009. The second respondent approached the High Court by filing the present Criminal Misc. Case No. 12454 of 2010, in which the impugned order was passed by the High Court on 9-12-2010 [Suresh Prasad v. State

of Bihar, Criminal Misc. Petition No. 12454 of 2010, order dated 9-12-2010 (Pat)].

13. *Having heard the learned counsel for the respective parties and having bestowed our serious consideration to the issue involved, we find force in the submission of the counsel for the appellant, as the same merits acceptance. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:*

Section 311, Code of Criminal Procedure

“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.”

Section 138, Evidence Act

“138.Order of examinations. —*Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. —*The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”*

14. *A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a prefix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of*

Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

17. *From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC 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 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*

17.3. *If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*

17.4. *The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

17.5. *The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*

17.6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7. *The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

17.8. *The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.*

17.9. *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

17.10. *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting*

errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

17.12. *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

17.13. *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

17.14. *The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution*

and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

23. *We find that the factors noted by the trial court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 CrPC. We do not find any bona fides in the application of the second respondent, while seeking the permission of the court under Section 311 CrPC 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. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30-5-2007, which resulted in the registration of the FIR in Khizersarai Police Station Case No. 78 of 2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 CrPC, by way of an afterthought. If really there was a threat to his life at the instance of the appellant 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 appellant, 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 second respondent herein 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 respondents filed under Section 311 CrPC. In our considered opinion, the trial court, had the opportunity to observe the demeanour of the second respondent, 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.

24. *In the light of the above conclusion, applying the various principles set out above, we are convinced that the order of the trial court impugned before the High Court did not call for any interference in any event behind the back of the appellant herein. The appeal, therefore, succeeds. The order impugned dated 9-12-2010, passed in Suresh Prasad v. State of Bihar [Suresh Prasad v. State of Bihar, Criminal Misc. Petition No. 12454 of 2010, order dated 9-12-2010 (Pat)] of the High Court is set aside. The order of the trial court stands restored. The trial court shall proceed with the trial. The stay granted by this Court*

in the order dated 7-3-2011, stands vacated. The trial court shall proceed with the trial from the stage it was left and conclude the same expeditiously, preferably within three months from the date of receipt of the copy of this order.”

17. In **State (NCT of Delhi) v. Shiv Kumar Yadav and Another**, the Hon’ble Supreme Court held in paragraph nos. 8, 27 and 29 as under: -

“8. The learned counsel for the respondent-accused supported the impugned order and submitted that though the previous counsel had cross-examined the witnesses, he had not asked relevant questions nor given suggestions which were required to be given. He placed reliance on Kishore Chand v. State of H.P. [Kishore Chand v. State of H.P., (1991) 1 SCC 286 : 1991 SCC (Cri) 172] , Hardeep Singh v. State of Punjab [Hardeep Singh v. State of Punjab, (2009) 16 SCC 785 : (2010) 2 SCC (Cri) 355] , Ram Chander v. State of Haryana [Ram Chander v. State of Haryana, (1981) 3 SCC 191 : 1981 SCC (Cri) 683] , State of Rajasthan v. Ani [State of Rajasthan v. Ani, (1997) 6 SCC 162 : 1997 SCC (Cri) 851] , Ritesh Tewari v. State of U.P. [Ritesh Tewari v. State of U.P., (2010) 10 SCC 677 : (2010) 4 SCC (Civ) 315] , Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira [Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira, (2012) 5 SCC

370 : (2012) 3 SCC (Civ) 126] , *Rajeswar Prasad Misra v. State of W.B.* [*Rajeswar Prasad Misra v. State of W.B.*, AIR 1965 SC 1887 : (1965) 2 Cri LJ 817 : (1966) 1 SCR 178] , *Jamatraj Kewalji Govani v. State of Maharashtra* [*Jamatraj Kewalji Govani v. State of Maharashtra*, AIR 1968 SC 178 : 1968 Cri LJ 231 : (1967) 3 SCR 415] , *Raghunandan v. State of U.P.* [*Raghunandan v. State of U.P.*, (1974) 4 SCC 186 : 1974 SCC (Cri) 355] , *Shailendra Kumar v. State of Bihar* [*Shailendra Kumar v. State of Bihar*, (2002) 1 SCC 655 : 2002 SCC (Cri) 230] , *Satyajit Banerjee v. State of W.B.* [*Satyajit Banerjee v. State of W.B.*, (2005) 1 SCC 115 : 2005 SCC (Cri) 276] , *UT of Dadra & Nagar Haveli v. Fatehsinh Mohansinh Chauhan* [*UT of Dadra & Nagar Haveli v. Fatehsinh Mohansinh Chauhan*, (2006) 7 SCC 529 : (2006) 3 SCC (Cri) 300] , *Iddar v. Aabida* [*Iddar v. Aabida*, (2007) 11 SCC 211 : (2008) 1 SCC (Cri) 22] , *Himanshu Singh Sabharwal v. State of M.P.* [*Himanshu Singh Sabharwal v. State of M.P.*, (2008) 3 SCC 602 : (2008) 2 SCC (Cri) 106] , *Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.* [*Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.*, (2008) 11 SCC 108 : (2009) 2 SCC (Cri) 455] , *Hanuman Ram v. State of Rajasthan* [*Hanuman Ram v. State of Rajasthan*, (2008) 15 SCC 652 : (2009) 3 SCC (Cri) 1149] , *Sudevanand v. State* [*Sudevanand v. State*, (2012) 3 SCC 387 : (2012) 2 SCC (Cri) 179] , *Mohd. Hussain v. State (Govt. of NCT of Delhi)* [*Mohd.*

Hussain v. State (Govt. of NCT of Delhi), (2012) 2 SCC 584; (2012) 1 SCC (Cri) 919; AIR 2012 SC 750], *J. Jayalalithaa v. State of Karnataka* [J. Jayalalithaa v. State of Karnataka, (2014) 2 SCC 401; (2014) 1 SCC (Cri) 824] and *Salamat Ali v. State* [Salamat Ali v. State, 2010 SCC OnLine Del 1343; (2010) 174 DLT 558].

27. *It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be*

justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. 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, we do not find any ground to justify the recall of witnesses already examined.

29. *We may now sum up our reasons for disapproving the view of the High Court in the present case:*

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel

were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on

account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

Finally, learned counsel prayed for setting aside of the impugned order passed by the Learned Trial Court.

SUBMISSION ON BEHALF OF THE OPPOSITE PARTY NO. 2:

18. Per contra, learned counsel appearing on behalf of the accused/opposite party no. 2 strongly opposed the prayer made by the learned counsel appearing on behalf of the petitioner and further submitted that the Learned Trial Court has rightly allowed the application and permitted the accused/opposite party no. 2 to cross-examine the P.Ws. 1, 2, 3 and 5 citing the reason that it is necessary to come to a just decision and it is a purely discretionary power of the Learned Trial Court for interest of justice.

19. Therefore, the Learned Trial Court has allowed such prayer as stipulated for recalling of witnesses under Section 311 of the CrPC. The judgments relied by the learned counsel appearing on behalf of the petitioner are not at all applicable in the present case as

the accused person had few questions left to be asked to the prosecution witnesses which are relevant for coming to a final conclusion of the case. Accordingly, the opposite party no. 2 filed such application and same was allowed with costs of Rs. 800/-. The costs to be paid to the P.Ws. 1, 2, 3 and 5 by paying them Rs. 200/- only each as they will turn up to depose before the Learned Court.

SUBMISSION ON BEHALF OF THE STATE:

20. Learned counsel appearing on behalf of the State submitted that the Trial court has allowed the application for just decision of the case as such same is not required to be interfered by this court.

21. Now, the question arises from the contentions of the parties that as to whether the Learned Trial Court was rightly allowed the application for recalling of the P.Ws. 1, 2, 3 and 5 with cogent reason after lapse of 7 to 14 years of their examination and cross-examination only on the ground that the said application is needed to be necessary to come to a just decision?

22. Before dealing with the case on merit, this Court would like to set out the provisions stipulated under Section 311 of the CrPC as follows: -

“311. Power to summon material witness, or examine person present. —Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

23. Upon meticulous perusal of the aforesaid provisions, the principles laid down by the Hon’ble Supreme Court as aforesaid and the application filed by the accused/opposite party no. 2 for recalling of the witnesses, this Court finds that the application lacks sufficient particulars and justification.

24. Accused/opposite party no. 2 only indicated that the doctors and Investigating Officer have not been examined and some questions were inadvertently omitted during the cross-examination of P.Ws. 1, 2, 3 and 5 for the purpose of contradiction and confrontation. The prayer for recall is, thus, required only for further cross-examination as the same is essential to the just decision of the case otherwise the accused/opposite party no. 2 will be highly prejudiced.

25. However, as it is evident from the petition, the accused/opposite party no. 2 filed the recalling application only to re-examine the P.Ws. 1, 2, 3 and 5 after lapse of 7 to 14 years without explaining any valid reasons or the questions which are left out during their previous cross-examination. Without considering these facts, the Learned Trial Court allowed the application for recalling of the P.Ws. 1, 2, 3 and 5 for re-examination without knowing the particular questions, which were left out by the accused/opposite party no. 2 while cross-examining the aforesaid prosecution witnesses.

26. Despite, this lack of clarity and absence of a well founded explanation, the Learned Trial Court allowed the application for recalling the prosecution witnesses to come to a just decision based on a judgment placed by the accused/opposite party in the case of ***Rajesh Agarwal v. State of West Bengal***⁵.

27. Upon careful perusal of the evidences of P.Ws. 1, 2, 3 and 5, this Court finds after full examination and cross-examination, their evidence was closed and they were discharged. No specific questions stipulated either in the application or indicated during the hearing. The Learned Trial Court had also not indicated the valid reasons for

⁵ (2011) 2 C Cr LR (Cal) 676

recalling of the aforesaid prosecution witnesses after long gaps of about 7 to 14 years.

28. In **Rajaram Prasad Yadav v. State of Bihar and Another**, the Hon'ble Supreme Court held in paragraph no. 14 as under: -

“14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a prefix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be

in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

29. At the same time, the Hon’ble Supreme Court further laid down the following principles while dealing with an application under

Section 311 of the CrPC read along with Section 138 of the Evidence Act, 1872 after conspectus consideration of various earlier decisions of the Hon'ble Supreme Court: -

17.1. *Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

17.2. *The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*

17.3. *If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*

17.4. *The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

17.5. *The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case,*

unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7. *The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

17.8. *The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.*

17.9. *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

17.10. *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to*

any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

17.12. *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

17.13. *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

17.14. *The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the*

victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

30. Therefore, while allowing the application filed by the accused/opposite party no. 2, the Learned Trial Court completely disregarded the principal objectives with which the provisions of Section 311 of CrPC has been brought into statute. While allowing the recall application, the Learned Trial Court did not consider purpose of filing application by the accused/opposite party no. 2 after lapse of 7 to 14 years of examination of P.Ws. 1, 2, 3 and 5. The impugned order does not reflect any of the issues or reasons save and except stating it is for just decision of the case, mechanically and without assigning any valid reasons, allowed the said application, which is not at all permissible in the law after such long delay of 7 to 14 years of examination and cross examination of the prosecution witnesses.

31. This Court is conscious that the accused person has the right to cross-examine the prosecution witnesses and same is the Constitutional right of an accused in a criminal trial. But in the present case the accused/opposite party wanted to re-examine the P.

W. nos. 1, 2, 3 and 5 after elapse of 7 to 14 years of their full examination and cross-examination.

32. In my considered view, the Learned Trial Court failed to appreciate the actual purpose and prospect of Section 311 of the CrPC while allowing the application for recall of P.Ws. 1, 2, 3 and 5 after such long delay of 7 to 14 years. No specific grounds or questions were brought before the Learned Trial Court by the accused/opposite party no. 2 either in an application or at the time of hearing to satisfy why further cross examination is required. Furthermore, the Learned Trial Court also failed to understand the reason for filing such application after long gaps of 7 to 14 years of closing of evidence. To fulfil the lacuna, such prayer cannot be allowed by the Learned Trial Court in its discretionary power. Ample opportunity was given to the accused/opposite party no. 2 while cross-examining of those prosecution witnesses which is reflected from the evidence itself. The law is well-settled that discretion under Section 311 of CrPC is to be exercised sparingly and only to prevent miscarriage of justice, not to fill up lacunae in the defence case. The record clearly indicates that the accused had full and adequate opportunity to cross-examine the said prosecution witnesses and no grievance was raised at the time of discharge. Therefore, permitting re-examination at this stage would amount to an abuse of process of

law and would cause grave prejudice to the complainant and prosecution, ultimately resulting miscarriage of justice. Therefore, the Learned Trial Court had not exercised its discretionary power under Section 311 of CrPC judiciously and with great care and consciously as such it is a totally perversity and against the law. Therefore, the said impugned order is liable to be set aside.

33. Accordingly, **CRR 846 of 2022** is, thus, **allowed**. Connected application being **CRAN 7 of 2023** is also, thus, disposed of.

34. Consequently, the impugned order dated 18th February, 2022 passed by the Learned Judicial Magistrate, 1st Court, Contai, Purba Medinipur in connection with G.R. Case No. 83 of 2006 arising out of Contai Police Station Case No. 28/06 dated 15.02.2006 under Sections 323/324/506/34 of the Indian Penal Code, 1860 is hereby set aside. The Learned Trial Court is directed to take appropriate steps and make further endeavour to conclude the trial as expeditiously as possible in accordance with law.

35. Let a copy of this Judgment be sent to the Learned Court below for information.

36. Interim order, if any, stands vacated.

37. Case Diary, if any, be returned to the learned counsel for the State.

38. Parties shall act on the server copies of this Judgment uploaded on the website of this Court.

39. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)