

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE UDAY KUMAR**

CRR 446 of 2024

**Milan Thapa @ Majhi @ Hari Majhi
-Vs.-
The State of West Bengal and Anr.**

For the Petitioner : Mr. Arnab Saha
Mr. Md. Shoaib Akhtar

For the State : Mr. Nilay Chakraborty
Mr. Sourav Ganguly

Hearing concluded on : 23.07.2025

Judgment on : 25.07.2025

Uday Kumar, J.:-

1. The present revisional application, CRR 446 of 2024, has been preferred by the petitioner, Milan Thapa @ Majhi @ Hari Majhi, assailing the legality, regularity, and propriety of Order No. 49 dated October 09, 2024, passed by the Learned Additional District and Sessions Judge, Kurseong, in Session Case No. 08 of 2020. By the impugned order, the Learned Trial Court rejected the petitioner's prayer to recall and re-examine witnesses (PW1, PW3, PW4) under Section 311 of the Code of Criminal Procedure, 1973 (now Section 348 of the Bharatiya Nagarik Suraksha Sanhita 2023). The petitioner contends that this rejection is

mechanical, causes serious prejudice, denies his fundamental right to a fair trial, and breaches settled positions of law.

- 2.** The genesis of the case lies in Mirik Police Station Case No. 18 of 2017, dated March 06, 2017, initiated on a complaint by opposite party no. 2, Praduman Tanti. It was alleged that the petitioner took his son, Basu Tanti, without the consent of his lawful guardian and kept him in Sikkim. Consequently, a case under Sections 363 (kidnapping) and 370 (trafficking) of the Indian Penal Code, 1860, was registered against the petitioner. Following an investigation, Charge Sheet No. 06 of 2018 dated February 5, 2018, was filed. The trial, Session Case No. 08 of 2020, under Sections 363/370 of the Indian Penal Code, 1860, subsequently commenced. It is an admitted fact that all prosecution witnesses have already been examined in the said sessions case. Furthermore, the statement of the accused under Section 313 Cr.P.C. was recorded on August 19, 2024, and the trial was thereafter fixed for adducing defence evidence.
- 3.** Subsequently, the petitioner filed two applications on September 9 and September 20, 2024, requesting the recall and re-examination of Prosecution Witnesses 1, 3, and 4. These applications meticulously specified precise questions to be posed to the witnesses, primarily aimed at clarifying crucial details surrounding the complaint's origin, exploring whether the complainant had previously asked the accused to educate his son, and inquiring about attempts to withdraw the case. The petitioner asserted that these questions were essential to bring important, relevant, and material facts onto the record that could not be

elicited previously due to "haphazard" trial proceedings or "inadvertence."

4. The Learned Trial Court, vide the impugned Order No. 49 dated October 09, 2024, rejected these applications. The grounds for rejection articulated by the Learned Trial Court were primarily:

- i. that all prosecution witnesses had already been examined;
- ii. that the statement of the accused under Section 313 Cr.P.C. had been recorded; and
- iii. that the applications were merely an attempt to "justify the reply of the question given by the accused during his examination under Section 313 Cr.P.C."

5. The Trial Court further concluded that the application was made to "fulfil the lacunae either in the prosecution evidence or in the defence evidence." The Learned Trial Court, finding the petition "devoid of merit," proceeded to reject it, holding that such an application should only be allowed if necessary for a just decision.

6. Mr. Arnab Saha, Learned Advocate appearing for the petitioner, vehemently assailed the impugned order, submitting that it is erroneous both in law and on facts, arbitrary in nature, and has prejudiced his fundamental right to a fair trial, guaranteed under Article 21 of the Constitution of India, besides violating established legal principles. He further argued that the trial proceedings were conducted in a "haphazard manner," leading to crucial questions being overlooked.

7. Mr. Saha emphasized the broad powers conferred upon courts by Section 311 Cr.P.C. and Section 165 of the Indian Evidence Act, 1872,

which mandate judges to actively participate in uncovering the truth and allow for the recall of witnesses "at any stage" if their evidence is essential for a just decision. In support of his contention regarding the complementary nature of Section 311 Cr.P.C. and Section 165 of the Indian Evidence Act, 1872, Mr. Saha relied on paragraphs 44, 45, 46, and 70 of the Hon'ble Supreme Court's decision in *Zahira Habibulla H. Sheikh and Ors. Vs. State of Gujarat and Ors.* (MANU/SC/0322/2004). He also underscored that the petition ought to be allowed for the sake of ensuring a fair trial, citing paragraphs 8, 9, and 11 of *Himanshu Singh Sabharwal vs. State of M.P. and Ors.* (MANU/SC/1193/2008).

8. Furthermore, Mr. Saha underscored the extensive and obligatory nature of these powers to ensure justice, even if it means recalling witnesses after the conclusion of evidence or arguments. He contended that the Learned Trial Court committed a grave error by failing to appreciate the true import and wide amplitude of Section 311 Cr.P.C. He argued that Section 311 permits a party to recall any witness whose testimony is material for the case, and such an application can be made at any stage of the proceedings, provided the Court deems it necessary for the discharge of substantial justice. Learned Counsel emphasized that by allowing this application, no prejudice would be caused to the prosecution; rather, it would significantly assist the Court in arriving at a conclusive decision and in maintaining the fairness of the trial.
9. It was further submitted by the Learned Advocate for the petitioner that specific questions, which were vital for the defence and necessary to bring important and relevant facts onto the record, were precisely

provided to the Trial Court. He contended that if these questions are not allowed to be put to the concerned PWs, the petitioner would suffer irreparable prejudice, as those facts are material and not external to the evidence already adduced. Therefore, Mr. Saha argued that the Trial Court's order failed to uphold principles of natural justice, as it denied him the opportunity to be heard and to present crucial evidence, thereby misinterpreting his true intention, which was not to cause delay or fill lacunas but to ensure all aspects of the matter came to light.

- 10.** Conversely, Mr. Niloy Chakraborty, Learned Public Prosecutor, appearing for the State, vehemently opposed the petitioner's prayer. He submitted that the application was made at a very late stage, specifically after the examination of the accused under Section 313 Cr.P.C. He contended that it was an afterthought, intentionally made to fill up perceived lacunae in the defence evidence, and was designed to cause delay in the proceedings. According to Mr. Chakraborty, the questions sought to be put were irrelevant and would not materially advance the petitioner's case. In response to the judgments cited by the petitioner, Mr. Chakraborty argued that the power under Section 311 Cr.P.C. is indeed discretionary and should not be exercised routinely. He submitted that the exercise of this power solely depends on the discretion of the Trial Court, and in the present case, the Trial Court had rightly rejected the application. He concluded that there was no patent irregularity, illegality, or impropriety in the impugned order, and thus, the instant petition deserved to be summarily dismissed.

11. On the basis of the aforesaid materials and the submissions of the Learned Advocates for both parties, the pivotal question that needs to be decided by this Court is:

"Whether the Learned Additional District and Sessions Judge at Kurseong erred in rejecting the Petitioner's application under Section 311 of the Code of Criminal Procedure, 1973, for recalling and re-examining prosecution witnesses, thereby denying the Petitioner a fair trial and violating settled legal principles?"

12. To answer this crucial question, it is essential to first consider the provisions of Section 311 Cr.P.C., 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 re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

13. A plain reading of Section 311 Cr.P.C. reveals two distinct parts. The first part confers a discretionary power on the Court, indicated by the word "may," allowing it to summon, examine, or recall any witness at any stage. The second part, however, imposes a mandatory duty on the Court, signified by the word "shall," to summon or recall a person if "his evidence appears to it to be essential to the just decision of the case." This mandatory aspect underscores the paramount importance of securing all relevant evidence for a fair and conclusive trial.
14. The Trial Court's reliance on the completion of prosecution evidence and the Section 313 Cr.P.C. statement as a bar is directly challenged by the phrase "at any stage" in Section 311 Cr.P.C. As per settled law, this

phrase grants wide power that can be exercised even after the evidence is closed, or arguments concluded, if the evidence is essential for a just decision.

15. The scope and object of Section 311 Cr.P.C. have been extensively deliberated upon by the Hon'ble Supreme Court of India in numerous pronouncements. *In Zahira Habibulla H. Sheikh and Ors. Vs. State of Gujarat and Ors. (supra)*, often referred to as the "Best Bakery case," the Hon'ble Supreme Court emphatically emphasized that a criminal court is not a mere spectator but must actively participate to ascertain the truth. It highlighted that the duty of a presiding judge is to explore every avenue to discover the truth and advance the cause of justice, being expressly invested with wide powers under Section 165 of the Indian Evidence Act to put questions to witnesses. This position was unequivocally reaffirmed in *Himanshu Singh Sabharwal vs. State of M.P. and Ors. (supra)*, where the Court reiterated the imperative of a fair trial, which is an integral part of Article 21 of the Constitution.
16. The Hon'ble Supreme Court, in *Rajaram Prasad Yadav v. State of Bihar & Anr.* (2013) 14 SCC 461, while discussing the wide power under Section 311 Cr.P.C., observed that it should be exercised with the primary objective of finding out the truth and ensuring that a judgment is not rendered on inconclusive facts, thereby preventing a failure of justice. The Court clarified that the expression "at any stage" implies that the power can be invoked even after the closure of evidence or arguments, or when the case is posted for judgment, if it is essential for the just decision. This principle was echoed in *Natasha Singh v. CBI*

(State) (2013) 5 SCC 741 and *U.T. of Dadra & Haveli & Anr. v. Fatehsinh Mohansinh Chauhan* (2006) 7 SCC 529, where the Court stressed the court's duty to secure all necessary evidence for a just decision. The principles laid down in *Chootey Badri Prasad vs. State of U.P.* (2006) and *P. Chhaganlal Daga vs. M. Sanjay Shaw* (2004) further reinforce that this power can be exercised even after arguments are concluded or the case is posted for judgment, if the evidence is deemed essential.

17. The argument often raised by the prosecution, and indeed taken by the Learned Trial Court in this case, regarding the application being an attempt to "fill lacunae," needs careful consideration. While Section 311 Cr.P.C. cannot be used to fill a lacuna in the prosecution's case in the sense of a deliberate omission or to re-examine witnesses merely to cover up previous lapses, it is crucial to understand that the power is primarily for the benefit of the Court to arrive at the truth. As held in *Manju Devi v. The State of Rajasthan* (2019) 15 SCC 377, the discretionary power under Section 311 is meant to keep the record straight and clear any ambiguity in evidence, without causing prejudice. The ultimate touchstone for exercising the power under Section 311 Cr.P.C. is whether the evidence sought to be adduced appears to be essential for the just decision of the case. The recent Supreme Court pronouncement in *Harendra Rai v. State of Bihar* (2023) further reiterated that Section 311 Cr.P.C. should be invoked when "it is essential for the just decision of the case."
18. In the present matter, the petitioner has not only cited specific reasons for recalling the witnesses but has also provided precise questions

intended to be put to PWs 1, 3, and 4. These questions relate to fundamental aspects of the complaint, including its genesis, the alleged consent, and any attempts at withdrawal—facts that are directly relevant to the charges under Sections 363/370 IPC. The Learned Trial Court's mechanical rejection, based on the mere fact that prosecution evidence was closed and Section 313 Cr.P.C. statement recorded, without adequately appreciating the necessity of the proposed questions for a fair trial, appears to be an overly restrictive application of its powers. The "lacunae" argument, in this context, seems to have been misapplied, as the petitioner's intention appears to be to clarify existing ambiguities or introduce facts crucial for his defence, rather than to deliberately fill a void caused by his own negligence.

- 19.** The Trial Court's strict interpretation of "filling lacunae" is often a point of contention. While Section 311 cannot be used to permit a party to plug deliberate gaps or overcome negligence, its primary objective is to enable the Court to arrive at a just decision by bringing all necessary evidence on record. If the evidence is essential for the court to discover the truth, even if it incidentally benefits one party by covering a perceived "lacuna," it should generally be allowed. The Hon'ble Supreme Court has repeatedly clarified that this power is for the benefit of the court and for rendering a just decision.
- 20.** The fundamental right to a fair trial, enshrined under Article 21, demands that the accused be given every reasonable opportunity to present his defence. If relevant and material questions could not be put to the witnesses during their initial examination due to inadvertence, or

if new facts emerged during the Section 313 Cr.P.C. examination that necessitate clarification from earlier witnesses, denying such an opportunity would certainly prejudice the accused and potentially lead to a miscarriage of justice. The Learned Trial Court's observation that the petition was "devoid of merit" without a comprehensive analysis of how the proposed questions would impact the just decision of the case appears to be an error in the exercise of its judicial discretion.

- 21.** In any event the impugned order also fails to uphold principles of natural justice by denying the Petitioner the opportunity of being heard, thereby violating his right to a fair and impartial hearing under Article 21 of the Constitution of India. Furthermore, the Learned Trial Court erred in interpreting the Petitioner's intention as merely to "lengthen the period of the Trial proceedings" or "fulfil the lacuna in the defence evidence." The sole intention, as argued, was to bring every aspect of the matter to light and exercise the right to be heard. Thus, the impugned order is described as a "mechanical exercise of law" by the Learned Trial Court, which failed to consider established legal provisions and exhibited a biased and myopic understanding of the facts and relevant law.
- 22.** Given the wide amplitude of Section 311 Cr.P.C. and the mandatory duty cast upon the Court to summon or recall a witness if their evidence is essential for a just decision, I find that the Learned Trial Court has committed a serious error in rejecting the petitioner's application. The questions proposed are not frivolous or irrelevant; they go to the root of the allegations and could potentially shed crucial light on the veracity of the prosecution's case.

- 23.** In view of the foregoing facts, arguments, and legal precedents, I am of the considered opinion that the Learned Additional District and Sessions Judge at Kurseong erred significantly in rejecting the petitioner's application under Section 311 Cr.P.C. The rejection was a mechanical application of law that failed to appreciate the wide, discretionary, yet essential powers vested in the court under Section 311 Cr.P.C. and Section 165 of the Indian Evidence Act. The Court's denial of the request to recall and re-examine witnesses, especially when specific questions were provided that could be crucial for ascertaining the truth and ensuring a fair trial, constitutes a violation of the petitioner's fundamental rights and amounts to a miscarriage of justice. The intention of the petitioner was not to cause delay or fill lacunas but to ensure that all relevant facts are brought on record for a just decision, which is the very essence of a fair trial.
- 24.** Therefore, the impugned order No. 49 dated October 09, 2024, passed by the Learned Additional District and Sessions Judge, Kurseong, suffers from legal infirmity and deserves to be set aside. The rejection of the petitioner's application under Section 311 Cr.P.C. has resulted in a denial of a fair opportunity to the accused to present his defence effectively, which is detrimental to the principles of a fair trial.
- 25.** Consequently, the revisional application, CRR 446 of 2024, is allowed.
- 26.** The impugned Order No. 49 dated October 09, 2024, passed by the Learned Additional District and Sessions Judge, Kurseong, in Session Case No. 08 of 2020, is hereby set aside.

- 27.** The Learned Additional District and Sessions Judge, Kurseong, is directed to allow the petitioner's application under Section 311 Cr.P.C. and to recall Prosecution Witnesses 1, 3, and 4 for re-examination, specifically allowing the petitioner to put the questions as enumerated in his applications dated September 09, 2024, and September 20, 2024. This exercise shall be conducted expeditiously, preferably within a period of four weeks from the date of communication of this order.
- 28.** The Learned Trial Court shall thereafter proceed with the trial in accordance with law.
- 29.** The interim order/orders, if any, granted earlier, stands vacated.
- 30.** The Trial Court Records (TCR), if any, shall be sent down to the Learned Trial Court at once.
- 31.** The Case Diary, if any, be returned forthwith.
- 32.** The department concerned is directed to communicate this judgment to the Learned Additional District and Sessions Judge at Kurseong and the Officer-in-Charge, Mirik Police Station, for necessary action.
- 33.** Urgent Photostat certified copy of this order, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard

(Uday Kumar, J.)