06.10.2026
Item no. 1
Ct. No.237
AKG

C.R.R. 3080 of 2026
Rahul Mahato
Vs.
The State of West Bengal & Ors.

Mr. Sabyasachi Banerjee, Sr. Adv.
Ms. Nahid Ahmed

...for the Petitioner

Mr. Kallol Kr. Basu,
Ms. Deblina Bhattacharjee

...for the State

Mr. Ayan Bhattacharjee, Sr. Adv.
Mr. Soumya Basu Roy Chowdhury

...for O.P. Nos. 5 to 8

The petitioner challenges the order dated April 22, 2026, passed by the learned Additional Sessions Judge, 4th Court, Howrah, in Sessions Trial No. 75 of 2021, whereby the learned Additional Sessions Judge rejected an application filed by the prosecution for recalling Prosecution Witness No. 10 (P.W. 10).

The facts leading to the passing of the impugned order may be summarised as follows:

In connection with B. Garden Police Station Case No. 48 of 2021, registered under Sections 341/326/307/195A/506/34 of the Indian Penal Code, 1860, read with Sections 25/27 of the Arms Act, 1959, a seizure list was prepared by the Investigating Agency on April 22, 2021. The following articles were recorded as having been seized:

> ***"Article seized- Two sealed container (Plastic) Containing two fired bullet head (one bullet each container which was operated on 21.04.2021 during OT of patient Bhola Ray from his body)."***

P.W. 10 and P.W. 11 signed the said seizure list as witnesses.

After commencement of the trial, during the examination of P.W. 10 on April 10, 2026, the seizure list dated April 22, 2021, was tendered and shown to him. P.W. 10 identified and proved his signature appearing on the seizure list.

Thereafter, a green-coloured envelope was opened in Court in the presence of the witness. From the said envelope, a plastic container with a pink cap, covered with cello tape, was taken out and tendered to P.W. 10. From the said container, two fired bullet jackets, marked as B1 and B2 by the Forensic Science Laboratory, along with two bullets, also marked as B1 and B2 by the Forensic Science Laboratory, were taken out and tendered to P.W. 10.

Upon seeing the articles, the witness stated:

> ***"These are the similar types of bullets which were recovered"***

The said two bullets and the two bullet jackets were marked with objection.

Thereafter, the cross-examination of the said witness commenced. However, his cross-examination could not be completed on that date.

It appears that, on the very same date, i.e., April 20, 2026, an application was filed by the prosecution for recalling the said witness, contending, inter alia, that, by mistake, a different container had been shown to him instead of the two containers which had actually been seized in the course of the investigation.

The cross-examination of P.W. 10 resumed on the next date, i.e., April 22, 2026. Upon completion of his cross-examination, P.W. 10 was discharged on the same date.

The learned Sessions Judge, however, by the impugned order dated April 22, 2026, rejected the application for recall on the ground that the prosecution should not be permitted to fill up a lacuna.

It is, however, significant to note that the next prosecution witness, namely, P.W. 11, was examined on April 28, 2026. In the course of his examination, a green-coloured envelope was opened in his presence. From the said envelope, two plastic containers with white caps, covered with cello tape, were taken out and tendered to him. From the said two plastic containers, two bullet heads, marked as D1 and D2 by the Forensic Science Laboratory, were taken out and tendered to the witness.

Container D1 bore a label containing the signature of P.W. 11. Upon seeing the same, P.W. 11 stated:

> **"These are the two bullets which were recovered. This is my signature on this label of container D1. I had signed on the same."**

Mr. Sabyasachi Banerjee, learned senior advocate appearing for the petitioner, submits that, having regard to the facts and circumstances of the case, the learned Additional Sessions Judge ought to have allowed the application for recall. It is submitted that, from the nature and tenor of the evidence adduced by P.W. 11, who was one of the seizure witnesses, it is evident that P.W. 10 had been shown an incorrect container.

It is further submitted that the aforesaid fact stands corroborated by the evidence of P.W. 10 himself, who merely deposed that the bullets shown to him were similar to the bullets seized, whereas P.W. 11, during his examination, categorically identified the bullets shown to him as the actual seized articles.

It is further submitted that the application filed by the prosecution was not captioned under any specific provision of the Code of Criminal Procedure, 1973. Nevertheless, the learned Sessions Judge had ample power to recall the witness under Section 165 of the Evidence Act, 1872.

Mr. Ayan Bhattacharjee, learned senior advocate appearing for opposite party nos. 5 to 8, on the other hand, submits that the power to recall a witness under Section 311 of the Code of Criminal Procedure, 1973, is an exceptional power and ought to be exercised sparingly.

In the present case, it is submitted that P.W. 11 was shown the correct two containers and that his evidence is already on record. There is, therefore, no justification for recalling P.W. 10 merely to show him the said two containers again. Mr. Bhattacharjee submits that the entire exercise would be redundant.

Drawing the attention of the Court to Section 278(2) of the Code of Criminal Procedure, 1973, Mr. Bhattacharjee argues that Section 311 cannot be invoked for deleting any evidence, or any part thereof, which has already come on record. According to him, if P.W. 10 is recalled and examined afresh, it would effectively

result in the deletion or displacement of the evidence already adduced by him.

Mr. Bhattacharjee further submits that, at the time when the application for recall was filed before the learned Sessions Judge on April 20, 2026, P.W. 10 had not yet been discharged. The application was, therefore, premature. According to him, a witness who has not yet been discharged cannot be recalled by taking recourse to Section 311 of the Code of Criminal Procedure, 1973.

In support of his submission, Mr. Bhattacharjee has placed reliance upon the judgment reported at **1974 SCC OnLine Cal 139 (*Mukti Kumar Ghosh v. State of West Bengal*)**.

Mr. Bhattacharjee further argues that Section 311 of the Code of Criminal Procedure, 1973, has been incorporated with the object of enabling the Court to bring on record evidence which is necessary for a just decision of the case but which may have been omitted by inadvertence. The said provision, according to him, cannot be invoked for filling up a lacuna in the prosecution case.

It is submitted that the learned Additional Sessions Judge rightly observed that the application was an attempt on the part of the prosecution to fill up a lacuna in its case and, accordingly, rightly rejected the application for recalling P.W. 10.

Mr. Bhattacharjee also submits that, if this Court does not agree with the view expressed by a learned Single Judge of this Court in ***Mukti Kumar Ghosh (supra)***, judicial propriety and consistency require that the matter be referred to a Larger Bench for an authoritative determination of the issue.

In support of his submission, Mr. Bhattacharjee has relied upon the judgment reported at **(2019) 14 SCC 526 (*Om Prakash Agarwal v. Vishan Dayal Rajpoot*)**.

To deal with the contention with regard to filling the lacuna, it is profitable to take note of the judgment of the Supreme Court reported at **(1999) 6 SCC 110 (*Rajendra Prasad v. Narcotic Cell*),** where it has been held as follows:

> "**7.** It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.
>
> **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."

Even the possibility of "filling a lacuna" is not, by itself, an absolute bar to the exercise of power under Section 311 of the Code of Criminal Procedure. In ***Varsha Garg v. State of Madhya Pradesh, (2023) 19 SCC 646***, the Supreme Court clarified that

the mere possibility of filling a loophole in the prosecution case is not, by itself, decisive; the controlling consideration remains whether the evidence sought to be elicited is essential for the just decision of the case.

There cannot be any doubt that the evidence of P.W. 11 makes it clear that, owing to an oversight on the part of the learned Public Prosecutor during the trial of the present case, an incorrect article was shown to P.W. 10. The identity of the actual seized article is a material fact, and its proper identification by the seizure witnesses is crucial. In the present case, the prosecution, on the very same date and with due promptitude, sought to rectify its bona fide and inadvertent mistake. In such circumstances, the learned Trial Court ought to have allowed the application filed by the prosecution, particularly when the interests of the accused could have been adequately protected by affording them a full opportunity to further cross-examine the witness.

As regards the issue whether a witness who has not yet been discharged can be recalled in exercise of the power under Section 311 of the Code, it must be acknowledged that discharge is ordinarily what makes a “recall” necessary in the procedural sense. However, Section 311 contains no express requirement that a witness must first be discharged before such power can be exercised. On the contrary, the power is expressly exercisable “at any stage” of an inquiry, trial or other proceeding. Where circumstances arise during an ongoing examination which render further examination of the witness necessary for a just decision of

the case, the power of the Court under Section 311 cannot be regarded as having been automatically extinguished merely because the witness has not yet been formally discharged. The Court must, in such circumstances, independently apply the test of whether the further examination is essential for a just decision of the case.

Indeed, the proposition that a witness who has not yet been discharged cannot be recalled for further examination would lead to an anomalous result. The facts of the present case themselves illustrate the position. P.W. 10 was examined-in-chief on April 20, 2026. On the very same date, the prosecution filed the application seeking his recall.

The examination-in-chief of P.W. 10 was resumed and completed on April 22, 2026, and his cross-examination was also concluded on the same date. It would, therefore, be wholly artificial to hold that the application seeking recall, having been filed on April 20, 2026, was not maintainable merely because P.W. 10 had not yet been discharged, when the very same application, had it been filed on April 22, 2026, immediately after the conclusion of his cross-examination, would have been maintainable.

To hold otherwise would make the exercise of the power under Section 311 dependent upon the fortuitous timing of the formal discharge of the witness, rather than upon the statutory test of whether the proposed evidence is essential for a just decision of the case.

The ratio of ***Mukti Kumar Ghosh***, therefore, cannot be mechanically extended to a factual situation where the application under Section 311 was made during the continuing examination of the witness and where the proposed further examination is confined to correcting an inadvertent mistake concerning the identity of the seized article.

Accordingly, **CRR 3080 of 2026** is allowed, subject to the following conditions:

(i) P.W. 10 shall be permitted to be further examined only for the limited purpose of identifying the seized articles;

(ii) such further examination shall not be converted into a fresh or unrestricted examination-in-chief;

(iii) the accused shall have full liberty to further cross-examine P.W. 10 on such further evidence; and

(iv) the earlier evidence of P.W. 10 identifying the article previously shown to him shall remain on record and shall not be treated as effaced, withdrawn or obliterated.

Urgent certified *website* copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Kausik Chanda, J.)