Rajesh Kumar vs. State of H.P.

Cr. Revision No. 322 of 2015

Reserved on: 7.10.2026

26.10.2026 **Present**: Mr Sunil Chauhan, Advocate, for the petitioner.

Mr Ajit Sharma, Deputy Advocate General, for the respondent-State.

CrMP No. 4366 of 2026

The petitioner/applicant has filed the present application for examination of the Public Analyst, Kandaghat, in respect of the Analysis Report dated 17.10.2007.

2. It has been asserted that Mr T.K. Sharma, Public Analyst, Kandaghat, had issued a report about sample serial number S/II/2741 of the Local Health Authority dated 17.10.2007. The report was exhibited without summoning the public analyst as a witness. The accused could not avail the opportunity to cross-examine the witness in relation to the contents of the report. The report is erroneous because the sample of the food item (Khoya) was not taken properly, and there is a small margin/difference in the quantity of fat content as per the prescribed standard. The preservative, namely formalin, was added in a lesser quantity than prescribed under the rules, and there is a possibility of the sample getting

spoiled. The cross-examination of the witness is essential for the just decision of the case. The opportunity to cross-examine the witness could not be availed earlier due to sheer inadvertence and ignorance regarding these aspects of the case. Hence, the present application.

3. I have heard Mr Sunil Chauhan, learned counsel for the petitioner/applicant, and Mr Ajit Sharma, learned Deputy Advocate General, for the respondent/ State.

4. Mr Sunil Chauhan, learned counsel for the petitioner/applicant, submitted that the Public Analyst could not be examined before the learned Courts below and his examination is necessary. Therefore, he prayed that the present application be allowed and the Public Analyst be recalled for cross-examination. He relied upon the judgment in ***Ajitsinh Chehuji Rathod Vs. State of Gujarat and another (2024) 4 SCC 453*** in support of his submission.

5. Mr Ajit Sharma, learned Deputy Advocate General, for the respondent/State, submitted that the report was issued in the year 2007. The application has been filed after 19 years. The applicant had ample opportunity to summon and cross-examine the witness before the learned Trial Court and Appellate Court, but he

had not availed this opportunity. The additional evidence can be led at the revisional stage only in rare cases. Therefore, he prayed that the present application be dismissed.

6. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

7. It was laid down by the Hon'ble Supreme Court in ***State of Rajasthan v. Asharam, 2023 SCC OnLine SC 423***, that Sections 311 and 391 of Cr. P.C. deal with the power of the Court to take additional evidence. Section 311 deals with the trial, while Section 391 deals with the appeal. The Appellate Court can examine the evidence, but it does not possess the wide powers conferred upon the Trial Court. It was observed:

> "6. Both Sections 311 and 391 of the Cr. P.C. relate to the power of the court to take additional evidence; the former at the stage of trial and before the judgment is pronounced; and the latter at the appellate stage after judgment by the trial court has been pronounced. It may not be entirely correct to state that the same considerations would apply to both situations, as there is a difference in the stages. Section 311 of the Cr. P.C. consists of two parts; the first gives power to the court to summon any witness at any stage of inquiry, trial or other proceedings, whether the person is listed as a witness, or is in attendance

> though not summoned as a witness. Secondly, the trial court has the power to recall and re-examine any person already examined if his evidence appears to be essential to the just decision of the case. On the other hand, the discretion under Section 391 of the Cr. P.C. should be read as somewhat more restricted in comparison to Section 311 of the Cr. P.C., as the appellate court is dealing with an appeal, after the trial court has come to a conclusion with regard to the guilt or otherwise of the person being prosecuted. The appellate court can examine the evidence in depth and detail, yet it does not possess all the powers of the trial court, as it deals with cases wherein the decision has already been pronounced."

8. It was laid down in ***Sukhjeet Singh v. State of U.P.*, *(2019) 16 SCC 712: (2020) 2 SCC (Cri) 434: 2019 SCC OnLine SC 72*,** that additional evidence can be taken by the Appellate Court if the evidence is necessary for just determination of the case; however, Section 391 cannot be used for retrial. The order should not be made if the party had sufficient opportunities and had not availed those opportunities. It was observed at page 721:

> "**24.** Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in ***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].*** Hidayatullah, J., speaking for the Bench, held that a wide discretion is

conferred on the appellate courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because *there would be a failure of justice without it*. The following was laid down in paras 8 and 9: (AIR p. 1892)

> "*8*. ... Since a wide discretion is conferred on appellate courts, the limits of that court's jurisdiction must obviously be dictated by the exigency of the situation and fair play, and good sense appear to be the only safe guides. There is no doubt some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There, the resemblance ends, and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.
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> *9*. Additional evidence may be necessary for a variety of reasons, which it is hardly necessary (even if it were possible) to list here. We do not propose to do what the legislature has refrained from doing, namely, to control the discretion of the appellate court under certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be a failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there

> is no restriction on the kind of evidence that may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused, as, for example, it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise."

25. This Court again, in ***Rambhau v. State of Maharashtra [Rambhau v. State of Maharashtra, (2001) 4 SCC 759: 2001 SCC (Cri) 812],*** had noted the power under Section 391 CrPC of the appellate court. The following was stated in paras 1 and 2: (SCC p. 761)

> *1.* There is a very wide discretion available in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same...
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> 2. A word of caution, however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in ***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]*** in no uncertain terms observed that *the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it.* This Court was candid enough to record, however, that it is the concept of

> justice which ought to prevail, and in the event the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard."
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> **26.** From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 CrPC of the appellate court. All powers are conferred on the court to secure the ends of justice. The ultimate object of judicial administration is to secure the ends of justice. The court exists for rendering justice to the people." (Emphasis supplied)

9. This position was reiterated in ***State (NCT of Delhi) v. Pankaj Chaudhary*, *(2019) 11 SCC 575: (2019) 4 SCC (Cri) 264: 2018 SCC OnLine SC 2256***, and it was held that this power should not be exercised to fill up the gaps by either side, especially to reverse the judgment of the learned Trial Court. It was observed at page 586:

> "25. The High Court observed that the trial court erred in saying that the accused failed to prove the making of previous complaints against the prosecutrix. While saying so, the High Court referred to certain complaints made against the prosecutrix, including the one allegedly given on 21-7-1997, which were produced by the Bar at the time of arguments. The power conferred under Section 391 CrPC is to be exercised with great care and caution. In dealing with any appeal, the appellate court can refer to the additional evidence only if the same has been recorded as provided under Section 391 CrPC. Any material produced before the appellate court to fill in the gaps by either side cannot be considered by the appellate

court; more so, to reverse the judgment of the trial court."

10. Similarly, it was held in ***H.N. Jagadeesh v. R. Rajeshwari*, *(2019) 16 SCC 730: (2020) 2 SCC (Cri) 450: (2020) 2 SCC (Civ) 758: 2017 SCC OnLine SC 1813***, that where the complainant had failed to produce the notice before the learned Trial Court, he could not be permitted to lead the evidence before the learned Appellate Court to prove it. It was observed at page 731:

> "6. We are unable to agree with this approach of the High Court, in the facts of this case, which is inappropriate in law. The service of the statutory notice calling upon the drawer of the cheque (after it has been dishonoured) to pay the amount of the cheque is a necessary precondition for filing the complaint under Section 138 of the Act. Therefore, it was incumbent upon the respondent to produce the said statutory notice on record to prove the same as well. In this case, this document was not even filed by the respondent along with the complaint, and the question of proving the same was, therefore, a far cry. In a case like this, we fail to understand how the aforesaid omission on the part of the respondent in not prosecuting the complaint properly could be ignored, and another chance could have been given to the respondent to prove the case by producing further evidence. It clearly amounts to giving an opportunity to the respondent to fill up the lacuna."

11. It was laid down in ***Rajvinder Singh v. State of Haryana*, *(2016) 14 SCC 671: (2016) 4 SCC (Cri) 421: 2015 SCC***

OnLine SC 971 that where it was possible to examine the Forensic Expert at the trial stage, an application to examine him at the appellate stage cannot be allowed. It was observed at page 677.

> "12. At the outset, we must deal with submissions as regards the application for leading additional evidence at the appellate stage. It has been the consistent defence of the appellant that the dead body found in agricultural fields in District Muzaffarnagar was that of Pushpa Verma, and he went to the extent of producing a photograph of the dead body in the present trial. He also examined Brahm Pal Singh, Sub-Inspector and other witnesses. It was certainly possible to examine a forensic expert at the trial court stage itself, and the High Court was right and justified in rejecting the prayer to lead additional evidence at the appellate stage. Nonetheless, we have gone through the report of the said forensic expert engaged by the appellant. The exercise undertaken by that expert is to start with the admitted photograph of Pushpa Verma on a computer, then remove the "bindi" by some process on the computer, then by the same process remove her spectacles and by computer imaging change the image as it would have looked if the lady was lying down in an injured condition. The computer image so changed was then compared with the photograph of the dead body. We have seen both the images, and we are not convinced at all about any element of similarity. We do not, therefore, see any reason to differ from the view taken by the High Court."

12. It was held in ***Ajitsinh Chehuji Rathod v. State of Gujarat*, *(2024) 4 SCC 453: 2024 SCC OnLine SC* 77**, that the

power under Section 391 of Cr.P.C. can be exercised when the party was prevented from presenting the evidence despite the exercise of due diligence or the facts giving rise to such prayer came to light during the pendency of the appeal. It was observed at page 455:

> "8. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional evidence under Section 391 of CrPC should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice."

13. In the present case, it has been stated that the opportunity to cross-examine the witness could not be availed earlier due to sheer inadvertence and ignorance. This is not sufficient. It was held by this Court in ***Pohu Lal v. Kamla Devi, 2001 (2) Shim. LC 384*** that inadvertence is a form of negligence. Therefore, the application does not disclose any exercise of due diligence.

14. The report was issued in the year 2007, and it is not explained as to why there is such an inordinate delay in filing the application. The application has been filed merely to prolong the disposal of the revision, which is not permissible.

15. Hence, the present application fails and is dismissed.

16. The observations made hereinabove shall remain confined to the disposal of this application and shall have no bearing on the merits of the case.

(Rakesh Kainthla)
Judge

26th October, 2026
(Chander)