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IN THE HIGH COURT OF SIKKIM
CRIMINAL REVISION PETITION NO.18 OF 2003

Nar Bahadur Bhandari,
S/o. Late Shri Balaram Bhandari,
6th Mile, 31A N.H. Way,
P.S. Ranipool,
East District, Sikkim. ... **PETITIONER.**

- VERSUS -

State (represented by C.B.I.),
Through
The Director,
Central Bureau of Investigation,
C.G.O. Complex,
Lodhi Road,
New Delhi - 110 003. ... **RESPONDENT.**

Coram: Hon'ble Mr. Justice N. S. Singh, Judge.

Present: Mr. J. C. Ghosh, Advocate assisted by Mr. Bhaskar Raj Pradhan and Mr. K. T. Bhutia, Advocates for the petitioner.

None for CBI.

Date of Hearing: 05/09/2003.
Date of Decision: 08/09/2003.

JUDGMENT & ORDER

Singh, J.

The Order dated 24th June 2003 passed by the learned Special Judge, P.C. Act (E & N) Sikkim at Gangtok in

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Criminal Case No.7 of 1997 by which the application filed by the accused, the petitioner herein for examination of one cited witness of the prosecution, namely Mr. T. L. Brahmin as Court witness was rejected, is the subject matter under challenge in this revision petition.

2. According to the present accused-petitioner, the prosecution without making any effort to bring evidence in the Court prayed for dropping the cited witness, namely Mr. T. L. Brahmin by casting most improper allegation of winning over of the said witness by the accused-petitioner. It is also the case of the accused-petitioner that on 2nd December 2002, he made an application to call/summon the said Mr. T. L. Brahmin as witness for the ends of justice before examination of the Investigating Officer and the said petition was not heard and disposed of and over and above this, the accused-petitioner approached the Court below with another application for summoning and examination of the said Mr. T. L. Brahmin as Court witness whose name stands as witness No.68 in the charge-sheet before the examination of the Investigating Officer by contending, inter alia, that the said Mr. T. L. Brahmin shall depose the truth before the Court as he is material witness who prepare the plan of the building in

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question and apart from that the statement of the said witness recorded under Section 161 Cr.P.C. shows that the said Shri T. L. Brahmin is an important witness which is expected to have the local knowledge about the building, but the learned Court below rejected the prayer of the accused-petitioner under the impugned order without any justification.

3. Supporting the case of the accused-petitioner, Mr. J. C. Ghosh, learned counsel contended that the prosecution had withheld vital and important evidence which is in favour of the accused-petitioner by dropping the said Mr. T. L. Brahmin as prosecution witness and if the said witness is examined and his statement is recorded, the said evidence will establish the innocent of the accused-petitioner from the charges levelled against him. Mr. J. C. Ghosh, learned counsel further contended at the bar that P.W. No.33, namely K. A. Nankani deposed about the total evaluation as per his report with regard to the five-storied building situated at Church Road comes to Rs.15,05,155/- and another witness P.W. No.34, namely K. J. Singh deposed that for the first-storied building the total amount of internal electrical installation is Rs.46,995/- and for another building the total

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evaluation is Rs.1,930/- and whereas Mr. T. L. Brahmin, the said cited witness No.68 has been dropped by the prosecution as prosecution witness who stated to the Investigating Officer about the tentative cost of construction of the building as Rs.11,13,406.44. According to Mr. Ghosh, learned counsel, the learned Court below ought to have summoned and examined the said Mr. T. L. Brahmin as Court witness to secure ends of justice as well as for just decision of the case. It is also submitted by Mr. J. C. Ghosh, learned counsel at the bar that the present stage of the case is examination of Investigating Officer (I.O.) of the case. Supporting his contention, Mr. Ghosh had relied upon the following decision of the respective High Courts and the Apex Court rendered in:-

- (1) Pradeep Kumar Agarwal v. State reported in 1995 CRI.L.J. 76 (Orissa High Court),
- (2) Jamatraj Kewalji Govani v. State of Maharashtra reported in AIR 1968 SC 178,
- (3) Govind Ram v. State of U.P. & ors. reported in 1999 CRI.L.J. 1955 (Allahabad High Court),
- (4) Balbir v. State of Haryana & anr. reported in 1999(4) Crimes 289 (SC).

4. Now, this Court is to see and examine as to whether the impugned order suffers from infirmity, illegality

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and impropriety and whether the prayer of the accused-petitioner can be granted or not?

5. On perusal of the available materials on record, it has been revealed that on the prayer made by the prosecution, the learned Court below dropped Mr. T. L. Brahmin as prosecution witness vide, order dated 15th November 2002 and thereafter, the accused-petitioner filed the application for examination of Mr. T. L. Brahmin as Court witness whose name figures at Sl. No.68 in the charge-sheet before examination of other witnesses. For better appreciation in the matter, the provision of Section 311 Cr.P.C. is quoted below: -

“ 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.”

According to me, the first part of Section 311 Cr.P.C. is discretionary which enables a Court at any stage to summon any person as a witness; or to examine any person in attendance or to recall and re-examine any witness already

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examined and, that the second part of this section is mandatory which further enables the Court to take any of the above steps if the new evidence of the witness appears to be essential to the just decision of the case. In other words, the object of this section is to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just decision of the case.

6. In the instant case, the prosecution had dropped the said Mr. T. L. Brahmin as prosecution witness as discussed above. According to me, this is the legal right of the prosecution to drop a particular cited witness and, it is the duty of the prosecution to lay all material evidence available, but, it would be unsound to lay down as a general rule that every witness must be examined and that, even if it is known that the witness has been won over or terrorised and, in such a case, it is also always open to the defence to examine such witnesses as defence witnesses.

7. The learned Court below while passing the impugned order made the following observation: -

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“ The prosecution can drop any witness on certain ground and it cannot be compelled to examine each and every witness whose name figures in the list of witnesses filed by it Discretion lies with the Prosecution not to examine a particular witness if it finds reason to do so Exercising such option Prosecution has decided not to examine Sri T. L. Brahmin as its witness whose evidence pertains to plan of the building in question. The statement of this person as recorded by the Police shows that he had not constructed the building in question but has was an Architect of it. Therefore, it cannot be said that the Prosecution is withholding the best evidence by not examining Sri T. L. Brahmin. Whether Sri T.L. Brahmin is the best witness or not, it is not for the defence to decide but it is for the prosecution to decide. Further the submission of the Ld. Defence counsel that if Sri Brahmin is not examined, the defence will be prejudiced is ill founded for the reason that the defence has the liberty to examine Sri Brahmin as a defence witness. ”

In my considered view, it is a reasoned finding and observation of the learned Court below.

8. The above observation clearly shows that liberty was granted to the accused to examine Mr. T. L. Brahmin as a defence witness. Bare perusal of the statement of the said Mr. Brahmin recorded under Section 161 Cr.P.C. shows that Mr. T. L. Brahmin had prepared the plan of the building and he gave his tentative view of cost of construction so made to the tune of Rs.11,13,406.44. If the accused-petitioner desires

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to establish the factum of the said tentative cost of construction of the building etc, he can do so by citing and examining the said Mr. Brahmin as his defence witness. But the Court cannot compel the prosecution not to drop the said witness as prosecution witness. However, the Court is to see and examine as to whether it is essential and necessary to examine the said Mr. T. L. Brahmin as Court witness for just decision of the case or not. According to me, it is not essential to examine the said Mr. Brahmin as Court witness. So far the case laws and the related decisions cited and relied upon by the learned counsel for and on behalf of the accused-petitioner do not help the case of the accused-petitioner inasmuch as in the said ***Pradeep Kumar Agarwal v. State (supra)***, it could not be ascertained as to whether the said six persons to be summoned and examined in that case are cited witness or not in the charge-sheet and, as to whether the application was made for and on behalf of the accused or prosecution or not. In other words, the facts of the present case are quite different^t from the facts of the case of said ***Pradeep Kumar Agarwal v. State (supra)***. Similarly, in ***Jamatraj Kewalji Govani v. State of Maharashtra (supra)***, the prosecution applied for examination of one Dutta, Inspector of Customs, Bombay as a Court witness in the interests of justice and the application was opposed by the

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accused Govani. However, the Magistrate, by his order dated 26th July 1965, ordered the examination of Dutta under Section 540 (old) of the Code of Criminal Procedure and the said Dutta stated that he had seized the watches in the reasonable belief that they were smuggled and the accused Govani was, thereafter, examined again and was given an opportunity to lead his defence evidence and later on the accused Govani was convicted under Section 135(a) and 135(b) of the Customs Act awarding him a sentence of one year's rigorous imprisonment and a fine of Rs.2,000 and in default, further rigorous imprisonment for six months on each of the two counts and, thereafter, the accused Govani had appealed to the High Court by contending that the evidence of Dutta was improperly received by the Magistrate and the same should be excluded from consideration. The High Court rejected those contentions thus upholding the conviction. Being aggrieved, the accused Govani appealed to the Apex Court by special leave. The grant of special leave is limited to the questions whether the evidence of Dutta was improperly received by the Magistrate and whether, if excluded, the conviction of Govani can be supported and in that case, the **Apex Court** held that in those circumstances, it cannot be said that the Court had exceeded its jurisdiction in acting under the second part of the Section 540 (old) of the

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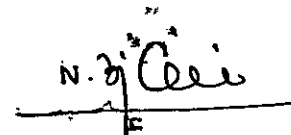
Code of Criminal Procedure. Likewise, in **Balbir v. State of Haryana & anr. (supra)**, the **Apex Court** observed that if the prosecution had deliberately avoided to examine cited eye witness, the Court should have exercised its powers under Section 311 of the Code to know what their version is regarding the occurrence. In **Govind Ram v. State of U.P. & ors. (supra) (Allahabad High Court)**, the judgment on acquittal had been questioned before the Allahabad High Court. The case was of dowry death with harassment for dowry and in that case, the learned A.P.P. avoided the production of every material piece of prosecution evidence before the Court and placed on record only the routine evidence and unfortunately, the Presiding Judge allowed all those omissions made by the learned A.P.P. and that being the position, the Allahabad High Court held that there is miscarriage of justice due to the acts and omissions of the prosecutor (A.P.P.) and the acts and omissions of the trial Judge and the order of acquittal passed by the trial Judge was set aside. Hence, this decision also does not help the case given petitioner.

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9. For the reasons, observations and discussions made above, I am of the view that the accused-petitioner could not make out a case to justify interference with the

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impugned Order dated 24th June 2003 passed by the learned Special Judge, P.C. Act (E & N) Sikkim at Gangtok in Criminal Case No.7 of 1997. In the result, the present petition is devoid of merit and accordingly, it is dismissed thus affirming the impugned Order passed by the learned Court below in Criminal Case No.7 of 1997. But no order as to costs. The Registry is directed to communicate a copy of the Judgment and Order to the learned Special Judge, P.C. Act (E & N) Sikkim at Gangtok.


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(N. S. Singh)
Judge
08-09-2003