

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Revision Jurisdiction)

S.B. : HON'BLE MR. JUSTICE S. K. AGNIHOTRI, JUDGE

**I.A. No.01 of 2016 in CrI. Rev. P. No. 07
of 2015**

Petitioner / : Mr. Gopal Pradhan
Revisionist S/o Late Lall Bahadur Pradhan,
R/o Indira Bye-Pass, Gangtok.
East Sikkim.

Versus

Respondent : State of Sikkim

Application under Section 311 of the Code
of Criminal Procedure, 1973.

Appearance

Mr. A. K. Upadhayaya, Senior Advocate with Ms.
Aruna Chettri, Advocate for the
Petitioner/Revisionist.

Mr. S. K. Chettri, Assistant Public Prosecutor for the
State-Respondent.

ORDER

(27th June, 2016)

S. K. Agnihotri, J

1. This is an application filed by
petitioner/revisionist, seeking remand of the case for

summoning and examining one, Mr. Dawa Tashi Lepcha, Language Teacher (Lepcha) of Kaluk Senior Secondary School, West Sikkim and the accused himself Mr. Gopal Pradhan, once again.

2. The facts in brief leading to filing of the instant revision petition are that the petitioner/revisionist was charge-sheeted for an alleged offence of sexual assault on three minors with intent to outrage their modesty under Provisions of Section 354 of the Indian Penal Code, 1860 (for short "IPC").

3. The petitioner was held guilty by the Trial Court vide judgment dated 31.05.2013, rendered by the Chief Judicial Magistrate, (East & North) Sikkim at Gangtok in General Register Case no. 23 of 2012. The petitioner/revisionist was sentenced to undergo imprisonment for a period of two years. Feeling aggrieved, the revisionist/petitioner preferred an appeal, being Criminal Appeal No. 1 of 2015 in the Court of Sessions Judge, West Sikkim, at Gyalshing.

4. The Learned Sessions Judge, upholding the findings recorded by the Chief Judicial Magistrate, dismissed the appeal and confirmed the sentence

ordained by the Chief Judicial Magistrate vide judgment dated 08.06.2015.

5. Not feeling satisfied with the judgment of the Sessions Court, the instant revision under Provisions of Section 397 and 401 read with Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") is filed.

6. During pendency of the instant revision petition, the instant application under Provisions of Section 311 of the Cr.P.C. is filed, wherein the petitioner/revisionist seeks the remand as aforestated.

7. Mr. A. K. Upadhayaya, Learned Senior Counsel appearing for the petitioner/revisionist would contend that the petitioner/revisionist could not examine himself and also one Mr. Dawa Tashi Lepcha, a language teacher in the concerned Kaluk Senior Secondary School. Mr. Lepcha, being a language teacher, used to be present in his class room throughout the day, which was opposite to the relevant class room. Mr. Lepcha, is most relevant person for examination in regard to the allegation that door of the concerned class room remained closed throughout.

8. It is also contended that petitioner/revisionist was also not examined properly and such re-examination of the petitioner/revisionist himself be done by remitting the matter to the concerned Court in the interest of just decision.

9. Referring to a decision of the Supreme Court in ***Union of India & Ors. V. B. Valluvan & Ors. AIR 2007 SC 210***, Mr. Upadhyaya, would further submit that material witness, Mr. Lepcha, in the instant case, may be examined at any stage even at the stage of revision. It is lastly contended that the Court is obliged to exercise the jurisdiction under the said provisions to come to a just decision in the interest of justice.

10. On the other hand, Mr. S.K. Chettri, Assistant Public Prosecutor, appearing for the State-Respondent would contend that the petitioner/revisionist was afforded a full opportunity at the time of his examination and recording of his statement under Section 313 of the Cr.P.C. The petitioner/revisionist was especially asked the question whether he would like to examine any other witnesses in his defence, which was specifically declined by him.

11. The instant petition is an afterthought to delay the proceedings. Even otherwise, the said witness, Mr. Lepcha, may not be a material witness as the allegation is that the accused used to close the door of the class room of class III while indulging into unnatural activities, which has been found finally established. The petitioner/revisionist has not taken up the plea and as such the petitioner/revisionist is not entitled to any relief at this stage under the provisions of Section 311 of the Cr.P.C. 1973.

12. I have heard Learned Counsels appearing for the parties, perused pleadings and documents, appended thereto.

13. On examination, it is found that the petitioner/revisionist was specifically asked a question to the extent as to whether he would like to examine any other witness in his defence, during recording of his statement and also his examination under Section 313, Cr.P.C. The petitioner/revisionist had in a categorical and specific manner declined the same and also not stated the factum of one Mr. Lepcha, attending the adjacent class room, which was just opposite to the concerned class room of class III. It was also not stated as to how

Mr. Lepcha, would verify the happenings inside the other room, even if the door was kept open. Open or closure of the door of the concerned class room is not very much material. It is now pleaded that the class room was kept open throughout the day. The allegation in the case is that the petitioner/revisionist used to ask all the students to hide their heads downwards on the table.

14. Be that as it may, petitioner/revisionist was afforded sufficient opportunity at the trial stage as well as the appellate stage, wherein he did not come forward to examine any witness. The examination of the petitioner/revisionist was done fully. It is not the case of that he was not given full opportunity, and as such petitioner/revisionist is not entitled to one more opportunity to examine Mr. Lepcha, and also to examine himself again.

15. In *Iddar & Ors. Vs. Aabida & Anr.*¹, there was a variance in the statements made by the complainant during investigation and before the Trial Court which necessitated filing of an application in terms of Section 311 Cr.P.C. seeking recording of statement of the

1. AIR 2007 SC 3029

complainant afresh during trial. The Trial Court rejected the application holding that the prosecution was trying to fill up lacunae in the version. An application under Section 482 of Cr.P.C. for setting aside the said order of the Trial Court was made, which was allowed on 28th February, 2006. Assailing the said order, the matter was taken in the Special Leave Petition to the Supreme Court, the Supreme Court set aside the order of the High Court on the ground that appellants were not heard before the High Court and it was directed to hear the petitioners on merit. In that context, the Supreme Court examined the scope of Section 311 of Cr.P.C. and observed as under:-

“9 In this context, reference may be made to Section 311 of the Code 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”.

10. The section is manifestly in two parts. Whereas the word used in the first part is “may”, the second part uses “shall”. In consequence, the first part gives purely discretionary authority to a Criminal Court and

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enables it at any stage of an enquiry trial or proceeding under the Code: (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

11. 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 for the prosecution and not that

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of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers 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 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.

12. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Some times the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new

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evidence is essential or not, must of course depend on the facts of each case, and has to be determined by the Presiding Judge.”

16. In yet another case, in **Natasha Singh vs. Central Bureau of Investigation (State)**², wherein a case was registered under section 120B read with Sections 420, 467, 468 and 471 of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against Natasha Singh and Ors. After investigation, a charge-sheet was filed. The prosecution examined 52 witnesses. Natasha Singh in her defence examined only one witness, after proving certain documents. During trial, Natasha Singh preferred an application under Section 311 of the Cr.P.C. for permission to examine three witnesses which was rejected by the trial court, against which, a Criminal Misc Petition was filed by her which was also dismissed by the High Court. The Supreme Court held as under:-

“15. The scope and object of the provisions is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application

2. (2013) 5 SCC 741

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under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, *or to cause serious prejudice* to the defence of the accused, or to give an *unfair advantage to the opposite party*. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred 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 great caution and circumspection. The very use of words such as “any court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring

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that there is no breach of the same. [*Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar, Zahira Habibulla H. Sheikh v. State of Gujarat, Zahira Habibullah Sheikh (5) v. State of Gujarat, Kalyani Baskar v. M. S. Sampooram, Vijay Kumar v. State of U.P. and Sudevanand v. State.*]

17. It is eloquent from the judicial principles as laid down by the Supreme Court, as aforesaid, that exercise of power under provisions of Section 311 Cr.P.C. is discretionary, however, the same should be exercised judiciously, not capriciously or arbitrarily, to arrive at a just decision in the case. In both the decisions (*supra*), the applications under Section 311 were made during trial of the case. In the case on hand, there is no complaint that the petitioner/revisionist was not given an opportunity of hearing or he has attempted to plead the fact that the allegation of unnatural act was not established. The petitioner/revisionist had declined to examine any witness, when he had full opportunity before the Trial Court as well as the Appellate Court. The revision is not a continuation of the trial. The scope of revision is very limited to examine as to whether Courts below have exceeded its jurisdiction or the decision is perverse or without there being any evidence. At this stage, for want of any relevant material, the petitioner/revisionist has failed to establish that the new

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witness sought to be examined is relevant and material for the case.

18. Accordingly, the application is rejected.

(S.K. Agnihotri)

Judge

27-06-2016

Approved for reporting : Yes

Internet : Yes

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