
(2011) 04 GAU CK 0030

In the Gauhati High Court

Case No : Criminal Revision Petition No. 43 of 2003

Bishurai Debbarma @ Bisrai Debbarma @ Bisu Debbarma

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Constitution of India, 1950 — Article 141

Criminal Procedure Code, 1973 (CrPC) — Section 207A, 311, 540

Evidence Act, 1872 — Section 165, 60, 64, 91

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 25, 29

Citation : (2011) 3 GLT 572

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : Somik Deb, for the Appellant; A. Ghosh, Addl P.P., for the Respondent

Judgement

A.C. Upadhyay, J.—This revision petition has been filed by the petitioner praying for quashing the order, dated 07.08.2003, passed by the learned Additional Sessions Judge, West Tripura, Agartala, whereby the prayer of the prosecution to recall its witness PW. 8, Rabindra Das Baishnab, to prove his signature in the inquest report was allowed.

2. The said impugned orders, passed by the learned Court, below, reads as follows:

07.082003

Learned Additional P.P. Mr. P. Paul for the prosecution is present.

Accused Bishurai Debbarma on bail is present.

The case is fixed to-day for filing written objection against the petition of the prosecution side.

A petition has been filed by the learned defence counsel praying for time without mentioning the ground for which time is prayed for. None has appeared to move

the petition of defence side. Learned Addl. P.P. opposes the said petition. Heard. The petition is rejected.

The original Inquest report of Gopal Das Baishnab and Krishna Debnath filed by the prosecution side on 26.07.2003 are accepted and these are kept in connected GR. Case No. 337/ 00.

The petition has been filed on 26.07.03 by the prosecution side praying for recalling the P.W. 8 Sri Rabindra Das Baishnab in respect of proving the signature in Inquest Report. Perused the petition. Heard. Considered. Prayer is allowed. The learned Add. P.P. is directed to produce the remaining P.Ws at his own accord on the next date. Inform.

Fix 2.9.03 for examination of remaining P.Ws."

3. Mr. Somik Deb, learned counsel for the petitioner submitted that the learned trial Court by passing a cryptic order without application of judicial mind allowed the petition, filed by the prosecution, for re-examination of its witness P.W. 8, without returning to a finding that such re-examination of the witness P.W.8 is essential for just decision of the case. Mr. Deb, learned counsel for the petitioner referring to the provisions of Section 311 Cr.P.C. contended that no doubt, discretion is vested on the Court to recall/re-examine or summons a witness, if his or her evidence appears to be essential for just decision of this case, but such judicial discretion is required to be exercised judicially and not arbitrarily.

4. Before we initiate the discussion, on the subject matter in question, it would be appropriate to extract herein below the relevant provision of the "Section 311" of the Code of Criminal Procedure, 1973, 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.

5. The aforesaid beneficial provision of law has been enacted to enable and empower the Courts at any stage of the proceeding, to find out the truth, in order to render a just decision of the case. Thus, in exercise of its discretionary power u/s 311 of Cr.P.C. at any stage of the proceeding, the Court shall have the power to 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 Court also has the power to summon/examine/recall and re-examine any such person, only, if his/her evidence appears to be essential to the just decision of the case.

6. In this context, by referring to a decision of the Hon''ble Supreme Court in U.T. of Dadra and Haveli and Another Vs. Fatehsinh Mohansinh Chauhan, learned

counsel submitted that the discretion given to the Court u/s 311 Cr.P.C. binds the Court to exercise such discretion, only on condition that such evidence is essential for a just decision of the case. I could not resist my temptation to portray herein below the relevant extract of the decision in U.T. of Dadra & Nagar Haveli Vs. Fatehsinh Mohansinh Chauhan (supra), where in the scope and extent of power u/s 311 Cr.P.C. has been succinctly culled out by the Apex Court, as follows:

Section 311 of Code of Criminal Procedure, 1973 is a verbatim reproduction of Section 540 of Code of Criminal Procedure, 1898....

9. The scope and content of Section 540 of the old Code was considered in several decisions rendered by the High Courts. A Division Bench of the Allahabad High Court in Ram Jeet v. State examined the provisions of the section in considerable detail. In this case after the entire evidence had been recorded and the arguments had been heard and a date for pronouncement of judgment had been fixed, the learned Sessions Judge felt that for the just decision of the case the evidence of certain persons who had not been examined hitherto was essential. Therefore, on the date originally fixed for delivery of judgment, he passed an order for summoning and examining some persons as witnesses u/s 540 of the old code. The order passed by the learned Sessions Judge was challenged in revision before the High Court and one of the grounds raised was that the examination of fresh evidence would tantamount to making good lacunae in the prosecution case and was, therefore, not justified u/s 540 of the old Code. It was held that the section is manifestly in two parts; the first part gives purely discretionary authority to the criminal Court; on the other hand, the second part is mandatory. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the Court. But the second part does not allow for any discretion: it binds the Court to examine fresh evidence, and the only condition prescribed is that this evidence must be essential to the just decision of the case. Dealing with the argument that examination of fresh evidence amounted to filling in lacuna in the prosecution case, in para 4 of the report, it was held: (AIR p. 440)

4. The misconception instinct in the applicant's argument is made evident by this analysis of the terms of Section 540 and springs from a disregard of the second part of the section. This part, as should be plain, casts on the Court the duty of calling fresh evidence whenever such evidence "appears to it essential to the just decision of the case". That is to say, the paramount consideration should be the doing of justice in the case, and whenever the Court finds that any evidence which is essential for this has not been examined, the law enjoins it to call and examine it. If this results in what is sometimes thought to be the "filling of loopholes", that is a purely subsidiary factor and cannot be taken into account.

7. In State of W.B. v. Tulsidas Mundhra (1963) Supp (1) SCR 1 this Court considered the amplitude of Section 540 of the old Code. The question which arose for consideration in this case was whether in the proceedings u/s 207-A of

the old Code (commitment proceedings before a Magistrate in a case instituted on a police report and which was exclusively triable by the Court of Session) the provision of Section 540 would be applicable. It was held:

[Section 540] confers on criminal Courts very wide powers. It is no doubt for the Court to consider whether its power under this section should be exercised Or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person already examined is essential to the just decision of the case, it is its duty to take such evidence. The exercise of the power conferred by Section 540 is conditioned by the requirement that such exercise would be essential to the just decision of the case.

8. In *Jamatraj Kewalji Govani v. State of Maharashtra* 1968 Cri LJ 251, after analysis of the provision of the section it was held as under

Section 540 is intended to be wide as the repeated use of the word "any" throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word "may" in the first part and of the word "shall" in the second firmly establishes this difference. Under the first part, which is permissive, the Court may act in one of three ways: (a) summon any person as a witness, (b) examine any person present in Court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fied of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.

9. In *Mohanlal Shamji Soni Vs. Union of India and another*, it was observed that:

10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and 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 sides.

It is the duty of a Court not only to do justice but also to ensure that justice is being done. It was further held that the second part of the section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case. It was emphasised that power is circumscribed by the principle that underlines Section 311 Cr.PC. namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Further, that the power must be used judicially and

not capriciously or arbitrarily. It was further observed that evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties and the discretion of the Court must obviously be dictated by exigency of the situation and fair play and good sense appear to be the safe guides and that only the requirement of justice commands the examination of any person which would depend on the facts and circumstances of each case. *Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi*, is a decision, where the contention that the prosecution should not be permitted to fill in the lacuna was examined having regard to the peculiar facts where the exercise of power u/s 311 Cr.P.C. second time was challenged and, therefore, it is necessary to notice the facts of the case in brief. The accused along with some other persons was facing trial for offences under Sections 21, 25 and 29 of the NDPS Act. The prosecution and the defence closed their evidence on 19.09.1997 and the case was posted for further steps and on 07.03.1998, after few more dates, at the instance of the prosecution two witnesses who had already been examined were re-examined for the purpose of proving certain documents for prosecution. After they had been examined and the evidence had been closed, the case was posted for hearing arguments, which was heard in piecemeal on different dates. Subsequently on 07.06.1998, the Public Prosecutor moved an application seeking permission to examine Dalip Singh, SI and two other persons. Though the application was strongly opposed by the counsel for the accused, the trial Court allowed the same in exercise of its power u/s 311 Cr.P.C. and summons were issued to the witnesses. The challenge raised to the order of the learned Sessions Judge by filing a revision was dismissed by the High Court. In appeal before this Court it was contended that in the garb of exercise of power u/s 311 Cr.P.C., a Court cannot allow the prosecution to re-examine the prosecution witnesses in order to fill up the lacuna in the case specially having regard to the fact that Dalip Singh, witness was never tendered by the prosecution for cross-examination and PW 4, Suresh Chand Sharma had also not been cross-examined by the State. Repelling the contention raised on behalf of the accused it was held:

7. It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers u/s 311 of the Code or u/s 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 lapses 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.

10. The very same decision Mohanlal Shamji Soni Vs. Union of India (supra) which cautioned against filling up lacuna has also laid down the ratio thus:

It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

11. Dealing with Corresponding Section in the old Code Section 540. Hidayatullah Jias the learned Chief Justice then was speaking for a three-judge bench of this Court had said in Jamatraj Kewalji Govani Vs. The State of Maharashtra, as follows:

It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage or the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is needed by it for a just decision of the case.

14. Finally, it was held that the proposition that the Court cannot exercise power of resuming any witness if once that power was exercised, cannot be accepted nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during arguments. Similar view has been taken in P. Chhaganlal Daga v. M. Sanjay Shaw, where permission granted by the Court to a complainant to produce additional material after evidence had been closed and case was posted for judgment was upheld repelling the contention that production of the document at that belated stage would amount to filling in a lacuna.

15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power u/s 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal Court. Calling a witness or re-examining a witness already

examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused resulting in miscarriage of justice.

11. In yet another decision in *Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others*, Supreme Court observed as follows:

26. In this context, reference may be made to Section 311 of the Criminal Procedure 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.

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 enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the 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 news 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 a 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.

27. 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 of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the 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 any 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.

28. 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 Evidence Act, 1872 (in short "the 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. Sometimes 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 evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

12. In State of Punjab Vs. Bhag Singh, the Hon'ble High Court while dealing with an almost identical cryptic order as it is in the present case before this Court observed as under;

3. The trial Court held that the prosecution version was entirely dependent upon the testimony of official witnesses and since no independent witness was involved, the prosecution version was vulnerable. It was noted that the search and seizure was made at a thoroughfare and it is unbelievable that no independent witness was available. The trial Court therefore directed acquittal. The appellant State filed an appeal before the Punjab and Haryana High Court which refused to grant leave and disposed of the application for leave in the following manner:

Heard. No merit.

Dismissed.

The manner in which appeal against acquittal has been dealt with by the High

Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in *State of U.P. Vs. Battan*. About two decades back in *State of Maharashtra v. Vithal Rao Pritirao Chawan* the desirability of a speaking order while dealing with an application for grant of leave was highlighted. The requirement of indicating reasons in such cases has been judicially recognized as imperative. The view was reiterated in *Jawahar Lal Singh Vs. Naresh Singh and Others*, Judicial discipline to abide by declaration of law by this Court, cannot be forsaken, under any pretext by any authority or Court, be it even the highest Court in a State oblivious to Article 141 of the Constitution of India.

6. Even in respect of administrative orders, Lord Denning, M.R. in *Breen v. Amalgamated Engg. Union* observed: 1971 (1) All E.R. 1148-"The giving of reasons is one of the fundamentals of good administration." In *Alexander Machinery (Dudley) Ltd. V. Crabtree* it was observed : "Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

13. In *Hoffman Andreas Vs. Inspector of Customs, Amritsar*, Hon"ble Supreme Court observed that 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 of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the 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 any 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.

14. In view of the above discussion, it is apparent that the learned trial Court while passing the impugned order did not assign any reason, whatsoever, while allowing the prayer for recalling prosecution witness P.W.8, for re-examination. More so the impugned order was also passed without affording adequate opportunity of being heard to the accused - petitioner. Consequently, learned trial Court exercised discretion without following the statutory mandate contained in Section 311 of Cr.P.C.

15. In view of the trial Court's manner of disposal of the request of the prosecution this Court is of the opinion that the application submitted by the prosecution u/s 311, Cr.P.C. has to be considered afresh. This is necessary because the trial Court is seized of the record, and is in a best position to judge whether and if, the request for further cross examination of P.W.8 is justified. For the aforesaid reasons, without entering into merits of the contentions raised, I deem it necessary, in the interest of justice, to afford an opportunity to the accused - petitioner as well as the prosecution of being heard on the petition filed by the prosecution for re-examination of prosecution witness No. 8. The trial Court shall hear the application of the prosecution u/s 311 Cr.P.C, afresh, and shall decide the application having regard to the nature of directions it chooses to make, and its likely impact upon the accused petitioner, from the standpoint of prejudice. The order shall be a reasoned one, looking into all the contentions raised, and shall be made within a months from date of receiving a copy of this order. In the event the Court decides to permit further cross-examination, it shall do so by fixing a date for the purpose.

16. Consequently, the impugned order dated 07.08.2003 passed by the trial Court is set aside and the matter is remitted to the trial Court for reconsideration of the petition filed by the prosecution for re-examination of witness PW.8 by giving adequate opportunity to both the parties of being heard.

17. As it appears, unfortunately sufficient delay has already been caused in the disposal of the proceeding pending before the learned trial Court, therefore, this Court is of the view that the learned trial Court shall make an endeavor to dispose of the pending case as early as possible, in accordance with law untrammelled by any observations made in this order.

18. The stay order passed by this Court, in connection with this case, if any, stands vacated.

19. With the above observation and direction, this petition stands disposed of.

20. Send a copy of this order to the learned trial Court forthwith.