

**(2006) 12 PAT CK 0059**  
**In the Patna High Court**

Nesar Ahmad @ Nasser and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

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**Date of Decision :** 14-12-2006

**Acts Referred:**

**Citation :** (2006) 12 PAT CK 0059

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**Judgement**

Abhijit Sinha, J.—Through this application the petitioners herein have prayed for quashing of the order dated 15.09.2006 passed by the learned Presiding Judge, F.T.C. No. 3 Muzaffarpur in Sessions Trial No. 303/2000 whereby he has allowed the petitions dated 5.3.2003 and 14.9.2006 filed by the prosecution permitting them to get the documents proved and marked as Exts.

2. The grievance of the petitioners is that after 26 witnesses on behalf of the prosecution and three witnesses on behalf of the defence had been examined and the case had been fixed for argument on 4.9.2006, the Special p.p. on behalf of the prosecution instead of starting argument filed a petition u/s 311 of Cr.P.C. only for the purpose of vexation or for causing delay prayed for adducing a document which had been filed but had not been exhibited as Ext. It was submitted in this connection that the document which the prosecution wanted to bring on record at the stage of argument had never been introduced or mentioned in evidence by any of the prosecution witnesses including the father, brother uncle and maternal uncle of the deceased lady. It is further said that prior either to the prosecution had been given indulgence to lead further evidence on three occasions i.e. 5.9.2000, 23.11.2002 and 14.9.2006. It is said that on 14.9.2006 when defence started its argument and prayed for formal proof of marriage certificate which had already been mentioned "X" for identification the prosecution also filed a copy of documents for getting it exhibited with an intent to fill up the lacuna of the prosecution case. In this connection reference was made to the case of Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, wherein it was held that the power u/s 311 of Cr.P.C. is exercised and the evidence is examined neither to help the prosecution nor the defence and the object of the section is to enable the court to arrive at the truth,

irrespective of the fact that the prosecution or the defence has failed to adduce some evidence which is necessary for a just and proper disposal of the case and to uphold the truth and if the prosecutor is remiss in some way, the court can control the proceedings effectively so that the ultimate objective of truth is arrived at.

3. On the contrary it was submitted by the prosecution that there was no error in the impugned order. The case related to an offence u/s 304B of the I.P.C. and since the date of marriage was in dispute the defence sought permission to mark the marriage card which has been filed on behalf of the defence and had not been proved and had merely been marked as Ext. "X". It was also necessary that the prosecution be allowed to prove the alleged marriage certificate (Nikahnama) which had been filed in the year, 2003 but could not be marked and in the interest of justice and just decision of the case the power u/s 311 of Cr.P.C. can be exercised at any stage of the proceeding provided the examination of such person is essential for just decision of the case and in the instant case it was essential to prove the document on record for just decision in the case. Reference in this connection was made to the case of Mohanlal Shamji Soni Vs. Union of India and another,

4. Section 311 of Cr.P.C. consists of two parts i.e. (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide the very width requires a corresponding caution --that the discretionary powers should be invoked, as the exigencies of justice require, and exercised judicially with circumspection and consistently with the provisions of the Code. Therefore, this power has to be exercised in exceptional case or extraordinary situation. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case.

5. What calls for pointed attention is the language of Section 311 of Cr.P.C. What the Section says is that the court may 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 (underlining is mine for emphasis). Therefore, what Section 311 of Cr.P.C. talks of is the evidence of the witnesses and evidence would mean material evidence and does not include documentary evidence.

6. In the instant case what was sought to be proved by both the parties were the marriage card and marriage certificate (Nikahname). If Section 311 of Cr.P.C. is to be construed in its this perspective, documents cannot be included within the ambit of Section 311 of Cr.P.C.

7. In my opinion, the court below has erred in law, in regard being had to the discussions made in the foregoing paragraphs, by allowing both the parties to prove their documents.

8. As such accordingly, the impugned order is required to be set aside.

9. This application succeeds and the impugned order dated 15.9.2006 is quashed.