

(2014) 12 GUJ CK 0130
In the Gujarat High Court

Case No : Special Criminal Application (Quashing) No. 4902 of 2014

Rambhai Hirabhai Vadhiya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 161, 165, 231, 233, 233(3)
Evidence Act, 1872 — Section 138
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 21, 25, 29
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 2 GLR 1320

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Hriday Buch, for the Appellant; L.R. Pujari, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J. By this application under Art. 227 of the Constitution of India, the petitioner-original accused calls in question the legality and validity of the order dated 9th October, 2014 passed by the learned 2nd Additional Sessions Judge, Junagadh below Exh. 83 in the Sessions Case No. 8 of 2012 by which the learned Additional Sessions Judge allowed the application Exh. 83 filed by the prosecution for the purpose of summoning a medical officer for his examination. The facts giving rise to this application may be summarized as under:

(a) The petitioner is being tried being accused of the offence of murder punishable under Sec. 302 of the Indian Penal Code, in the Court of the learned 2nd Additional Sessions Judge, Junagadh. It appears from the materials on record that after the arrest and while drawing the panchnama of the person of the accused, the Investigating Officer noticed few injuries on his body. In such circumstances, the Investigating Officer thought fit to forward the accused with a police yadi for the purpose of his medical examination, at the Civil Hospital. One Dr. P.K. Javia had carried out the medical examination of the accused at the

relevant point of time.

(b) It also appears that in the charge-sheet Dr. Javia was shown as one of the prosecution witnesses, however, in the course of the trial he was dropped by the prosecutor and was not examined. The recording of evidence was concluded. The further statement of the accused under Sec. 313 of the Code of Criminal Procedure, 1973 was also recorded when the trial was at the stage of pronouncement of the judgment, the Public Prosecutor filed an application Exh. 83 stating that inadvertently Dr. Javia, who had carried out the medical examination of the accused was not examined and his examination was essential for the just decision of the case. In the application Exh. 83, it was prayed that Dr. Javia, the Medical Officer be summoned along with the medical case papers for his examination.

2. The Exh. 83 filed by the State was opposed by the accused by filing his reply Exh. 84.

3. The learned Additional Sessions Judge adjudicated the application and allowed the same taking the view that summoning Dr. Javia and his examination was necessary for the just decision of the case.

4. The petitioner original accused being dissatisfied with the order passed by the learned Additional Sessions Judge, Junagadh has come up with this application challenging the same.

Submissions on behalf of the accused:

5. Mr. Hriday Buch, the learned Advocate appearing on behalf of the accused vehemently submitted that the impugned order is erroneous in law and quite prejudicial to the defence of the accused. The principle argument of Mr. Buch is that the impugned order ought not to have been passed by the learned Judge after the arguments were concluded and the matter was posted for pronouncement of the final judgment.

6. Mr. Buch submits that the Medical Officer who is now sought to be summoned for the purpose of examination was consciously dropped by the Public Prosecutor during the trial, more particularly, when he was shown as one of the witnesses in the charge-sheet. According to Mr. Buch having consciously dropped a witness the Public Prosecutor now cannot pray that he should be permitted to examine the Medical Officer as the Medical Officer had carried out the medical examination of the accused.

7. Mr. Buch further submits that in the application Exh. 83 no cogent grounds have been assigned as to why it is necessary to examine Dr. P.K. Javia, the Medical Officer.

8. In support of his submissions, Mr. Buch has placed strong reliance on the following decisions of the Supreme Court (1) Mohanlal Shamji Soni Vs. Union of India and another, , (2) Dr. Rajesh Talwar and Another Vs. C.B.I. and Another, .

9. In such circumstances referred to above, Mr. Buch prays that there being merit in the application the same be allowed and the impugned order be quashed.

Submissions on behalf of the State:

10. Mr. L.R. Pujari, the learned A.P.P. appearing for the State has vehemently opposed this application submitting that no case is made out for interference in exercise of supervisory powers of this Court under Art. 227 of the Constitution of India. Mr. Pujari submits that no error not to speak of any error of law could be said to have been committed by the learned Sessions Judge in passing the impugned order. Mr. Pujari therefore prays that there being no merit in this application the same be rejected.

Analysis:

11. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration in this application is whether the learned Judge committed any error in passing the impugned order.

12. Section 311 of the Code of Criminal Procedure reads as under:

"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."

13. Section 138 of the Evidence Act, reads as under:

"138. Order of examinations:- witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to the relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

14. In a recent pronouncement of the Supreme Court in the case of Rajaram Prasad Yadav Vs. State of Bihar and Another, , the Court has very exhaustively discussed the law on the subject of Sec. 311 of Cr.P.C.

15. I may quote with profit the observations made by the Supreme Court in Paragraphs Nos. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23:

"14. A conspicuous reading of Sec. 311, Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "an" has been used as a pre-fix to "Court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Sec. 311, Cr.P.C. and Sec. 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Sec. 138, will have to necessarily be in consonance with the prescription contained in Sec. 311, Cr.P.C. It is, therefore, imperative that the invocation of Sec. 311, Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Sec. 311, Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Sec. 311, Cr.P.C. In the decision reported in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, , this Court held as under in Paragraph 14:

"14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of 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. If the Court has acted without the requirements of a just decision, the action is open to criticism but if the Court's action is supportable as being in aid of a just decision, the action cannot be regarded as exceeding the jurisdiction."

(Emphasis added)

16. In the decision reported in *Mohanlal Shamji Soni Vs. Union of India and another*, , this Court again highlighted the importance of the power to be exercised under Sec. 311, Cr.P.C. as under in Paragraph 10:

"10. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Sec. 540 of the Code (Sec. 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

17. In the decision in *Raj Deo Sharma Vs. The State of Bihar*, , the proposition has been reiterated as under in Paragraph 9:

"9. We may observe that the power of the Court as envisaged in Sec. 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, nor in *Kartar Singh case*, 1994 Cri. L.J. 3139 such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court under Sec. 311 of the Code. We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case, it is the duty of the Court to summon and examine or recall and re-examine any such person."

(Emphasis added)

18. In *U.T. of Dadra and Haveli and Another Vs. Fatehsinh Mohansinh Chauhan*, , the decision has been further elucidated as under in Paragraph 15 (of SCC):

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Sec. 311, Cr.P.C. 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."

(Emphasis added)

19. In *Iddar and Others Vs. Aabida and Another*, , the object underlying under Sec. 311, Cr.P.C., has been stated as under in Paragraph 11:

"11. The object underlying Sec. 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 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 Sec. 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."

(Emphasis added)

20. In *P. Sanjeeva Rao Vs. The State of A.P.*, , the scope of Sec. 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in Paragraphs 13 and 16, which are as under:

"13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in *Hoffman Andreas Vs. Inspector of Customs, Amritsar*, . The following passage is in this regard apposite:

"In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Sec. 311 of the Code. After all the trial is basically for the prisoners and Courts should afford the opportunity to them in the fairest manner possible."

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent, the apprehension

expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

(Emphasis added)

21. In a recent decision of this Court in Sheikh Jumman Vs. State of Maharashtra, , the above-referred to decisions were followed.

22. Again in an unreported decision rendered by this Court dated 8-5-2013 in Natasha Singh Vs. CBI (State), , where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in Paragraphs 14 and 15:

"14. The scope and object of the provision 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 under Sec. 311, Cr.P.C. 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 Sec. 311, Cr.P.C. 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.

15. 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 a 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 that there is no breach of the same. (Vide : Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, ; Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, ; Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others, ; Mrs. Kalyani Baskar Vs. Mrs. M.S. Sampornam, ; Vijay Kumar Vs. State of U.P. and Another, ; and Sudevanand Vs. State, ."

23. From a conspectus consideration of the above decisions, while dealing with an application under Sec. 311 Cr.P.C. read along with Sec. 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

(a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Sec. 311 is noted by the Court for a just decision of a case?

(b) The exercise of the widest discretionary power under Sec. 311, Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

(c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

(d) The exercise of power under Sec. 311, Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(e) The exercise of the said power cannot be dubbed as filling in a lacuna in a 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.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

(h) The object of Sec. 311, Cr.P.C. simultaneously imposes a duty on the Court to

determine the truth and to render a just decision.

(i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(j) Exigency of the situation, fair-play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

(k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

(l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

(n) The power under Sec. 311, Cr.P.C. 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society, and therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

16. Section 311 of the Code of Criminal Procedure is in two parts:

In the first part, discretion is given to the Court and enables it, at any stage of an inquiry, trial or other proceedings 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 was already been recorded; on the other, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of the orderly society. The Court examines evidence under this Section neither to help the prosecution nor to help the accused. It is done

neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. The fundamental thing to be seen is whether this evidence the Court thinks necessary in the facts and circumstances of the particular case before it. If this resulting in what is sometimes thought to be the "filling of lacunae" as contended by the learned Counsel for the petitioner, that is purely a subsidiary factor and cannot be taken into consideration. Section 311 Cr.P.C. confers jurisdiction on the Judge to act in aid of justice.

17. Even if a witness, whose statement under Sec. 161 Cr.P.C. had not been recorded at the time of the investigation, can be allowed to be examined under Sec. 311 Cr.P.C. Under Sec. 231 Cr.P.C., the Court is to take all evidence produced in support of the prosecution. Therefore, where the statement of witness is not recorded under Sec. 161 Cr.P.C., but the prosecution with the prior permission of the Court produce such a witness, the accused cannot be said to have been taken by surprise. When a witness examined in Court, whose statement has not been recorded at the time of the investigation under Sec. 161 Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if, it is found that prejudice has been caused to the accused, then the evidence of such witness may not be acted upon.

18. I may quote with profit a Division Bench Decision of this Court in the case of *Abdulla Gafur Sumra Vs. State of Gujarat*, :

"23. Shri Barejia for the appellant has then urged that the witness at Exh. 122 was not cited as a witness in the charge-sheet and he could not have been examined at trial by an on behalf of the prosecution in support of its case. In fact the submission urged before us by Shri Barejia for the appellant was to the effect that if a witness is not cited in the first information report or the complaint or the charge-sheet he cannot be examined as a witness on behalf of the prosecution at trial. This submission has to be stated only to be rejected for the simple reason that acceptance of such submission would render nugatory Sec. 311 of the Cr.P.C. It cannot be gainsaid that the enabling provision contained therein is not for gracing the statute book or as an empty or idle formality. The Court cannot be oblivious to the fact that it has not only to see that no innocent person is convicted and sentenced but it has also to see that no guilty person escapes the clutches of the penal law."

19. I am not impressed by the submission of Mr. Buch, the learned Advocate appearing on behalf of the applicant, that the application filed by the State, Exh. 83, should have been rejected solely on the ground that the same was filed at the stage of the pronouncement of final judgment.

20. If the prosecutor after the closure of his evidence finds that for one reason or the other, which of course is required to be persuasive, some witnesses, who were necessary for his case, could not be cited, or if cited could not be examined or some documents could not be tendered or exhibited in evidence, he has two options open before him. One is to ask the Court for permission to lead

additional evidence or request it to exercise its right under Sec. 311 of Cr.P.C., 1973. His choice on the first option is very limited and, except in exceptional cases, may not meet the approval of the Court. He can always crave to convince the Court for proceeding under Sec. 311 of the Code.

21. The discretion is required to be exercised by the Court keeping in view the just decision of the case unmindful of the fact whether any party before it gains or loses from the exercise of such discretion under this Section. There is no doubt that the object of the Section is not to enable anyone or the other party to fill up the gaps of its case. The Section is not to be used to enable the prosecution either to improve its version at a later stage or enable it to repair the lacunae. The sole criterion in such a case should be whether the exercise of power under this Section is necessary in the interest of justice. While exercising this discretion the Court has to keep in its mind the well-known principle of law that the order should not operate as a rebuttal of the case set-up by the defence after the prosecution case is closed. The use of this Section cannot be limited only to something arising ex-improviso which no human agency could see.

22. I may quote with profit a King's Bench Division in the case of *The King v. Dora Harris*, reported in 1927 (2) KB 567. The Court observed as under:

"A Judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice, but in order that injustice should not be done to an accused person, a Judge should not call a witness in a criminal trial after the case for the defence is closed, except in a case where a matter arises ex-improviso, which no human ingenuity can foresee, on the part of the prisoner.

Rule Laid down by Tindal C.J. in *Reg. v. Frost*, 1839 (4) St. Tr. (N.S.) 86, 386; 9 C. & P. 129, 159 applied."

23. The question, therefore, is whether or not after the entire evidence of the prosecution or the defence is over, the Court should permit further evidence to be allowed, will depend upon the facts of each case. It cannot be Laid down as a general rule that in no case can additional witnesses be called by the Judge at the suggestion of the prosecution, before the close of the trial of the case, where the defence has been closed or arguments have been heard. The trial comes to an end with the pronouncement of the judgment, though judgment itself may not be a part of the trial. The mere fact that the additional evidence is permitted to be taken after the entire prosecution case is over is not in itself in excess of the powers of the Court.

24. I may quote with profit a decision of the Supreme Court in the case of *B.M. Lall (Dead) by Lrs. Vs. Dunlop Rubber and Co. Ltd. and Others*, . In *Jamatraj Kewalji*, (supra), the Supreme Court with reference to Sec. 540 of the old Code observed:

"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 fide 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. There are, however, two aspects of the matter which must be distinctly kept apart.

The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly."

It was further observed:

"There is, however, the other aspect namely, of the power of the Court which is to be exercised to reach a just decision. This power is exercisable at any time and the Code of Criminal Procedure clearly so states."

25. It is, therefore, imperative that before using his powers, the Judge has to take into account the circumstances of the case of examining witnesses after the entire case is closed and that should not cause injustice to the accused. To a certain extent I do agree with Mr. Buch, the learned Advocate appearing on behalf of the accused as a proposition of law that it should not operate to demolish the case Laid by the accused if he has done so in his defence. No hard and fast rules can be prescribed as to when and at what stage this discretion should be exercised. The anxiety for justice is paramount and should be kept in view. The Court should be unmindful of the fact of the use of the discretion in favour or against any party. The principle that such evidence should not demolish the case set up by the accused in his defence, if he has done so should be present to the mind of the Judge at the time when he takes a decision. The Court under Sec. 311 is to help neither the prosecution nor the accused.

26. In the present case, it is not in dispute that after the arrest of the accused and while drawing the arrest panchnama, the Investigating Officer had noticed few injuries on the body of the accused. In such circumstances, the Investigating Officer thought fit to subject the accused to medical examination through the Medical Officer. Dr. Javia had carried out the medical examination and had prepared the medical papers in that regard. It appears that the prosecution wants to bring on record such fact through Dr. Javia so that the medical papers could be exhibited. The learned Judge himself has stated in the impugned order that the fact that the accused was subjected to medical examination is borne out from the post-mortem report Exh. 10 itself. With a view to seek further clarity in that regard, the Medical Officer, Dr. Javia is now sought to be examined for the limited purpose of bringing on record the relevant medical papers as regards the injuries which were noticed on the body of the accused. In such circumstances, could it be said that the prosecution is trying to fill up a lacuna left behind much to the prejudice of the defence? In my view, the answer has to be in the negative.

27. The judgment of the Supreme Court in the case of Mohanlal Shamji Soni Vs.

Union of India and another, on which strong reliance has been placed by Mr. Buch, has been considered and dealt with by the Supreme Court in the case of U.T. of Dadra and Haveli and Another Vs. Fatehsinh Mohansinh Chauhan, in Paragraph No. 11. The Court observed as under:

"In Mohanlal Shamji Soni Vs. Union of India and another, , it was observed that 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 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 emphasized that power is circumscribed by the principle that underlines Sec. 311, Cr.P.C., 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 command 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 lacuna was examined having regard to the peculiar facts where the exercise of power under Sec. 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 Secs. 21, 25 and 29 of the N.D.P.S. Act. The prosecution and the defence closed their evidence on 19-9-1997 and the case was posted for further steps and on 7-3-1998, 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 7-6-1998, the Public Prosecutor moved an application seeking permission to examine Dalip Singh, S.I. 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 under Sec. 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 under

Sec. 311, Cr.P.C., a Court cannot allow the prosecution to re-examine prosecution witnesses in order to fill up lacuna in the case specially having regard to the fact that Dalip Singh witness was never tendered by the prosecution for cross-examination and P.W. 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 under Sec. 311 of the Code or under Sec. 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 laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up."

28. In my opinion, the decision of Mohanlal Shamji Soni Vs. Union of India and another, is of no avail to the accused in any manner while challenging the impugned order. The Supreme Court has observed in the decision of Mohanlal Shamji Soni Vs. Union of India and another, that due care should be taken by the Court while exercising the power under Sec. 311 of the Code and it should not be used for filling up the lacuna left by the prosecution or by the defence. In my view it cannot be said that the prosecution is trying to fill up any lacuna.

29. I may quote with profit very apt observations of the Supreme Court in this regard. The Supreme Court in U.T. of Dadra and Haveli and Another Vs. Fatehsinh Mohansinh Chauhan, has observed that:

"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. Afterall, 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."

"Even if it amounts to "filling of loopholes" the same is just a subsidiary factor as observed by the Supreme Court in Iddar and Others Vs. Aabida and Another, ."

30. I may quote with profit a decision of the Supreme Court in the case of Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, , wherein the Supreme Court made the following observations in Paragraph Nos. 6 and 7.

"6. It is a common experience in criminal Courts that defence Counsel would raise objections whenever Courts exercise powers under Sec. 311 of the Code or under Sec. 165 of the Evidence Act by saying that the Court could not "fill the lacuna in the prosecution case". A lacuna in prosecution is not to be equated with the fall-out 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 the lacuna which a Court cannot fill up.

7. 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."

31. I may quote one more decision of the Supreme Court in the case of Raj Deo Sharma Vs. The State of Bihar, . Wherein the Supreme Court made the following observations in Paragraph No. 9:

"9. We may observe that the power of the Court as envisaged in Sec. 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the Seven-Judge Bench in Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., nor in Kartar Singh's case [1994 Cri. L.J. 3139], such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court under Sec. 311 of the Code.

We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case, it is the duty of the Court to summon and examine or recall and re-examine any such person."

32. In my view the observations made by the Supreme Court referred to above, is a direct answer to the main submission of Mr. Buch, the learned Advocate appearing on behalf of the accused.

33. The decision of the Supreme Court in the case of Dr. Rajesh Talwar and Another Vs. C.B.I. and Another, is also of no avail to the accused. In the said case during the trial proceedings of the well-known Aarushi Talwar murder case, where the parents were being tried for the murder of their daughter, the accused parents had moved an application under Sec. 233 read with Sec. 91 of the

Criminal Procedure Code, 1973, for production of the reports of concerned scientific tests (i.e., narco-analysis test, brain-mapping test, polygraph test, etc.) conducted on three persons who at one time were suspected accused in the said case and had been in police custody. It was submitted that the said reports were essential for the defence as they contained exculpatory statements favouring the present accused and it was only upon examination of the said reports by the trial Court that the accused would be able to put up their plea that the crime, in fact, might have been committed by the said three persons. On getting no relief from the trial Court, the accused approached the High Court. The High Court rejected the said prayer on the ground that the said application was vexatious and intended to delay the proceedings. Aggrieved thereby, the accused had preferred the present Special Leave Petition. The Supreme Court dismissed the Special Leave Petition observing as under:

"9. After considering the rival submissions on this point, we find no merit in the contention on behalf of the petitioners that they could not have approached this Court earlier. There is no reason why the petitioners ought to have waited from 19-7-2013 to 17-9-2013 to approach this Court and allowed the trial to proceed even further. We make this observation in the background of the observation of the High Court that even the initial applications were made at a stage where the prosecution evidence had been concluded and the defence had entered and almost concluded its evidence. In fact, the petitioners had, without raising any objection that the reports and documents allegedly proved by the witnesses have not been supplied to them or made part of the Court record, participated in the examination and cross-examination of two witnesses. We might note that criminal Courts are not obliged to accede to the request made by any party to entertain and allow application for additional evidence and in fact, are bound in terms of Sec. 233(3) Cr.P.C. to refuse such request if it appears that they are made in order to vex the proceedings or delay the same. It is also pertinent to mention here that the learned trial Judge who has been conducting the trial is likely to retire very soon."

34. Thus, from the above, it could be said that the Supreme Court did not permit the accused to lead such evidence after the closing of the statement under Sec. 313 of the Code on the ground that the petitioners before the Court had been adopting dilatory tactics on every moment.

35. I have reached to the conclusion that the examination of the Medical Officer Dr. Javia is absolutely necessary for doing substantial justice. Whatever be its worth. Ultimately, the accused will also have a right to cross-examine the witness in his own way. The Section is not limited only for the benefit of the accused, and it will not be in proper 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 of the accused. Ultimately, if such evidence is allowed to be brought on record, the Court will definitely give an opportunity to the accused to explain the injuries which were found on his body at the time of drawing of his

arrest panchnama. As observed by the Supreme Court in the case of Iddar and Others Vs. Aabida and Another, it is a cardinal rule in the law of evidence that the best available evidence should be brought before this Court.

36. It appears that the entire case of the prosecution hinges on the circumstantial evidence. There is no direct evidence available in the present case. If, after the incident in question and at the time of the arrest of the accused few injuries were noticed on his body, then in such circumstances, the Investigating Officer was quite justified in forwarding the accused for medical examination. Since, the medical examination was carried out the papers of such medical examination would probably help the learned Judge in arriving at the just decision of the case. For the forgoing reasons I do not find any merit in this application and the same is accordingly rejected.