

**(2012) 04 GAU CK 0020**  
**In the Gauhati High Court**  
**Case No : Criminal Reference No. 3 of 2006**

State of Assam

APPELLANT

Vs

Sri Prabin Paul

RESPONDENT

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**Date of Decision :** 27-04-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2, Order 18 Rule 17  
Criminal Procedure Code, 1973 (CrPC) — Section 154, 311  
Evidence Act, 1872 — Section 137, 138, 165  
Penal Code, 1860 (IPC) — Section 324

**Citation :** (2012) 3 GLD 85

**Hon'ble Judges :** Iqbal Ahmed Ansari, J

**Bench :** Single Bench

**Advocate :** Z. Kamar, PP, Assam, for the Appellant; S. Kataki, . Mr. A.N. Choudhury and Mr. P. Deka, for the Respondent

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## Judgement

1. This is a criminal reference, made by the learned Judicial Magistrate, 1st Class, Saraideo, Sonari, District Sivasagar, in GR Case No. 135 of 2009, wherein the question, which has been referred to by the learned Court below, for the decision of this Court, reads:

As to whether this Court may take, the evidence recorded in re-cross-examination of PW1, PW2, PW3, PW4 and PW6, into consideration in deciding this case as per direction of the Hon'ble appellate Court (Hon'ble Sessions Judge, Sivasagar) vide its judgment and order, dated 10-10-2001 in Appeal No. 6(1) 2001?

I have heard Mr. Z Kamar, learned Public Prosecutor, Assam, and Mr. S Kataki, learned counsel for the accused.

2. In the case at hand, as the reference is substantially based on facts, the background events, which have led to the making of the reference, need to be, therefore, taken note of. The material facts, leading to this reference, are, in brief, set out as under:

(i) By judgment and order, dated 30-12-2000, the learned Judicial Magistrate, 1st Class, Saraideo, Sonari, district Sivasagar, convicted the accused u/s 324, IPC and sentenced him to suffer rigorous imprisonment for a period of one year and pay a fine of Rs. 500/- and, in default of payment of fine, rigorous imprisonment for a period of three months. Aggrieved by his conviction and the sentence passed against him, the accused preferred an appeal, which gave rise to Criminal Appeal No. 6(1) of 2001.

(ii) By judgment and order, dated 10-10-2001, the learned Sessions Judge, Sivasagar, has partly allowed the appeal and remanded the case to the learned Court below with certain directions.

3. Before I go to the directions, given by the learned Sessions Judge in appeal it may be noted that the learned appellate Court has observed that in the appeal, a prayer, for remand of the case to the trial Court, was made on two grounds, namely, the witnesses were not thoroughly examined to bring on record the defence case; and, secondly, the investigation had apparently been taken up on the basis of Borhat Police Station GD Entry No. 28, dated 03-04-1999, but the said GD Entry was not produced in the learned trial Court and, according to the learned counsel for the appellant, any oral information of cognizable offence, recorded in the General Diary, shall be construed as the FIR within the meaning of Section 154, Cr.P.C.; but in the Criminal Reference No. 3 of 2006 Page 3 of 10 case at hand, the relevant GD Entry was not produced at the trial and the charge-sheet was submitted on the basis of a subsequently lodged First Information Report (in short, "FIR"). Learned counsel for the appellant also submitted, in the learned appellate Court, that the accused- appellant would be prejudiced if he was not given any opportunity to bring the defence case on record as well as cross-examine the investigating officer on the entry made, in the General Diary, on 02-04-1999. Reacting to the submissions, so made by the learned counsel for the appellant, the learned Sessions Judge observed and directed as under:

5. It is true that the defects pointed out by the learned counsel cannot be attributed on the part of the trial Court. However, justice demands fair and defects less trial sans whether it was on the part of his lawyer, the investigating officer or on the part of the Court. It appears to me that non-production of the GD Entry was a lacuna in the trial. To remove any kind of prejudice from the mind of the accused, it is desirable that the accused should be given an opportunity to re- cross-examine the I.O. on the basis of the GD Entry No. 28. I am also of the view that if the case is remanded back to bring on record the first GD Entry, the accused may be given an opportunity to re-cross- examine the remaining witnesses, who are available for this purpose.

6. Since the case is destined for remand, I am not adverting or discussing the merit of the prosecution case or the impugned judgment.

7. In the result, the appeal stands allowed only for the limited purpose of recross-examination of witnesses. It is made clear that if no witness is available for

further cross-examination no benefit can be given to them on this grounds.

8. Since the Court of Judicial Magistrate of Charaideo. He is directed to afford an opportunity to the accused to recross-examine the witnesses at his cost. Thereafter the learned Magistrate shall proceed to write a fresh judgment. The proceeding shall be decided as early as possible and no unnecessary adjournment shall be given to the accused.

9. The accused is directed to appear before learned SDJM, Charaideo on 19.10.01 and receive further order.

10. Return the L/C record with a copy of this judgment immediately.

4. On receipt of the case, on remand, the learned Magistrate, as transpires from the order, dated 25-11-2005, whereby this reference has been made, passed an order, on 15-10-2001, fixing the case for re-cross- examination of witnesses, including the investigating officer, directing him to produce the GD Entry and, during this course, PWs 1, 2, 3, 4 and 6 were further cross-examined and discharged; but on 11- 03-2004, the learned Magistrate directed re-examination of the investigating officer to bring on record the GD Entry No. 28, dated 02-04-1999, of Borhat Police Station, by invoking the provisions of Section 311, Cr.P.C.

5. Consequently, the investigating officer was re-examined, re- cross-examined and discharged and, thereafter, the present reference, as indicated above, has been made. The reason for making the reference, which has been assigned by the learned Judicial Magistrate, read as under :

Now the question arises in the mind of this Court as to whether a witness can be "re-cross-examined" without his "re-examination?"

Section 138 of Indian Evidence Act, 1872 clearly speaks "Order of examination" i.e. of witnesses. This provision says that the witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling being so desires). This provision clearly speaks that re-examination shall be directed to 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.

On the other hand, Section 137 of the Indian Evidence Act, 1872 defines only 3 (three) types of examination of witnesses i.e. (i) examination-in-chief (ii) cross-examination and (iii) re-examination only, but the said Act nowhere defines "Re-Cross-Examination of witnesses". This Court, on the basis of the aforesaid discussion finds it to be satisfactory that the re-cross-examination of PW 1, PW 2, PW 3, PW 4 and PW 6 in this case, in accordance with the said judgment and order of the said Hon"ble Appellate Court, involves a question of admissibility of said "re-cross-examination" of said witnesses as per provision of Indian Evidence Act. And as such, in opinion of this Court its determination is necessary for the disposal of this case.

6. While considering the present reference, it needs to be noted that Section 311, Cr.P.C. states that 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.

7. A patient reading of the Section 311, Cr.P.C. clearly shows that this section is divided into two parts. While the word used in the first part, is, "may", the word used in the second part, is, "shall". It would, therefore, logically follow that the first part of Section 311, Cr.P.C. is permissive in nature and gives a discretion to a Criminal Court to act, at any stage of enquiry, trial or other proceeding, in one of the three ways, namely,

(1) to summon any person as a witness, or

(2) to examine any person in attendance, though not summoned as a witness, or

(3) to recall and re-examine any person already examined.

8. The second part of Section 311 is, however, mandatory in nature and casts an obligation on the Court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

9. The language, employed in Section 311, clearly shows that this section is couched in widest possible terms and do not limit the discretion of the Court in any manner. However, the wider the power, more cautious shall be the exercise thereof. No exercise of power, in a judicial proceeding, can be arbitrary and, more so, the power to call or re-examine a witness. Whereas the first part of Section 311, as already indicated above, gives a discretion to the Court to call, re-call and re-examine any person as a witness, the second part of this section does not really give any discretion to the Court; rather, it clarifies that if a Court forms the view, in the facts of a given case, that the evidence of the person, who is sought to be called, recalled or re-examine, is essential to the just decision of the case, it would be mandatory for the Court to call, re-call or re-examine a person as a witness. This mandatory exercise of power can also be to obtain fresh evidence provided that the Court forms a view, as indicated hereinbefore, that bringing of such fresh evidence on record is essential to the just decision of the case.

10. Though the law requires the parties to produce, before the Court, the best available evidence, the fact remains that even in a criminal trial, prosecution as well as defence has the right to choose their witness or witnesses and also as to what evidence they would adduce. Nonetheless, they are bound to adduce the best available evidence. The Court has no power to compel either the prosecution or the defence to examine any particular witness. This embargo placed on the

powers of the Court, i.e., the limitation of not directing either the prosecution or the defence to examine any particular witness as their witness, is sought to be balanced by the Legislature with the help of the provisions contained in Section 311 inasmuch as the Legislature has, with the help of Section 311, empowered the Criminal Court to call, recall or re-examine any person as witness. The only rider, which Section 311 attaches to the exercise of this power, is that a Criminal Court cannot call, recall or re-examine any person, as witness, unless examination of such a person is, in the opinion of the Court, essential for a just decision of the case. It, however, the Court is of the view that evidence of a particular witness is necessary for reaching a just decision of the case, the Court, either on its own or on the application of any of the parties concerned, call, recall or re-examine any witness as long as it does not cause prejudice to any of the parties concerned or does not give an undue advantage to any of such parties.

11. This kind of power, which Section 311 vests in a Court, is not peculiar to the criminal law inasmuch as similar provisions have been made even in respect of civil Courts in the form of Order X, Rule 2, Order X, Rule 14 and Order XVIII, Rule 17. Even Section 165 of the Evidence Act recognizes Court's power to put any question to any witness, at any time, which appears to the Judge as necessary for a just decision of the case or in order to discover or obtain proof of relevant facts.

12. Coupled with the above, what now, needs to be noted is that Section 137 of the Evidence Act explains what examination-in-chief is, what cross-examination is and what re-examination means. Section 137 of the Evidence Act is, therefore, reproduced below:

137. Examination-in-chief.-The examination of a witness by the party who calls him shall be called his examination- in-chief.

Cross-Examination.-The examination of a witness by the adverse party shall be called his cross-examination.

Re-Examination.-The examination of a witness, subsequent to the cross-examination by the party who calls him, shall be called his re-examination.

13. Close on the heels of Section 137 of the Evidence Act, Section 138 gives the order of examination by providing as under:

138. Order of examinations.-Witnesses shall be first examined-in-chief, then (if adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to 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. From a careful reading of Section 138, it clearly follows that the Evidence Act has not used the expression re-cross-examination. Thus, re-cross-examination is essentially nothing, but further cross-examination, which obviously follows reexamination. In other words, a witness can be re-examined, in order to explain matters referred to in the cross-examination and if any new matter is, by permission of the Court, introduced in the re-examination, the adverse party may further cross-examine upon that matter. The re-cross-examination, therefore, means, as indicated hereinbefore, further cross-examination of a witness, who has been recalled and re-examined.

15. In the case at hand, the investigating officer (PW6) had been examined, cross-examined and discharged. Thereafter, for the reasons assigned by the learned Sessions Judge, in his judgment and order, dated 10-10-2001, the learned Sessions Judge directed, in effect, the learned trial Court to have the GD Entry No. 28, dated 02-04-1999, produced in the Court and, then, give an opportunity to the accused to further cross-examine the investigating officer on the contents of the said GD entry.

16. In view of the fact that, in terms of the directions of the learned Sessions Judge, which are not challenged, the Investigating Officer was required to produce the said GD Entry, it logically followed that he was required to prove the said GD Entry and, on proof thereof, if the prosecution wanted, it could ask relevant questions and, thereafter, the defence had the right to further cross-examine the investigating officer (PW 6) on the contents of the said GD Entry. It is with this purpose that the directions, as indicated by the judgment and order, dated 10-10-2001, were passed by the learned Sessions Judge.

17. There is no expression, in the Evidence Act, as re-cross-examination and, hence, re-cross-examination really means further cross-examination of a witness, who has been re-examined. In the case at hand, since the learned Court below has, by invoking its power u/s 311, Cr.P.C., got the relevant GD Entry produced, the examination of the investigating officer, in order to prove the entry contained in the aid GD Entry, is his re- examination and if the defence, so wishes, it shall be allowed to further cross-examine the investigating officer and this is what re-cross-examination would mean.

18. The reference stands answered as indicated above.

19. With the above observations and directions, this criminal reference shall stand disposed of. Send back the LCR.