
(2008) 03 MP CK 0071
In the Madhya Pradesh High Court

State of M.P.

APPELLANT

Vs

Vinod Mudgal and Others

RESPONDENT

Date of Decision : 03-03-2008

Acts Referred:

Arms Act, 1959 — Section 25
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 315, 344
Penal Code, 1860 (IPC) — Section 120B, 148, 149, 302, 306

Citation : (2008) ILR (MP) 1817

Hon'ble Judges : B.M. Gupta, J

Bench : Single Bench

Judgement

B.M. Gupta, J.—It is an order dated 10th July, 2007 passed by the 3rd Additional Sessions Judge, Morena in sessions case No. 247/93, whereby the learned Judge has allowed an application u/s 311 of Cr.P.C. filed on behalf of the accused persons for recalling complainant Dinesh Virthare, the main eye-witness of the case, for his further cross-examination of which the correctness, legality or propriety is required to be considered in this suo motu revision initiated by the High Court vide order of the Chief Justice of the High Court dated 13th September, 2007. Vide the same order of Chief Justice, the aforesaid sessions case alongwith its cross-case No. 87/94, has also been placed before this Bench for consideration of the transfer of both the cases from the aforesaid Court to any other competent Court in exercise of the powers of superintendence of the High Court over all subordinate Courts under Article 227 of the Constitution of India.

2A. Brief factual history, being necessary to be known is, that with regard to an incident happened on 22nd November, 1992 at 11.05 a.m. one FIR was lodged by Dinesh Virthare, the father of the deceased, at police Station, Kotwali, Morena, alleging himself to be an eye-witness, on which crime No. 805/92 was registered for the offence punishable u/s 302/34 of IPC against four accused persons namely (1) Vinod Mudgal (2) Parasram Mudgal (3) Ranglal and (4)

Ramvilas, the respondents herein. On this FIR, the aforementioned four persons are facing trial for the offence of murder of Ravikant Virthare in sessions case No. 247/93. The statement of Dinesh Virthare was recorded on 28th and 29th April, 1994 and also on 23rd July, 1994, contains less than two pages of examination-in-chief and 34 pages of cross-examination. Thereafter, recording the statements of all other witnesses, the prosecution closed its evidence on 6th January, 2004, on 6th February, 2004 the statements of accused were recorded u/s 313 of Cr.P.C. and fixed for defence evidence on 25th February, 2004. Before closing of the defence evidence, on 14th June, 2007 this application u/s 311 of Cr.P.C. was filed. It was opposed in writing by the prosecution. Vide impugned order, the same has been allowed. On 26th July, 2007 his further cross-examination has been completed and again the case has been fixed for defence evidence on August, 2007.

2B. Before 4th August, 2007 one application dated 30th July, 2007 has been filed on behalf of Dinesh Virthare for early hearing of the case but the same has been withdrawn on 4th August, 2007. Another application has been filed on behalf of Dinesh Virthare for his further recall as a witness on the ground, that when he was cross- examined on behalf of the prosecution on 26th July, 2007, then upon a question, he replied- ;s dguk xyr gS fd iwoZ es tks esjk dFku gqvK Fkk oks eSus iqfYl ds nokc esa ugh fy[kk;k Fkk while the same has been typed as- ;g dguk xyr gS fd iwoZ esa tks esjk dFku gqvK Fkk oks eSus iqfYl ds nokc esa fn;k Fkk.

Despite oral objection by the prosecution, this application has also been allowed and thereafter he has been further called and re-examined on 9th August, 2007. It is the date when the defence side has also closed its evidence and the case has now been fixed for final argument. The arguments could not be heard, as the case has been called by the High Court under the direction of Hon. The Chief Justice for hearing of this revision.

2C. On perusal of the statement of Dinesh Virthare, it appears that during his first examination on the aforementioned three dates, he supported the prosecution case, stated against the aforementioned accused persons claiming to be an eye-witness of the case. When he was recalled in compliance of the impugned order, he has resiled from his earlier statement and has stated that he was not present at the time of incident. When he was further examined on 26th July, 2007, in para 96 he has stated- ;g dguk xyr gS fd iwoZ dk tks esjk dFku gqvK Fkk oks eSus iqfYl ds nokc esa fn;k Fkk- On perusal of his third statement recorded on 9th August, 2007, he has further resiled from his statement and has stated in para 99- ;s ckr lgh gS fd 1994 esa eSus U;k;ky; ds le{k tks dFku fn;k Fkk og iqfYl ds nokc ds dkj.k fn;k FkkA

2D. On perusal of FIR crime No. 806/92 of the cross-case registered at the same police Station based on the same incident dated 22nd November, 1992 happened at 11.05 hours, it appears that this report was lodged by one Parasram Mudgal, one of the aforementioned four accused persons of the sessions case No.

247/93, on which the offence u/s 307/34 of IPC was registered against (1) Dinesh Virthare (2) Teetu @ Shashikant Virthare (3) Ravikant Virthare (since deceased) and two others (not named). It is alleged inter alia in this FIR that the aforementioned accused persons came at the office of complainant Parasram Mudgal and with intent to commit his murder, Dinesh Virthare fired from his mouser gun causing gun shot injury at right thigh of the complainant. On perusal of this record, it appears that on 26th May, 2007, the statement of Dinesh Virthare was recorded in this cross- case u/s 313 of Cr.P.C. In this statement he has stated that he is not an eye-witness of the incident related to aforesaid sessions case No. 247/93 and it is the statement given by him on which the aforementioned application u/s 311 of Cr.P.C. was filed on behalf of the four accused persons in the aforementioned sessions case No. 247/93.

2E. On perusal of the order-sheets, it appears that the learned Judge, who passed the impugned order, joined the Court near about 30th June, 2005 because on the order-sheet of 30th June, 2005 her signatures are appearing. Prior to this date, another Judge was posted in the Court. On perusal of the order-sheets, it also appears that some times the case has been adjourned on account of filing of some applications at the stage of defence evidence.

3. The relevant provision of Cr.P.C., Section 311 of Cr.P.C. is 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 re call 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.

It appears manifestly in two parts; whereas the word used in first part is "may" and the word used in second part is "shall. In consequence, the first part which is permissive gives purely discretionary authority to the court and enable it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways mentioned therein. The second part being mandatory, imposes an obligation on the Court (1) to summon and examine, or (2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case. Undisputedly, and also on perusal, it appears that the application has been filed under second part, as in para 9 it has been written- ;g fd mDr izdj.k ds Qfj;knh fnus"k fcjFkjs }kjk l= izdj.k dzekad 87@94 es fn, x;s dFkuksa esa vk;s rF;ksa ds laca/k esa mDr lk{;h ls iqu% dwV ijh{k.k fd;k tkuk izdj.k ds U;kf;d fujkdj.k o mfpr U;k;nku gsrq vko";d gS rkfd ekuuh; U;k;ky; ds le{k okLrfod lPpkbZ izdV gks lds- Similarly vide last paragraph, the impugned order goes-vr% izLrqr U;k; n`"Vkar esa izfrikfmr fl)karks , oa izdj.k dh ifjfLFkfr;ksa dks n`f"Vxr j[krs gq, izdj.k ds U;k;ksfpr fujkdj.k gsrq vkjksihx.k dh vksj ls izLrqr vkosnui= varxZr /kkjk 311 Lohdkj fd;k tkrk gS

4. In this light, as mentioned in the application and also in the impugned order, it is to be seen as to whether the recalling of the witness was essential for the just decision of the case ?

5. While dealing with a case having more or less similar facts, the observation of the Apex Court in the case of Mishrilal and Others Vs. State of M.P. and Others, is to be seen. Brief facts of the case are that the incident giving rise to the case happened on 22nd July, 1990 at about 6 p.m. PW-1 Kammod, PW-2 Mokam Singh and deceased Balmukund were grazing the cattle in their fields. The appellants alongwith their accomplices came there and attacked Balmukund and PW-2 Mokam Singh. Balmukund died on account of the injuries caused by the assailants. PW-1 Kammod went to the police Station at Bajranggarh and lodged report about the incident. In this case PW-2 Mokam Singh was recalled on an application filed on behalf of the accused u/s 311 of Cr.P.C. With regard to this fact, the Hon. Apex Court has observed in para 5 and 6 as under:

The Learned Counsel for the appellants seriously attacked the evidence of PW 2 Mokam Singh. This witness was examined by the Sessions Judge on 6.2.1991 and cross- examined on the same day by the defence counsel. Thereafter, it seems, that on behalf of the accused persons an application was filed and PW 2 Mokam Singh was recalled. PW-2 was again examined and cross-examined on 31.7.1991. It may be noted that some of the persons who were allegedly involved in this incident were minors and their case was tried by the Juvenile Court. PW 2 Mokam Singh was also examined as a witness in the case before the Juvenile court. In the Juvenile Court, he gave evidence to the effect that he was not aware of the persons who had attacked him and on hearing the voice of the assailants, he assumed that they were some Banjaras. Upon recalling, PW-2 Mokam Singh was confronted with the evidence he had given later before the Juvenile Court on the basis of which the accused persons were acquitted of the charge u/s 307 IPC for having made an attempt on the life of this witness.

In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW 2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or some other reason. Whenever the

witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses.

6. Similarly the observation of the Apex Court in an another case of Yakub Ismailbhai Patel Vs. State of Gujarat, appears on the same footing. As per the facts of this case, on 25th August, 1995 one Nazim died on account of knife injuries inflicted at his person. Complaint was lodged by one Munna @ Gheti Mohamadshafi Shaikh mentioning therein that being a friend of the deceased on 24th August, 1995 when he visited his residence, he witnessed a hot altercation between him and the petitioner with regard to dispute of a quarter. On 25th August, 1995 while this Munna was returning from the house of his friend, he saw accused No. 1 and accused No. 2 alongwith other persons. They were running and accused No. 1 & 2 were having sharp edged weapon. When he proceeded further, he saw dead-body of his friend Nizamuddin. One Raju was also present there. On enquiry from Raju, he could gather that accused No. 1 and 2 with one another inflicted injuries on the person of the deceased causing his death. Munna reported the matter mentioning the aforementioned facts. After completion of investigation, charge-sheet was filed. Prosecution examined 14 witnesses. At the time of recording of the statements of the accused u/s 313 of Cr.P.C. , an application was filed on behalf of the accused to recall Munna @ Gheti as a defence witness. It appears that an affidavit was filed by witness Munna to the effect that whatever he had deposed before the Court as PW-1 was not true and it was so done at the instance of police. Trial Court convicted all the appellants. In appeal the High Court after considering the evidence dismissed the appeal and gave liberty to the trial Court to proceed against witness Munna @ Gheti u/s 344 of Cr.P.C. Aggrieved by this order, the appellant preferred SLP before the Apex Court impugning the conviction in which leave was granted. In these facts, the Hon. Apex Court has observed in para 40 and 41 as under:

40. Significantly this witness, later on filed an affidavit wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.

41. The averments in the affidavits are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there.

7. The observation of the Apex Court on the point in the case of Nisar Khan @ Guddu and Others Vs. State of Uttaranchal, also appears similar. In this case, the 5 appellants were convicted for the offence punishable under Sections 148, 149, 302/149 of IPC alongwith Section 25 of the Arms Act. In this case also on an application filed on behalf of the accused u/s 311 of Cr.P.C. a witness was recalled. With regard to this fact, the Hon. Apex Court in para 9 has observed as under : The other contention of Mr Jaspal Singh is that all the eyewitnesses were

turned hostile and the credibility of their testimonies are doubted. It is clearly apparent on the record that eyewitness PW 4 Naeem Babu had filed an application before the trial Magistrate (Ext. Kha-27) that he has been threatened and intimidated by the accused not to depose against them. So also PW 1 and PW 2 who were eyewitnesses and supported the prosecution case consistently, were turned hostile. PW 1 and PW 2, direct eyewitnesses of the occurrence were examined, cross-examined and discharged on 4.1.2001. They were recalled on 7.1.2002 and re-examined by the defence on which date all of them turned hostile and resiled from the previous statement. It clearly appears that the eyewitnesses were won over by threat or intimidation after more than one year of their examination and cross-examination and ultimately when the eyewitnesses were won over by the accused they were recalled and reexamined on 7.1.2002. Even on re-examination on 7.1.2002 the eyewitnesses consistently supported the prosecution story with regard to the date and place of incident, the car in which they came and the genesis of the incident. To that extent they supported the prosecution story. They resiled from the previous statement only with regard to the identity of the accused. It is in evidence on record that the accused and prosecution parties are at loggerheads because of business rivalry and known to each other from before. Naturally, by the time the eyewitnesses were recalled, they were won over either by money, by muscle power, by threats or intimidation. We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross-examined and discharged.

8A. A few more principles have been laid down by the Apex Court in the cases of Mohanlal Shamji Soni Vs. Union of India and another, and Iddar and Others Vs. Aabida and Another, , cited on behalf of the respondents/accused. As per the facts of the case of Mohanlal Shamji, during a raid primary gold alongwith silver bricks and an amount of Rs. 79,000/-was seized from the possession of the appellant. Assistant Collector of Customs filed two complaints (1) under the provisions of Customs Act, 1962 and (2) under the Gold Control Act, 1968. At the time of final argument, prosecution filed two applications in both the cases u/s 540 of the old Code of which the Section 311 of Cr.P.C. is corresponding , requesting the trial Court to recall Mr.Mirchandani, the seizing officer, for further examination alongwith two new witnesses K.K.Das, Assistant Collector of Customs and the Deputy Chief Officer (Assayer) of Mint Master, Bombay either as witnesses of prosecution or of the Court. Trial Court rejected, but the High Court allowed the revisions and directed to examine the aforesaid three witnesses. Feeling aggrieved, the appellant approached the Apex Court. The relevant observation of the Apex Court in para 16, 19 and 27 is as under:

16. ...Though any party to the proceedings points out the desirability (of) some evidence being taken, then the Court has to exercise its power under this provision either discretionary or mandatory -depending on the facts and circumstances of each case, having in view that the most paramount principle

underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.... The following extract is quoted from the quoted part of the Apex Court from the case of Jamatraj Kewalji Govani. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides.... 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.

18. ...Though Section 540 (Section 311 of the new Code), is, 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 they should be exercised, that power is circumscribed by the principle that underlines Section 540, 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.

Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results....

19. ...but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise.... The words, "Just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play.-----27.

The principle of law that "emerges from the views expressed by This Court in the above decisions is 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.

8B. The matter of Iddar (supra) was a case under Sections 498A, 406, 376 and 120B of IPC. On account of some settlement between the parties, a varied statement was given by the complainant during trial. After some time, an application u/s 311 of Cr.P.C. was filed to recall him. It was rejected, but allowed by the High Court, however, without hearing the accused/appellant. The

appellant filed appeal before the Apex Court on two grounds (1) that no reasons have been mentioned by the High Court in allowing the application while setting aside the order of the trial Court (2) the order has been passed without notice to the appellant. The Hon. Apex Court allowed the appeal on the second ground as per the observation in para 14. However, prior to it, the relevant observation in para 10 to 12 is-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.... It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court.... 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.

9. Arguing on behalf of the respondents/accused, Shri Vivek Tankha, learned Sr. Advocate, has also placed reliance on one more judgment of the Apex Court in the case of Mohd. Husain Umar Kochra etc. Vs. K.S. Dalipsinghji and Another etc., . It was an appeal against conviction of the appellant for the offence of criminal conspiracy to import and deal in gold, punishable u/s 120B of IPC read with Section 167(81) of the Sea Customs Act, 1878, the Hon. Apex Court has framed five questions to be considered for the disposal of the appeal. The 5th question which only relates with the present dispute was, did the Court below has wrongly refused to recall PW 50 Ali for cross- examination. With regard to this question, the following observation has been given in para 19

19. As to the last question, we find that examination-in-chief of P. W. 50 Ali commenced on October 7, 1960 and was concluded on October 10, 1960. His cross- examination commenced on August 21, 1961 and was concluded on September 4, 1961. On March 6, 1962 and again on June 21, 1962 the defence applied for recalling Ali for cross-examination. The learned Magistrate rejected the two applications. According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion, no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned Magistrate rightly disallowed the prayer for recalling Ali.

Shri Tankha has argued that the observation indicates that, had there been an affidavit filed, the refusal of recalling of the witness would have been observed, not justified. He has further submitted that this being an observation of three judges Division Bench and in case of any conflict with the observation of

aforementioned two judges Division Benches of the Apex Court, it is required to be followed.

In his support, he has drawn attention at para 29 of a judgment delivered by five judges Bench of the Apex Court in the case of Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., . Para 29 of the judgment goes as under:

29. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons, .that is not conveniently possible.

10. It is true and also settled that in case of conflict, a law pronounced by a three judges Division Bench or a Larger Bench, is to be followed in comparison to the law pronounced by two judges Division Bench or the Bench of smaller number of Judges. Thus, two material points are to be searched for the purpose to conclude the present controversy (1) whether a law, as contended, has been pronounced by the Apex Court in this case, that in all such cases when such affidavit is on record, irrespective of absence of the other factors required, such as, that the calling or recalling of a witness must be essential for the just decision of the case, the witness is to be recalled ? and (2) that, if such pronouncement is in existence, then whether it is in conflict with the law pronounced by the aforementioned Division Benches of the Apex Court. After a deep consideration, with respect, answer of both the questions is in negative. In reading the judgment in the case of Mohd. Hussain (supra), it appears that the order of rejection of the application by the Magistrate has been affirmed while mentioning -In our opinion, no ground was made out for recalling Ali, as there was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular-. It is further mentioned by the Hon. Court that -" he is prepared to give evidence which is materially different from what he had given at the trial-". The existence of inherent powers to recall has been okayed, but it is not observed that when such requirement for invoking the inherent powers will arise or what may be the other material on which the calling of the witness may be required. There appears no observation on the legal requirement-" the evidence appears to the Court to be essential to the just decision of the case", as the same was not required in the facts because the absence of affidavit or other material was considered sufficient to affirm the order of the Magistrate. Thus, in absence of such pronouncement of law, there appears no conflict of opinion in the observation of the other Division Benches of two judges of the Apex Court, quoted hereinabove, with the observation of the Apex Court in the case of Mohd. Hussain (supra).

11. On perusal of the afore-quoted observations of the Apex Court while

explaining the second part of the provision of Section 311 of Cr.P.C., it appears that the calling or recalling of a witness is required for the just decision of the case which is to be concluded by the presiding Judge on facts of each case. It should be for searching the truth by lawful means, not intended to give an unfair advantage to one of the rival sides. It calls for no limitation, with regard to the stage at which the powers should be exercised, but it should be with a view that the best available evidence is to be on the record before the Court. A witness ought not to be recalled and re-examine to deny or to efface the evidence, he had already given before the Court on oath. A witness can be confronted only with a previous statement made by him. The jurisdiction vested in the Court to call or recall a witness under this provision must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results.

12A. On perusal, it appears that with regard to an incident happened on 22nd November 1992, FIR was lodged by Dinesh Virthare at 11.05 a.m. mentioning himself to be an eye-witness. During trial, the statement of Dinesh Virthare was recorded on 28th April, 1994 and remained continue on next full day. Thereafter again his cross-examination was done on 23rd July, 1994. As against less than two pages in examination-in-chief, a lengthy cross-examination in detail on every point was completed on behalf of the accused persons in thirty four pages. The prosecution closed its evidence on 6th January, 2004. Accused statements u/s 313 of Cr.P.C. were recorded on 6th February, 2004. The case was first fixed for defence on 25th February, 2004. Thereafter, on 14th June, 2007 after near about 12 years from recording of his statement, this application u/s 311 of Cr.P.C. has been filed for recalling him for further cross-examination on the ground that in another case which has been alleged to be a cross-case, in the capacity of an accused he stated u/s 313 of Cr.P.C. and also gave statement u/s 315 of Cr.P.C. that he did not witness the incident, which has been allowed by the learned Judge vide impugned order considering the recalling of the witness as essential for the just decision of the case. In view of the aforementioned facts, this approach of the learned Judge cannot be upheld. As observed by the Apex Court in the case of Mishrilal (*supra*), after examination and cross-examination of this witness, such recalling amounts to providing an opportunity to a witness to deny or to efface the evidence, he had already given before the Court, which was not to be given, even though that witness had given an inconsistent statement before any other court or forum subsequently. It is against the observation of the Apex Court in the case of Yakub Ismailbhai (*supra*), as it amounts to permit the witness to perjure himself by resiling from his earlier testimony given on oath. It is also against the observation of the Apex Court in the case of Nisar Khan (*supra*), as the witness was not recalled within a period of one year, but recalled after more than 12 years. As observe by the Apex Court in the case of Mohanlal Shamji (*supra*), recalling of this witness does not amount to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice neither it can be said for a just decision of the case, not intended to give an unfair

advantage to one of the rival sides. Neither it amounts to getting at the truth by lawful means nor appears to be based on good sense of justice or fair play. On the contrary, it appears that the learned Judge has acted without the requirements of a just decision and thus, the action is open to criticism. Thus, the jurisdiction vested in the Court cannot be said to be exercised in judicious manner. In the facts and circumstances of the case, it does not appear that the recalling of the witness was in any manner essential for the just decision of the case.

12B. As argued on behalf of the respondents, it is true that all material evidence should be brought before the Court, but it does not mean that a witness ought to be recalled under the provision without following the settled principles of law, as settled by the Apex Court in aforementioned cases. Calling or recalling of a witness after flouting the aforementioned settled principles, ought not to be permitted. Bringing all material evidence before the Court also does not amount to record all irrelevant evidence. When a Judge exercises its discretion u/s 311 of Cr.P.C., he has to follow the aforementioned settled principles, to arrive at the conclusion whether calling or recalling of such witness is in real sense essential for the just decision of the case and the same is based on a fair play and good conscious and also not intended to give an unfair advantage to one of the rival parties. Permitting a witness to resile from his earlier evidence given on oath without any proper explanation thereto, amounts to wrong exercising of the jurisdiction vested in the Court causing miscarriage of justice, instead of deciding the case in a judicious manner. In view of this, in my considered opinion the impugned order is erroneous and also amount to miscarriage of justice. Hence, the same deserves to be set aside.

13A. Shri Tankha has placed reliance on one more judgment of Apex Court in the case of Satyajit Banerjee and Others Vs. State of West Bengal and Others, . In this case, the appellants/accused were acquitted from the offence punishable u/s 498A read with Section 306 of IPC. The High Court while hearing the appeal against acquittal observed that where prosecution lacks in bringing necessary evidence, the trial Court ought to have invoked its powers u/s 311 of Cr.P.C. and summoned for examining the father of the deceased and other additional witnesses whom it considered necessary to set aside the acquittal. With this observation, the case was remanded by the High Court with a direction for deciding afresh, as per suggested formula in the order. Feeling aggrieved, the matter was brought before the Apex Court by the appellants/accused. During pendency of the appeal and in absence of any stay order from the Apex Court, during retrial few statements were recorded in the trial Court in compliance of the aforementioned order of the High Court. It is observed by the Apex Court that the direction for retrial as per the suggested formula was wrong. The observation of the Apex Court in para 23, 26 and 27 is as under:

23. Without going into the correctness of all the observations made by the High Court in the impugned judgment, we find it necessary to clarify that the High

Court ought not to have directed the trial Court to hold a de novo trial and take decision on the basis of so called "suggested formula". The High Court in its concluding part of the judgment does state that any observation in its judgment should not influence the mind of the trial Court but, at the same time, the High Court directs the trial Court to take "a fresh decision from stage one" and on the basis of the "suggested formula". Learned Counsel for the accused is justified in his grievance and apprehension that the aforesaid observations and directions are likely to be mistaken by the trial Court as if there is a mandate to it to record the verdict of conviction against the accused regardless of the worth and weight of the evidence before it.----

26. So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial.

27. With the above clarification, we decline to interfere in the order of remand. To put the matter beyond any shadow of doubt we further clarify and reiterate that the trial Judge, after retrial, shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in the judgment of the High Court or this Court.

Wherever underline appears in the order, it is an emphasis which has been supplied.

13B. While citing this case, Shri Tankha has emphasized that in compliance of the impugned order, the further cross-examination of the witness has been recorded, hence, the same ought to be on record permitting the Court to decide as to which of the two statements of the witness is required to be believed. The contention of Shri Tankha, neither gets support from the aforementioned judgment of the Apex Court nor, appears appropriate to be sustained. In the aforementioned case, retrial was ordered without a direction of quashing the earlier trial and in absence of the stay order from the Apex Court, few statements were recorded in compliance of the order of the High Court conducting retrial. It is observed by the Apex Court that the evidence already recorded at the initial trial cannot be erased and the trial Judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial. The order of retrial was not set aside. Only a direction of the High Court was set aside that in suggested formula the case is to be decided and for the purpose it was directed by the Apex Court that the trial Judge shall take a decision on the basis of the entire evidence on record and strictly in accordance with law, without in any manner, being influenced or inhibited by anything said on the evidence in the judgment of the High Court or the Apex Court. But in the present case, the impugned order is being set aside. Permitting a trial Judge to read such evidence which has been recorded in

compliance of such order, does not appear appropriate. The evidence recorded under such order which is not alive, cannot be said to be a valid evidence on record. Hence, this contention of Shri Tankha to read this evidence, cannot be sustained.

14. With regard to next question which requires consideration is transfer of aforementioned both the sessions cases from the Court of the learned Judge, all the parties on record have unanimously informed the Court that the learned Judge who passed the impugned order has been transferred from that Court. It is also informed by all the parties that in such circumstances, both the cases can be continued in the same Court or if at all transfer of the cases is considered necessary, the same be transferred to any senior Judge either at Morena, Gwalior or Bhind. Considering the importance of the cases, the second suggestion appears justified. The parties are resident of Morena. In case the trial continues, it may not be considered convenient to the parties that the cases be tried at Gwalior, but at present the cases are at the stage of hearing of final arguments/ passing of judgment. Trial has been concluded. Distance of Morena from Gwalior is only 35 to 40 kms. As such, Gwalior is not a distant place for the purpose. Considering all these aspects and also the facts of the cases, it appears expedient for the ends of justice that both the cases are to be heard and decided by the Sessions Judge, Gwalior.

15. Consequently, the revision is disposed of thus:

(i) The impugned order is set aside. The further cross- examination of witness Dinesh Virthare recorded in compliance of the impugned order and thereafter is directed to be considered off the record.

(ii) Both the sessions cases are transferred from the Court of 3rd Additional Sessions Judge, Morena to the Court of Sessions Judge, Gwalior. The parties will remain present before the Sessions Judge, Gwalior on 17.3.08. The original record of both the cases, which is in the High Court, be transmitted to the Court of Sessions Judge, Gwalior before the aforementioned date. It is also observed that any observation by this Court in this order will not affect, in any manner, the independent approach of the learned Sessions Judge, Gwalior while disposing of both the cases.