

**HIGH COURT OF MADHYA PRADESH****BENCH AT GWALIOR****SINGLE BENCH****PRESENT:****HON'BLE MR. JUSTICE G.S. AHLUWALIA****Misc. Criminal Case No. 11021 OF 2016****Kamlesh Diwakar****-Vs-****State of M. P.**

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Shri Vivek Mishra, counsel for the applicant.

Shri Jai Prakash Sharma, Panel Lawyer for the respondent/State.

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**J U D G M E N T**  
**(08/11/2016)**

This petition under Section 482 of Cr.P.C. has been filed against the order dated 14.09.2016 passed by Additional Sessions Judge (Special Judge M.P. Dacoity Avam Vyapaharan Prabhavit Kshetra Adhinyam) Lahar, District Bhind in S.T. No. 2586/2016 by which the application filed by the complainant under Section 311 of Cr.P.C., for summoning one Jaiveer, has been allowed.

**2.** The applicant is facing trial for offences punishable under Sections 302, 363, 364-A of IPC and under Section 11/13 of MPDVPK Act.

**3.** The facts of the case in short, which are necessary for the disposal of this petition, are that a boy namely Vikram had gone to his school on 13.08.2015 at 11:00 AM but thereafter he did not come back. Gum Insaan report was lodged, and later on the dead body of deceased Vikram was recovered from a well situated at Dikoli. The dead body was identified by the relatives of the deceased

Vikram. The police after completing the investigation filed the charge sheet against the applicant for the above mentioned offences. It is not out of place to mention here that the case is based on circumstantial evidence.

**4.** After the prosecution case was over and the statement of the accused under Section 313 of Cr.P.C. was recorded, it appears that the complainant filed an application under Section 311 of Cr.P.C. stating that Vimlesh (PW-1) has stated in his evidence that Brijendra @ Jaiveer who is the resident of Dhanuk Ka Pura, P.S. Nayagaon, District Bhind had informed him that he had seen the deceased Vikram alive in the company of the applicant, therefore, it was prayed that Brijendra @ Jaiveer be called for his examination as a witness as it is essential for the just decision of the case.

**5.** Refuting the contention of the complainant, the applicant filed his reply and pleaded that Brijendra @ Jaiveer is a real brother-in-law (Sala) of Kamlesh (P.W.8), the father of the deceased Vikram. It was further stated that initially the prosecution had examined one Veer Kumar (PW-7) to prove the circumstance of last seen together but as Veer Kumar (PW-7) has not supported the prosecution case therefore, now the complainant wants to examine the real brother-in-law of Kamlesh in place of Veer Kumar. It was further stated that had Jaiveer seen the deceased for the last time in the company of the applicant, then he would have certainly informed the witnesses as well as the police, and the police would have recorded his statement. It was pleaded that in fact an attempt is being made to fill up the lacuna as Veer Kumar (PW-7) has not supported the prosecution case.

**6.** The trial court by the impugned order allowed the application on the ground that it is true the statement of Jaiveer was not recorded during the merg investigation as well as under Section 161 of Cr.P.C. and his statement under Section 164 of Cr.P.C. was also not got recorded. Similarly, in the statement of Vimlesh (PW-1) recorded under Section 161 of Cr.P.C. as well as under Section 164 of Cr.P.C. this fact was not mentioned that Jaiveer had seen the Vikram in the company of the applicant. However, the application has been allowed only on the ground that inspite of the fact that Vimlesh (PW-1) has stated in his examination-in-chief, that Jaiveer had informed him that he had seen the deceased in the company of the applicant but the applicant has not cross-examined Vimlesh (PW-1) on this statement. Therefore the court below came to the conclusion that for the just decision of the case it is essential to summon Jaiveer as a witness. Accordingly, the application filed by the complainant under Section 311 of Cr.P.C. was allowed.

**7.** Before considering the facts of the case, it is essential to consider the basic principle underlying Section 311 of Cr.P.C. Section 311 of Cr.P.C. 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.”

**8.** The object underlying Section 311 of Cr.P.C. is

that there should not be a failure of justice on account of mistake of any of the party in bringing valuable evidence on record. The Section is not limited only for the benefit of the accused but a witness can be summoned even if his evidence would support the case of prosecution. However, the first part of the section is discretionary and if the court is of the view that it is necessary to examine a witness for a just decision of the case then it shall be obligatory on its part to summon that witness. The court is not empowered under the provisions of Cr.P.C. to compel either the prosecution or the defence to examine any particular witnesses but in weighing the evidence the court can take note of the fact that the best evidence has not been given and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from the facts elucidated in the evidence, in such cases the court should act under the second part of the section. Sometimes the examination of the witness may result in what is thought to be loopholes but it is purely a subsidiary factor and whether the new evidence is essential or not must depend on the facts of each case, and has to be determined by the court.

**9.** In the case of **Raj Deo Sharma (II) vs. State of Bihar** reported in **1999 (7) SCC 604**, the Supreme Court has held as under:-

"9. We may observe that power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-judge Bench in A.R. Antulay case nor in Kartar Singh case 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 Section 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)

**10.** In **U.T. Of Dadra and Nagar Haveli and another vs. Fatehsinh Mohansinh Chauhan** reported in **2006 (7) SCC 529**, the Supreme Court has further held as under:-

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice."

(Emphasis added)

**11.** In **Iddar & Ors. vs. Aabida & Anr.** reported in **AIR 2007 SC 3029**, the Supreme Court while observing the object underlying under Section 311 Cr.P.C. has held as under:-

"11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or

leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case 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 Section 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)

**12.** The Supreme Court in the case of **Rajaram Prasad Yadav vs. State of Bihar and another** reported in **AIR 2013 SC 3081**, while taking note of various judgments dealing with an application under Section 311 of Cr.P.C. has enumerated the following principles which are required to be borne in mind by the courts while deciding an application under Section 311 of Cr.P.C. which reads as under:-

"23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 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 Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 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 Section 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 Section 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 safe guard, 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 Section 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.”

**13.** Before considering the facts of the case, it is important to mention that the undisputed fact is that Vimlesh (PW-1) had never informed the police in his statement under Section 161 of Cr.P.C. that Jaiveer has told him about the fact that the deceased was seen in the company of the applicant for the last time. Further the statement of Vimlesh was recorded under Section 164 of Cr.P.C., however, the fact of disclosure of circumstance of "Last Seen Together" was missing. Similarly, the police has also not recorded the statement of Jaiveer. In order to prove the circumstance of "Last Seen Together", the police had recorded the statement of one Veer Kumar. It is also not out of place to mention that Jaiveer was even not cited as a witness. In other words, Jaiveer was neither here or there in the prosecution case.

**14.** Keeping the above principles of law in mind, when the facts and circumstances of the case are considered, it is clear that initially the prosecution had come up with a specific case, that as per the statement of one Veer Kumar, the deceased Vikram was seen alive, in the company of the applicant. However, Veer Kumar (PW-7) did not support the prosecution case and was declared hostile. Thus, it is clear that in order to overcome that lapse or lacuna which has arisen because of non support of prosecution case by Veer Kumar (PW-7), the complainant by filing an application under Section 311 of Cr.P.C. has tried to substitute another witness in place of Veer Kumar (P.W. 7).

**15.** In case of **Rajaram Prasad Yadav (supra)** while laying down the principles, the Supreme Court has also laid down the principle that "the additional evidence must not be received as a disguise or to change the nature

of the case against any of the party."

**16.** It has further been held in the case of **Rajaram Prasad Yadav (supra)** that 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.

**17.** Thus, when the complainant found that the important witness of the prosecution has not supported the prosecution theory of "Last Seen Together", then by filing an application under Section 311 of Cr.P.C. it has tried to substitute another witness in place of Veer Kumar, to prove the circumstance of "Last Seen Together", which is not permissible, otherwise, there would never be an end to the Trial and whenever, it is realised, that the prosecution witness has not supported prosecution case, then some other witness would be introduced and would be cited as an important witness for just decision of the case.

**18.** Thus, an application filed under Section 311 of Cr.P.C. by the complainant to substitute the witness in place of Veer Kumar (PW-7) cannot be said to be essential for the just decision of the case specifically when Vimlesh (PW-1) had never disclosed either in his merged statement or in his statement under Section 161 of Cr.P.C. or under Section 164 of Cr.P.C., that he was ever informed by Jaiveer that the deceased Vikram was seen alive for the last time in the company of the accused/applicant. Merely because a specific question has not been put by the defence to Vimlesh (PW-1) during his cross-examination pointing out that he had not informed the police, either in his statement under Section 161 of Cr.P.C. or in statement under Section 164 of Cr.P.C. about the information given by Jaiveer, would not *ipso facto* mean that summoning of Jaiveer as a substitute witness in

place of Veer Kumar (PW-7) is necessary for just decision of the case.

**19.** Accordingly, the order dated 14.09.2016 passed by the Court of Additional Sessions Judge (Special Judge M.P. Dacoity Avam Vyapaharan Prabhavit Kshetra Adhiniyam) Lahar, District Bhind is set aside. The application filed under Section 311 of Cr.P.C. by the complainant is hereby rejected. The trial court is directed to proceed with the matter in accordance with law.

**(G.S. AHLUWALIA)**  
**Judge**  
**(08.11.2016)**

(alok)