

**M.Cr.C. No.27144/2017**

**Vikram Singh Paur Late Shri Tukoji Rao Paur**

**vs.**

**State of Madhya Pradesh**

Shri Z.A. Khan, learned Senior Advocate with Shri Ashok Kumar Verma, learned counsel for the applicant.

Shri Pankaj Wadhvani, learned Public Prosecutor for the respondent/State.

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**ORDER**

**Passed on 22/01/2018**

**Per: Justice S.K. Awasthi**

1. The applicant is aggrieved by the order dated 23.11.2017 passed by III Additional Sessions Judge, Dewas (M.P.) in S.T. No.278/2015 preferred this petition, whereby, the trial Court, in exercise of powers conferred under Section 311 of Cr.P.C., has summoned Resham Bai, the wife of the deceased, as court's witness in order to shade more light into the events, which leads to commission of offence, for which the trial is going on before the court below.

2. As per the prosecution case, on 18.3.2015, Ajay Lodhi s/o Babulal Lodhi, stating that on the fateful day, at about 4.30 p.m., the complainant and his family members were cutting the weeds of crop in their field, at that time, the complainant was being accompanied by his grandmother Avanta Bai, mother Tulsai Bai, aunt Ramkanya, Mamta, Laxmibai, sister Premlata, Khushbu, Anuradha, Chanchal, uncle Ramesh Pratap and younger

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brother Ashok. In between 4 to 5 p.m. Vikram Singh Puar s/o Maharaja Tukoji Rao Puar along with 15 to 20 persons in two vehicles came on the field and started collecting the crops and began to load on their trucks, Complainant and their companions tried to obstruct the act of loading the crop, at this juncture, Vikram Singh and his companions assaulted the complainant party with sword, gun, base ball bat and stick etc. The complainant's uncle Pratap received a gun shot over his head, the complainant received the bullet injury over his left wrist joint, Avanta Bai received gun shot injury over her left foot. Ramesh received injury over his head by stick. On this basis of the *Dehati Nalishi*, the police Barotha registered the crime No.92/2015 punishable under Section 307, 147, 148 of IPC and 25 and 27 of the Arms Act against the accused persons. Later on Pratap succumbed to head injuries and therefore, Section 302 of IPC was added. After completion of the investigation, the charge-sheet has been filed before Judicial Magistrate First Class, Dewas. During the trial before the Sessions Court, except Vikram Singh, all the accused persons were acquitted from the offence by the III Additional Sessions Judge, Dewas. However, Vikram Singh was absconded and when he was arrested, the supplementary charge sheet was filed against him

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and the trial is being conducted against him. The prosecution witnesses have been examined and after closing evidence of the prosecution witnesses, statement of the accused Vikram Singh was recorded. The final arguments were also heard on 15.11.2017 and thereafter the case fixed for pronouncement of judgment on 23.11.2017 .

3. It appears from the record that the trial Court seems to have formed opinion that for just and proper adjudication of the case, the testimony of Reshmabai, the wife of the deceased Pratap, is significant. Consequently, an explanation was invited from the Public Prosecutor to clarify as to whether any woman has been examined by the prosecution, who is wife of the deceased. Consequently, the Court had proceeded to summon her as the court witness. While pronouncing the impugned order the trial court has discussed several judicial pronouncements, which have discussed about the latitude available with the Court for summoning the material witness.

4. The learned counsel for the applicant has contended that the impugned order is erroneous in reasoning and the trial court has lost sight of the fact that the witness sought to be summoned by the Court was not named as a witness in the list

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of the prosecution nor any material has come on record, which may suggest that Resham Bai had witnessed the commission of offence, therefore the impugned order deserves to be set aside, as the same is resulting in delay in adjudication of trial, as also the purpose of summoning such a witness is to manufacture material, which is otherwise absent.

5. Per contra, the learned Public Prosecutor has supported the impugned order and contended that the trial Court in its wisdom has rightly passed the impugned order and has assigned sufficient reasons to indicate that the wife of the deceased is a material witness.

6. Having considered the rival contention of the parties and the sequential appreciation of the facts, this Court is of the considered view that the impugned order cannot be given a stamp of approval as the same has been passed without considering the factual aspect of the matter and also no convincing reason, has been given to indicate that the testimony of Resham Bai would assist in arriving at just outcome of the matter.

7. In order to support the conclusion drawn by this Court, it is pertinent to indicate that the trial Court in its order dated 30.11.2017 has pointed out that, firstly, the explanation given by

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the prosecution about Resham Bai is that, her statement under Section 161 of Cr.P.C. was not recorded, where as the record suggests that, all the family members of the deceased were present at the place of the alleged incidence. Thus, there is a reasonable suspicion about the manner in which the prosecution is conducting the matter. Secondly, the relationship of Resham Bai and the deceased is of husband and wife and considering the fact that, the prosecution itself has narrated that the family members of the deceased were present at the place of the incidence, thus, the statement of Resham Bai wife of the deceased would be necessary for just and fair adjudication of the matter.

8. This Court has no iota of doubt about the scope of power available to the trial Court under Section 311 of Cr.P.C. and in relation to the same, the trial Court in its order dated 30.11.2017 has highlighted some relevant judicial pronouncement on the present issue. Thus, it is quite unnecessary to discuss on the latitude jurisdiction of Section 311 of Cr.P.C. However, in one of the judgment by Hon'ble Supreme Court similar facts were under consideration as in that case also, the prayer was made to summon a person as "court witness" and such person was not named as a witness by the prosecution. In that case, the

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trial Court summoned such witness and the High Court endorsed the said order. Therefore, the order of the High Court was subject matter of challenge before the Hon'ble Supreme Court.

9. In order to appreciate the applicability of the judgment, pronounced by the Hon'ble Supreme Court in the case of **Vijay Kumar vs. State of Uttar Pradesh and another**: reported in **(2002) 8 SCC 136**, to the facts of the present case, it is important to reproduce some of the relevant paragraphs; namely, 10, 14, 16 and 19, which are as under:

“10. On 15-4-2010, objections were filed on behalf of the prosecution to the three applications submitted by the accused. So far as application praying to summon Smt. Ruchi Saxena and examine her as a court witness was concerned, it was stated on behalf of the prosecution that the application was filed to delay the trial because the accused were fully aware of the fact that Smt. Ruchi Saxena was residing in America as a citizen of USA and it was difficult for her to appear as a witness. It was also pointed out by the prosecution that Smt. Ruchi Saxena had nothing to do with this case and neither she was examine under Section 161 of the Code of Criminal Procedure nor her name had been listed as one of the prosecution witnesses. What was maintained by the prosecution was that the application was filed with mala fide intention and accused had failed to indicate in the application as to what was the intention of their questioning Smt. Ruchi Saxena especially when no questions and/or suggestions were put to any of the witnesses examined by the prosecution with reference to her.

14. There is no manner of doubt that the power under Section 311 Code of Criminal Procedure is a vast one.

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This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case.

16. As is evident from the facts of the case after success of the trap, FIR in the case was lodged by Mr. V.K. Bhardwaj, Inspector U.P.Vigilance Establishment. After framing of charge and commencement of trial several witnesses were examined by the prosecution, who had been cross-examined by the accused. Smt. Ruchi Saxena had nothing to do with the bribe case either as a complainant or as a witness to the trap arranged by the police. Her name did not figure as one of the witnesses to be examined by the prosecution when charge-sheet was submitted in the court of learned Special Judge. The High Court without specifying as to how Smt. Ruchi Saxena is a material witness or how her evidence is essential for just decision of the case, has directed the learned Special Judge to summon Smt. Ruchi Saxena as a court witness under Section 311 the Code of Criminal Procedure and to examine her.

19. At this stage, it would be advantageous to refer to decision of this Court in *Swal Das vs. State of Bihar* AIR 1974 SC 778. In the said case the appellant, his father and his mother were charged for murder of appellant's wife. Immediately after the wife was pushed inside the room and her cries of "Bachao Bachao" came from inside the room, her children were heard crying and uttering words that their mother was either being killed or had been killed. But the children were not produced as witnesses

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in the trial court. There was some evidence in the case that the appellant's children had refrained from revealing any facts against the appellant or his father or his step-mother when they were questioned by the relations or by the police. The argument before this Court was that they should have been summoned as court witnesses for examination under Section 540 of the Code of Criminal Procedure, 1898, which is in *pari materia* with same as Section 311 of Code of Criminal Procedure, 1973. This Court has held that the court could have rightly decided in such circumstances not to examine the children under Section 540 of the Code of Criminal Procedure.”

**10.** It emerges from reproduced portion of the judgment in the case of **Vijay Kumar (supra)** that, there is wide power available with the Trial Court. Further the trial Court's powers are not absolute to the extent that without assigning any cogent reason, the Court can direct summoning of a person as a witness. However, the court is required to indicate the substance available on record, which makes the person as “material witness”. It is also clear from perusal of judgment that due consideration is to be given to the fact that, the prosecution has not named the person as “prosecution witness”.

**11.** At this juncture, it will be necessary to ponder on the issue as to who is the “**material witness**”. In this regard, the judgment pronounced in the case of **Narain and others vs. State of Punjab**: reported in **AIR 1959 SC 484**, assumes significance the relevant portion of paragraph 13 of the



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judgment is re-produced as under:-

**“13. The question then is, was Raghbir a material witness ? It is an accepted rule as stated by the Judicial Committee in Stephen Seneviratne vs. The King (2) that " witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution." It will be seen that the test whether a witness is material for the present purpose is not whether he would have given evidence in support of the defence. The test is whether he is a witness "essential to the unfolding of the narrative on which the prosecution is based ". Whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied. It is not however that the prosecution is bound to call all witnesses who may have seen the occurrence and so duplicate the evidence. But apart from this,. the prosecution should call all material witnesses.”**

**12.** Now in the context of the above the facts of the present case are to be considered, it is borne out from the impugned order itself that, the basis of inviting the wife of the deceased is the prosecution version that, the family members of the deceased were present at the place of the incidence and since the wife being closes to the deceased, she ought to have been named as a witness. I am unable to hold, that these reasons are qualifying to maintain exercise of the powers under Section 311 of Cr.P.C. because, mere proximity with the deceased is not sufficient to qualify as material witness. Further the trial Court has not highlighted any material, which may show that, the wife

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of the deceased is in any manner a witness of the incidence nor does the court has shown that, in any of the testimony of witnesses, the name of the wife had cropped up, as to her presence at the place of the incidence. Thus, in the opinion of this Court the reasoning of the trial court is arbitrary. While the trial Court observed the reason for passing the impugned order, it also referred to the suspicious conduct of the prosecution and the defense, however, nothing has been discussed to back this impression. Hence, in absence of the same, this Court cannot be expected to test the reasoning of court, as for this purpose, the court will be required to venture into excessive presumption about the alleged conduct of the parties. It can also be observed that, the trial Court had also not put any question to the witnesses about role/ presence of Resham Bai in exercise of power under Section 165 of Indian Evidence Act, and now it is too late in the day, when the parties have advanced their final arguments and the matter was fixed for pronouncement of the judgment to raise and avail Section 311 of Cr.P.C.

**13.** If, for the purpose of argument, it is considered that, the wife of the deceased was also present at the place of incidence, but still as per record, there were other family members, who were also present at the place of the incidence

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and some of them have appeared as prosecution witnesses. Therefore, if we go by the ratio of the case of **Narain (supra)**, she would be duplicate the narration of facts as done by other family members and she cannot be termed as “material witness”. Apart from it, the trial Court has observed that it would like to hear about the presence of Resham Bai and to understand her version of the event as they transpired. This reason conclusively indicated that, the trial court is trying for roving and fishing enquiry, which in the considered opinion of this Court cannot be permitted in the light of judgment of the Hon'ble Supreme Court, which has been discussed above. Further, this also show that the trial Court is completely oblivion about the presence of Resham Bai at the place of the incidence. It is observed that, the power under Section 311 of Cr.P.C. cannot be exercised in casual manner as the same has consequence of denovo trial to some extent and the court is required to balance the interest of both the parties.

**14.** Upon cumulative consideration of the above, the instant Miscellaneous Criminal Case filed under Section 482 is allowed and the impugned order dated 30.11.2017 passed by the III Additional Sessions Judge, Dewas in S.T. No.278/2015 is hereby set aside.

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**15.** A copy of this order be sent to the concerned trial Court for information and consequent action.

Certified copy, as per rules.

**(S. K. AWASTHI)**

**JUDGE**