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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA**

ON THE 3rd OF FEBRUARY, 2023

MISC. CRIMINAL CASE No. 3851 of 2023

BETWEEN:-

1. SHANKARLAL S/O BHAGGA PATIDAR AGED:
MAJOR, OCCUPATION: AGRICULTURIST, R/O
VILLAGE BHAIOLA, P.S. TAAL, TEHSIL TAAL,
DISTT. RATLAM (MADHYA PRADESH)
2. BALWANT SINGH S/O ROOPSINGH RAJPUT,
AGED: MAJOR, OCCUPATION: SERVICE, VILLAGE
- KARMADI, TESHIL TAAL, DISTRICT RATLAM.
(MADHYA PRADESH)

.....APPLICANTS

(BY SHRI SANJAY KUMAR SHARMA - ADVOCATE)

AND

THE STATE OF MADHYA PRADESH STATION HOUSE
OFFICER THROUGH POLICE STATION TAAL DISTT.
RATLAM (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI R.S BAIS - GOVT. ADVOCATE)

This application coming on for admission this day, the court passed the following:

ORDER

This is a petition under Section 482 of the Code of Criminal Procedure being aggrieved by the order dated 09.01.2023 passed by Additional Sessions Judge, Alot, Dist. Ratlam in Sessions Trial No.05/2016 whereby the application filed under Section 311 Cr.P.C. for recall of witness in Crime No.276/2015 by the respondent prosecution has been allowed.

- 2) The applicants are accused person in a complaint filed by Narsingh

for commission of offences under Section 420, 467, 468, 471 IPC. The Magistrate had sent the same for investigation to the police.

3) Counsel for the applicants submits that after closure of evidence of prosecution witnesses twice and after recording the statement of accused under Section 311, an application has been filed to produce handwriting expert and other documents and to recall investigation officer for evidence has been erroneously allowed. The said application ought to have been rejected by the trial Court as the same was filed by the prosecution to fill up the lacuna which is not permissible under the provisions of Section 311 Cr.P.C. To bolster his submissions, he has placed reliance on an order dated 20.01.2016 passed in Cr.R. No.1626/2015 by Coordinate Bench in the case of *Indrajeet Singh vs. The State of M.P.* wherein it has been held that the prosecution cannot be allowed to fill up the lacuna. In the said case, the prosecution moved an application to examine important witness Dr. N.K. Upadhyay, who could not be examined due to bona fide mistake. He also placed reliance on a judgment passed by High Court of Bombay in *Criminal Writ Petition No.418 of 1994 (B.D. Goel vs. Ebrahim Haji Husen Sanghani & Ors.)* decided on 23.06.2000 wherein it has been reiterated that after recording the statement of accused under Section 313 Cr.P.C., the prosecution cannot file an application for recalling prosecution witness to fill up the lacuna. He also placed reliance on an order dated 13.07.2021 passed by Bombay High Court in *Criminal Writ Petition No.1658 of 2021 (Nayna Rajan Guhagarkar vs. State of Maharashtra)* wherein the same law has been reiterated.

4) Per contra counsel for the State submitted that the handwriting expert report and certain important documents were lost in the police station and the

same could be traced out only after the arguments and, therefore, the application under Section 311 Cr.P.C. was filed to file the aforesaid documents and to recall investigating officer as a witness. There is no illegality in the order impugned as there was no endeavour to fill the lacuna and the said documents and evidence of investigating officer was essential to establish the case. Those documents were lost in the police station.

5) I have heard learned counsel for the parties in order to appreciate the rival submissions, it is apposite to reproduce the provisions of **Section 311 Cr.P.C.** 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.

6) The nature and scope of Section 311 has been examined by the Apex Court in the case of *Rajaram Prasad Yadav vs. State of Bihar & Anr.*, (2013) 14 SCC 461. The Apex Court explained and laid down the principles to be followed by courts. The Court further explained and enumerated in detail and held that such power can be exercised at any stage as per principles elaborately stated in para 14. The relevant para 14 reads as under:-

A conspicuous reading of Section 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 "any" has been used as a prefix 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 Section 311 Cr.P.C. and Section 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 Section 138 will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 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.

7) It is crystal clear that the Court has been empowered to summon any person as a witness at any stage of inquiry, trial or other proceeding. It is settled in law that if the conditions under this section are satisfied the Court can call a witness not only on the motion of either the prosecution or the defence, but also it can do so on its own motion. All that is required is the satisfaction of the Court in relation to such evidence which appears to the Court to be essential for the just decision.

8) In the case of *Mohanlal Shamji Soni v. Union of India*, 1991 Supp.

(1) 271, it is held that any person can be summoned as witness or recalled or re-examined at any stage of proceeding where essential. In the said case, it has been further held that power of Court to recall any witness or witnesses already examined or to summon any witness can be invoked even if the evidence in both sides is closed so long as the court retains seisin of the criminal proceedings.

9) In the case of *Rajendra Prasad vs. Narcotic Cell* (1999) 6 SCC 110, the Apex Court has explained what is meant by lacuna in the prosecution case. The following passage of the said decision will be apposite in this contest: (SCC p. 113, para 7)

It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 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 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 proved. A corollary of any such latches or mistakes during the conducting Of a case cannot be understood as the lacuna which a court cannot fill up.

The same law has been reiterated in a recent judgment of the Apex Court in the case of *P. Chhaganlal Daga vs. M. Sanjay Shaw*, (2003) 11 SCC 486.

10) In view of the aforesaid law laid down by the Apex Court, I do not find any illegality or perversity in the order impugned passed by the trial Court allowing the application filed by the prosecution under Section 311 Cr.P.C. The petition is dismissed.

soumya

