HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

MCRC No. 26900 of 2017

Khoob Singh s/o Kanhaiya ..... **Petitioner**

- V/s -

The State of M.P. ..... **Respondent**

Through P.S. Kumhari, Dist. Damoh (M.P.)

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Vijay Kumar Shukla, Judge

Present:

Mr. Bhupendra Kumar Shukla, Advocate for the petitioner.

Ms. Namrata Agrawal, Government Advocate for the respondent/ State.

Whether Approved for Reporting : **Yes**

Law Laid Down:

- In terms of second part of Section 311 of the Cr.P.C., the Court is competent to recall any witness or examine any witness not summoned, if the Court finds that his evidence appears to be essential to the just decision of the case.
- The Court can exercise such jurisdiction under Section 311 of the Cr.P.C. at any stage of the proceeding before the pronouncement of the judgment.
- The Judgment of a Single Bench of Gwalior Bench of this Court in **Imrat Singh and others vs. State of M.P. (2015 Cri.L.J. 3473**) does not lay down the correct law and is thus, **overruled**.

Significant Paragraph Nos.: 9 to 23

Order Reserved on: 05.03.2018

O R D E R

(Passed on this 8th day of March, 2018)

Per : Hemant Gupta, Chief Justice:

A learned Single Bench of this Court on 3rd January, 2018 has referred the following questions for the opinion of the Larger Bench:-

> "(i) Whether recalling of witness for re-examination or calling of a witness for examination can be permitted under Section 311 Cr.P.C. after the arguments are over and before the pronouncement of judgment?
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> (ii) Whether the view expressed in the case of "**Imrat Singh V. State of M.P. (2015) Cri.L.J. 3473**", is in accordance with the provisions of Section 311 of the Cr.P.C.?"

2. The said question arises out of the fact that in a trial for the offences punishable under Sections 363, 366A, 376A and 302 of the Indian Penal Code, 1860 (for short "the IPC") and Section 4 of the Protection of Children From Sexual Offences Act, 2012 (for short "the Act"), the learned Trial Court passed an order on 6th October, 2017 permitting the re-examination of three witnesses, namely, Arjun Singh (PW-9), Dr. Sunil Parashar (PW-10) and N.P. Patel (PW-16) and also ordered examination of constable Neeraj Rawat, Sainik Ramesh, Constable Tej Singh, Bharat, Hakum, Charan, Bhagwan, Santosh Rai and Halka Patwari – Dharmendra and one Vandana alias Simma. It is the said order, which has been challenged before this Court relying upon a Single Bench decision of Gwalior Bench of this Court in the case of **Imrat Singh and others vs. State of M.P. (2015 Cri.L.J. 3473**) *inter alia* contending that after the case

is fixed for argument, the application for recall of the witnesses is not maintainable.

3. The learned Single Bench hearing the petition, had reservation about the judgment rendered in the case of **Imrat Singh (supra**) and therefore, the matter has been referred to the Larger Bench.

4. In **Imrat Singh**'s case **(supra**), after final arguments were heard and case was posted for judgment by the Trial Court, an application was filed by the prosecution for recall of Dr. Anoop Verma to clarify as to whether bone of left leg or right leg was fractured. In the earlier evidence, he had deposed that the fracture was found in the left leg but as per the X-ray, it was right leg which was found to be fractured. The learned Trial Court permitted the doctor to be re-examined but the learned Single Bench relied upon a Single Bench judgment of Rajasthan High Court reported as **1998 Cri. LJ 950 (Cheeku Singh vs. State of Rajasthan**) held that the order passed by the Trial Court was contrary to law, having been passed on the date when the case was fixed for judgment. Reference was also made to Section 353 of the Criminal Procedure Code, 1973 (in short “the Code”).

5. In **Cheeku Singh**'s case **(supra**), the learned Single Bench of Rajasthan High Court held that Section 311 of the Code is in two parts. Under the first part, any Court, at any stage of inquiry, trial or other proceeding under the 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. Under the second part, the Court is duty bound to summon and examine or recall and re-examine any such

person if his evidence appears to be essential to the just decision of the case. In the said case, the name of one of the witness was not mentioned in the list of witnesses, therefore, it was found that the public prosecutor has not pointed out any special circumstances, which may justify that the summoning of such witness for examination for evidence was essential to the just decision of the case within the meaning of second part of Section 311 of the Code.

6. During the course of argument, learned counsel for the petitioner referred to another order passed by a learned Single Bench of Kerala High Court reported as **1985 Cri.L.J. 1288 (Chandran vs. State of Kerala**) wherein recall of an Investigating Officer for production and proof of vital record having relevance to the guilt of the accused and that too after conclusion of the evidence, was found to have resulted in miscarriage of justice. Learned counsel for the petitioner contended that by recall of the witnesses and by summoning of the witnesses not cited as a witness while submitting report under Section 173 of the Code is permitting the prosecution to fill up the lacuna, which is not permissible.

7. On the other hand, Ms. Agarwal, learned Government Advocate for the State relied upon the judgment of the Supreme Court reported as **1991 Supp (1) SCC 271 (Mohanlal Shamji Soni vs. Union of India and another**) in which the scope of Section 311 was elaborately discussed and it was held that Section 311 of the Code is expressed in the widest possible terms and does not limit the discretion of the Court in any manner. However, the provisions require a corresponding caution that the

discretionary power is to be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The relevant extract, reads as under:-

> "**7**. Section 540 was found in Chapter XLVI of the old Code of 1898 under the heading 'Miscellaneous'. But the present corresponding Section 311 of the new Code is found among other sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'. Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word "essential" occurring in the old Section. This section is manifestly in two parts. Whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Code and enables it 'at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,
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> (1) to summon any person as a witness, or
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> (2) to examine any person in attendance, though not summoned as a witness, or
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> (3) to recall and re-examine any person already examined.
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> **8**. The second part which is mandatory imposes an obligation on the Court-
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> (1) to summon and examine, or
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> (2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.
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> **9.** The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.
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> **18.** The next important question is whether Section 540 gives the

court carte-blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said Section is unguided, uncontrolled and uncanalised. 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. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or the cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

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21. At the risk of repetition it may be said that Section 540 allows the court to invoke its inherent power at any stage, as long as the court retains seisin of the criminal proceeding, without qualifying any limitation or prohibition. Needless to say that an enquiry or trial in a criminal proceeding comes to an end or reaches its finality when the order or judgment is pronounced and until then the court has power to use this section .....

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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."
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> (emphasis supplied)

8. We have heard learned counsel for the parties and find that the judgment of this Court in **Imrat Singh**'s case **(supra**) does not lay down correct law for the reasons recorded here-in-after.

9. A perusal of the judgment rendered by the Supreme Court in **Mohanlal Shamji Soni (supra)** would show that the Court has power to invoke its inherent powers at any stage without qualifying or any limitation or prohibition and that inquiry or trial as the criminal proceeding comes to an end or reaches its finality when the order or judgment is pronounced and until then the Court has power to exercise its jurisdiction under Section 311 of the Code. The said judgment was not noticed by the learned Single Bench in **Imrat Singh (supra**) or for that matter by Rajasthan High Court in **Cheeku Singh**'s case **(supra**) or the by the Kerala High Court in **Chandran's case** .

10. Chapter XVIII of the Code deals with the trial before a Court of Session. Section 234 of the Code deals with the arguments permitting the prosecutor to sum up his case and the accused to reply. However, Section 235 of the Code contemplates that after hearing the arguments, the Judge shall give a judgment in the case and if accused is convicted, hear the accused on the question of sentence and then pass sentence on him according to law. Therefore, it is judgment in terms of Section 235 of the Code, which concludes the trial and not hearing of the arguments.

11. In a judgment reported as **(1999) 6 SCC 110 (Rajendra Prasad vs. Narcotic Cell** through its Officer in Charge, Delhi), the Supreme Court was examining the argument regarding the lacuna to be filled up by the prosecution. The Court held that lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in the trial can be foreclosed from correcting the errors. The function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. The relevant extract of the judgment is reproduced as under:-

> "**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, 1872 by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producting 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 prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.
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> **8**. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal Court is administration of

> criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.
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> **12.** We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down or frowned at."
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> (emphasis supplied)

12. In a judgment reported as **AIR 2004 SC 3114 (Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others**) the Supreme Court held that a Presiding Judge must not be a spectator and a mere recording machine but should be becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth and administer justice with fairness and impartiality both to the parties and to the community it serves. The relevant extract reads as under:-

> "**39**. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will be not correct to say that it is only the accused who must be fairly dealt with. That would be turning

Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

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41. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.

42. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and presence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

43. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

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46. The Courts have to take a participatory role in a trial. They are

> not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands to such prosecuting agency showing indifference or adopting an attitude of total aloofness."
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> (emphasis supplied)

13. The Supreme Court in **Vijay Kumar vs. State of Uttar Pradesh and another (2011) 8 SCC 136** while dealing with the nature, scope and object of Section 311 of the Code and the power of the Court under Section 165 of the Evidence Act, came to the conclusion that for the just decision of the case, power to summon any person as a witness can be exercised at any stage of the trial 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. The Court held as under:-

> **"13.** Section 311 of the Code of Criminal Procedure reads as under:
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> "**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."
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> This section consists of two parts viz. (*1*) giving discretion to the court to examine the witness at any stage; and (*2*) the mandatory portion which compels a court to examine a witness if his evidence appears to be essential to the just decision of the case. The section enables and in certain circumstances, imposes on the court the duty of summoning witnesses who would have been otherwise brought before the court. This section confers a wide discretion on the court to act as the exigencies of justice require. The power of the court under Section 165 of the Evidence Act is complementary to its power under this section. These two sections between them confer jurisdiction on the court to act in aid of justice.
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> **14.** There is no manner of doubt that the power under Section 311 of the Code of Criminal Procedure is a vast one. 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 emphasised 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 the just decision of the case."

14. In another judgment reported as **(2013) 5 SCC 741 (Natasha Singh vs. Central Bureau of Investigation (State)**, the Supreme Court held that the Court can weigh the evidence only and when the same has been laid before it and brought on record. Therefore, the Trial Court was not justified in dismissing the application of the accused under Section 311

of the Code for permission to examine the witnesses. The relevant extract is quoted as under:-

> "**8**. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under the Cr.P.C., or to summon any person as a witness, or to recall and re-examine any person who has already been examined *if his evidence appears to it, to be essential to the arrival of a just decision of the case*. Undoubtedly, the Cr.P.C. has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.
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> **15**. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to *cause serious prejudice* to the defence of the accused, or to give an *unfair advantage to the opposite party*. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred 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 great caution and

circumspection. The very use of words such as 'any Court', 'at any stage", or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide: *Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors., AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.), (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I., (2012) 3 SCC 387*)."

(emphasis supplied)

15. In a later judgment reported as **(2013) 14 SCC 461 (Rajaram Prasad Yadav vs. State of Bihar and another**) it was held that Section 311 of the Code can be invoked only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case and such power 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. The relevant excerpts from the said decision read as under:-

> **"14**. 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 pre-fix 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 is concerned, 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.

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17. 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:

17.1 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?

17.2 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3 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.

17.4 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.

17.5 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.

17.6 The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7 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.

17.8 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.

17.9 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.

17.10 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.

17.11 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.

17.12 The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13 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.

17.14 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."

(emphasis supplied)

16. The Supreme Court in its judgment reported as **(2016) 2 SCC 402 [State (NCT of Delhi) vs. Shiv Kumar Yadav and another**) has taken a similar view as has been taken in **Rajaram Prasad Yadav (supra)** and held that fairness of the trial has to be seen not only from the point of view

of the accused but also from the point of view of the victim and society. In the name of fair trial, system cannot be held to ransom. The relevant extract of the said judgment reads as under:-

> "**11**. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross- examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case."

17. In a judgment reported as **(2017) 9 SCC 340 (Ratanlal vs. Prahlad Jat and others**), the Supreme Court has held that the object of Section 311 of the Code as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. The relevant paragraph of the said decision reads as under:-

> "**17**. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as

> a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."

18. The Supreme Court in its decision reported as **(2014) 13 SCC 59 (Mannan Shaikh and others vs. State of West Bengal and another**) has held that the aim of every Court is to discover truth. Section 311 of the Code empowers the Court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness if his evidence appears to be essential for the just decision. It was also held that the cause of justice must not be allowed to suffer because of the oversight of the prosecution. The relevant extract of the said judgment reads, thus:-

> **"22.** In the ultimate analysis we must record that the impugned order merits no interference. We must, however, clarify that oversight of the prosecution is not appreciated by us. <u>But cause of justice must not be allowed to suffer because of the oversight of the prosecution</u>. We also make it clear that whether deceased Rupchand Sk's statement recorded by PW 15 SI Dayal Mukherjee is a dying declaration or not, what is its evidentiary value are questions on which we have not expressed any opinion. If any observation of ours directly or indirectly touches upon this aspect, we make it clear that it is not our final opinion. The trial court seized of the case shall deal with it independently."
>
> (emphasis supplied)

19. In our considered opinion, any lapse in the investigation does not affect the core of the prosecution case. In this context, reliance can be placed upon the judgment of the Supreme Court reported as **(2015) 9 SCC 588 (V.K. Mishra and another vs. State of Uttarakhand and another**). This Court in **Criminal Appeal No.2615/2005 (Sukhendra Singh vs. State of M.P.**) decided on 7th September, 2017 referred to the decision of the Supreme Court in **V.K. Mishra (supra)** and held as under:-

> "**24**. Therefore, the failure of the Investigating Officer to produce the bloodstained clothes of Satish Kumar Chourasiya (PW-1) or to produce evidence of safe custody of country-made pistol, empty shall and live cartridge will not prejudice the trial as the statements of eye-witnesses such as Satish Kumar (PW-1) and Shivprasad (PW-2) and even the witnesses namely, Jogendra Tamrakar (PW-9) and Dilip Kumar (PW-10), who have been declared hostile, clearly implicates the appellant as the one who fired the fatal shot from a country-made pistol in his possession."

20. In view of the above, we find that in a heinous crime for an offence punishable under Sections 363, 366A, 376A, 302 of IPC and Section 4 of the Act, any lapse in the prosecution in not citing the witnesses in the report under Section 173 of the Code, cannot be permitted to defeat the object of orderly society. The crime against women and the children are increasing, affecting the social fabric of the society. Therefore, technicality or the lapse of the prosecution in not citing relevant witnesses or the mistake of the public prosecutor in not proving the relevant evidence will not bar the jurisdiction of the Court under Section 311 of the Code. It may be stated that when the prosecution filed an application under Section 311 of the Code, the only objection raised by the defence was that the argument had been heard.

21. Keeping in view that the purpose of criminal trial is orderly society and that to find out the truth, the summoning of witnesses cannot be said to be unjustified as the petitioner would have complete opportunity to cross-examine the witnesses. It is not the case of lacuna but the failure of the prosecution to produce relevant evidence during the course of trial. Such evidence is not filling of a lacuna but a case of oversight in the management of the prosecution which cannot be stated to be irreparable lacuna. As held by the Supreme Court in **Mannan Shaikh (supra)**, the lapse in the prosecution cannot be used to defeat the cause of justice.

22. Consequently, we hold that the judgment of this Court in **Imrat Singh (supra**) does not lay down correct law and is thus, overruled. Relying upon the Supreme Court judgments referred to above, an application under Section 311 of the Code can be filed at any stage of trial even after conclusion of the argument as the trial is complete only after the judgment is announced. Section 353 of the Code contemplates that the judgment in every trial shall be pronounced in an open Court immediately after termination of the trial. Though the recording of the witnesses may be complete but the trial concludes only after pronouncement of the judgment.

23. Having answered the questions referred to us, let the matter be placed before the Bench as per Roster for final disposal.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

S/