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IN THE HIGH COURT OF SIKKIM

CRIMINAL REVISION NO.3 OF 2004

State of Sikkim

... **Petitioner.**

VERSUS

1. Sri Thukchuk Lachungpa,
S/o (L) Tencho Lachungpa,
R/o M.G. Marg, Gangtok,
East Sikkim.
2. Sri Sonam Chajor Bhutia
alias Purkey Sonam,
S/o Sri Lobsang Lachungpa,
R/o Lachung,
North Sikkim

... **Respondents.**

For the petitioner : Messrs. S. P. Wangdi, Senior Advocate assisted by Karma Thinlay, Asstt. Govt. Advocate and J. B. Pradhan, Public Prosecutor.

For the respondent No.1 : Messrs. D. N. Choudhury, Senior Counsel assisted by K. T. Bhutia, S. S. Hamal and B. R. Pradhan, Advocates.

For the respondent No.2 : Shri T. B. Thapa, Advocate.

PRESENT: THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 26th July 2004.

J U D G M E N T

SINGH, J.

The order dated 13th April 2004 passed by the Sessions Judge (South & West), Namchi in S.T. Case No.1 of 2004

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arising out of Ranipool P.S. Case No.12(5)2000 dated 14th May 2000 under Sections 147/148/149/302 I.P.C. read with Section 25 of Arms Act, 1959, rejecting the application filed by the prosecution under Section 311 Cr.P.C. is the subject matter under challenge in this Revision Petition.

2. The facts of the case, in a short compass, are as follows:-

On the basis of FIR dated 14th May 2000 lodged at Ranipool P.S. alleging that the son of the informant, Dawa Tashi Bhutai was assaulted by a group of 10/12 boys with a iron rods, iron grills, stones and other dangerous weapons at Ray Khola, Ranipool at the instigation of the accused Thukchuk Lachungpa, the Ranipool P.S. Case No.12 (5) 2000 dated 14th May 2000 under Sections 147/148/149/302 I.P.C. was registered against the accused Thukchuk Lachungpa and his associates and that, after the arrest of the accused persons, the accused Thukchuk Lachungpa and Sonam Chazor Bhutia were charged and sent up for trial and in the course of the trial as many as 28 prosecution witnesses were examined and the prosecution witness No.29 was partly examined in the said case as on 2nd February 2004. In the meantime, on 13th April 2004 an application under Section 311 Cr.P.C. was filed by the prosecution before the trial Court for summoning one prosecution witness, namely, Shri Avichal, A.I.G., S.P.G. and examination of the said witness by contending, inter alia, that the said witness had not been examined as on 13th April 2004 for various reasons which are on record, though he was all along present in the Court for

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his evidence on 2nd December 2002 and 2nd February 2004 coming on the way from Delhi and the said witness is an essential and important witness for the prosecution being the Supervisory Officer of the investigation and the said witness also heard the dying declaration of the deceased. The said application was rejected by the trial Court under the impugned order by holding that the similar prayer was made by the learned Public Prosecutor on 2nd February 2004 and the trial Court on the same day, had rejected the prayer of the learned Public Prosecutor after discussing the provisions laid down under Section 311 Cr.P.C., 1973 and, the present prayer of the prosecution in the said application looks like asking the trial Court to review its order dated 2nd February 2004 and, there is no provision in the Code of Criminal Procedure which permits the court to review its order in the circumstances like the present case. Being aggrieved by the impugned order dated 13th April 2004, the present petitioner filed this revision petition.

3. Supporting the case of the petitioner, i.e. the State of Sikkim, Shri S.P. Wangdi, learned senior counsel contended that the trial Court is erred in law by failing to appreciate the very purpose and object of Section 311 Cr.P.C., 1973 while passing the impugned order inasmuch as it is obligatory for the Court to afford opportunity either to the prosecution or the defence to produce evidence if the same is essential for just decision of the case.

4. According to Shri Wangdi, learned senior counsel, Shri Avichal, A.I.G., S.P.G. being a supervisory officer, he is an

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essential and important witness for the prosecution and this important aspect was not properly examined and considered by the trial Court; instead, the trial Court was of the view that several adjournments were granted and opportunity was given to the prosecution to procure the presence of witness, Shri Avichal along with other two police officers, namely, A. Sachdeva, Superintendent of Police, East and A.S.I. Karma T. Denzongpa and since the prosecution failed to procure the presence of Shri Avichal, the trial Court was left with no alternative but to proceed with the examination of two police officers on 8th December 2003 and apart from that, the trial Court was of the view that similar prayer was made by the learned Public Prosecutor on 2nd February 2004 before the trial Court and in view of it, it will not be proper to discuss and decide on the same point again and again. The learned senior counsel went on to contend that the said witness Shri Avichal is a listed witness in the charge sheet who has not been dropped by prosecution but by virtue of the said order dated 8th December 2003 and 2nd February 2004, the prosecution has been prevented from production and examination of the said witness Shri Avichal for which the prosecution filed a separate application dated 13th April 2004 for summoning and examination of the said witness Shri Avichal, A.I.G., S.P.G. by showing sufficient reasons and

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grounds but, the said application was rejected by the trial Court without any justification. It is also contended by Shri Wangdi, learned senior counsel that the said witness is an important witness for the prosecution inasmuch as he heard the dying declaration of the deceased Dawa Tashi Bhutia and if the said witness is not examined as one of the prosecution witnesses then, it will occasions in miscarriage of justice.

5. Per contra, supporting the case of the accused-respondent No.1, Shri D. N. Choudhury, learned senior counsel contended that the prayer of the prosecution for examination of the said witness Shri Avichal was rightly rejected vide, order dated 2nd February 2004 passed by the trial Court and that, the trial Court was of the view that it will not be proper to discuss and decide on the same point again and again and that being the position, the application under Section 311 Cr.P.C. filed by the prosecution was duly rejected. The learned senior counsel also argued that, on the prayer of the defence, the trial Court allowed the three police officers, namely, Shri A. Sachdeva, S.P., East; Shri Avichal, A.I.G. and Shri Karma T. Denzongpa, A.S.I. were required to be cross-examined on the same date and on several occasions, the prosecution sought for adjournment and, since the prosecution failed to procure the presence of Shri Avichal,

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the trial Court was left with no alternative but, to proceed with the examination of two police officers on 8th December 2003. It is also argued that the sole object of making prayer by the defence for allowing them to cross-examine the said three police officers including Shri Avichal on the same date was to ensure that their defence will not be disclosed and the accused would not be prejudiced and that being the position, the trial Court rightly rejected the earlier prayer of the prosecution to examine the said witness Shri Avichal on 2nd February 2004 and such rejection was mainly on the ground that he was not made available for cross-examination along with other two police officers on the same date when they were cross-examined on 8th December 2003 and as such there is no infirmity or illegality in the impugned order as the trial Court rightly rejected the application under Section 311 Cr.P.C. filed by the prosecution. Strengthening his arguments, Shri D. N. Choudhury, learned senior counsel has drawn my attention to the related orders dated 2nd December 2002, 21st August 2003, 30th September 2003, 7th November 2003, 28th November 2003, 8th December 2003, 23rd December 2003 and 2nd February 2004 and contended that, the trial of the case has been delayed by the adjournments sought for by the prosecution from time to time and the accused has been facing trial for the last more than four

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years. At this stage, the learned senior counsel has highlighted the provision of law laid down under Section 309 Cr.P.C. and contended that the criminal trial shall be held as expeditiously as possible and in particular, when the examination of witness has once begun, the same shall be continued from day to day until all the witnesses' in attendance have been examined, but, in the instant case, the same has not been done as the prosecution always sought for adjournment of the hearing of the case. According to Shri D. N. Choudhury, right to speedy trial is the right given by Article 21 of the Constitution of India and such trial could not be lingered for a long time on the grounds of adjournments, and this aspect was properly examined by the trial Court and passed a related order dated 28th November 2003 with a direction to the prosecution to produce all the witnesses including the said Shri Avichal on the next date positively, i.e. on 8th December 2003 which was not duly complied with by the prosecution instead the learned Public Prosecutor submitted an application for adjournment of the case on the ground that said Shri Avichal, A.I.G., S.P.G. was unable to attend the Court due to preoccupation which was rightly turned down by the trial Court. Supporting his argument, Shri D. N. Choudhury relied upon a decision of the **Apex Court** rendered in **V. C. Shukla v. State through C.B.I.**

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reported in **AIR 1980 SC 962** and contended that an accused person should get a fair trial and every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society and in addition to it, there shall be fair deal to the accused person. It is also submitted that there is no dying declaration in the case in hand but, the prosecution in their application under Section 311 Cr.P.C. stated that the said witness Shri Avichal has also heard the dying declaration of the deceased. Shri D. N. Choudhury, learned senior counsel vehemently argued that the impugned order is an interlocutory order and as such it is not revisable and in this regard, he cited a decision of **Jammu and Kashmir High Court** rendered in **S. K. Mahajan and etc. v. Municipality, Jammu and others etc.** reported in **1982 Cr.L.J. 646** and contended that order refusing to summon witness is interlocutory order and the same is not revisable and apart from that, no legal right is decided by the Court in refusing such prayer. Further argument advanced by Shri D. N. Choudhury on behalf of the respondent No.1 is that when more power is assigned to the Court under a related provision of law like Section 311 Cr.P.C., the higher responsibility is vested upon the Court concerned and such power should be exercised by the Court with due care and caution.

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6. Shri T. B. Thapa, learned counsel appearing for the respondent No.2, in his usual frankness, submitted that he respectfully endorsed the submissions and arguments so far advanced by Shri D. N. Choudhury, senior advocate, for his client, respondent No.2.

7. Now, this Court is to see and examine as to whether the present Revision Petition is maintainable or not and whether, the State of Sikkim, the petitioner herein could make out a case to justify the interference with the impugned order dated 13th April 2004 passed by the Sessions Judge (South & West), Namchi in S.T. Case No.1 of 2004 or not? And, whether the impugned order suffers from infirmity or illegality or not?

8. On perusal of the available materials on record, it is seen that right from the year 2000 to 1st February 2001, the accused respondent No.2 Shri Sonam Chazor Bhutia was found absconding and he has been declared as absconder under the related order dated 1st February 2001 passed by the learned Chief Judicial Magistrate (East and North) in the connected case. The factum of absconding of the said accused respondent No.2 can be seen from the orders dated 14th August 2000, 7th September 2000, 14th September 2000, 20th September 2000, 4th October 2000, 11th October 2000, 25th October 2000, 30th October 2000, 3rd November 2000, 7th

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November 2000, 9th November 2000, 21st November 2000, 27th November 2000, 17th January 2001, 30th January 2001, 1st February 2001; and on 1st February 2001, the case was committed to the Court of Sessions Judge (East & North), Gangtok. On 21st February 2001, 6th March 2001 and 28th March 2001, the accused sought for adjournment on the ground to engage a lawyer of his choice. However, the trial Court framed the charge as against the accused Thukchuk Lachungpa on 11th April 2001. By virtue of the orders dated 11th June 2001 and 18th June 2001 the copies of the witnesses recorded under Section 164 Cr.P.C. were supplied to the counsel of the accused and on 21st July 2001 the trial Court allowed the petition for framing additional charge under Section 114 I.P.C. and accordingly, the charge had been framed under Section 114 I.P.C. on 23rd July 2001. In the meantime, as the Presiding Judge S. W. Lepcha, Sessions Judge (East & North), Gangtok opined not to hear and try the case, the matter was referred to the High Court on 7th August 2001 and, no prosecution witness could be examined as the defence counsel made a prayer for examination of some witnesses and cross-examination of them on the same date and only on 21st August 2001 the trial Court started issuing order for examination of the witnesses and, accordingly, P.W. Nos. 1 and 2 were examined on 7th September 2001 and 10th

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September 2001. It is seen that even though the witnesses were present for examination on 18th September 2001, they could not be examined due to the prayer made by the defence counsel as stated above and that being the position, the witnesses, namely, P.W. Nos.3, 4 and 5 were examined on 5th November 2001 and in the meantime, i.e. on 24th December 2001 and 31st January 2002, three accused persons were produced from judicial custody before the trial Court including the accused-respondent No.2, and the trial Court could not proceed with the examination of the prosecution witnesses for some time and again on 7th August 2002, the accused-respondent No.1 was absent and accordingly, the trial Court issued bailable warrant of arrest on that day. In the meantime, the learned counsel appearing for the accused No.2 made a prayer for allowing the accused to cross-examine at least three PWs, namely, Pema Wangyal Bhutia, Tshering Wangchuk Lepcha and Tashi Lepcha who were already examined by the trial Court vide, Order dated 21st October 2002. However, by an order dated 22nd October 2002 the prosecution has been directed to produce the witnesses for recording their statements, and on that day, three witnesses namely, Tashi Lepcha, Tshering Wangchuk Lepcha and Pema Wangyal Bhutia were re-examined. In this way on some occasions adjournments of the case were sought for from the

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side of the accused persons and likewise on some occasions, the prosecution sought for time and in this way the regular examination of the witnesses resumed from 2nd December 2002 and even after it, the case was adjourned from time to time on the prayer made by the parties and these circumstances prevented the learned Sessions Judge, i.e. the trial Court to expedite the trial of the case. However, it is made clear that the trial Court took up the case as a first time on 1st February 2001 after the case was committed to it. Hence, the submissions of Shri D. N. Choudhury, learned senior counsel that the trial of the case has been delayed by the adjournments sought for by the prosecution holds a little water. It may be noted that the trial Court received the related case records from the Chief Judicial Magistrate concerned only on 1st February 2001. Therefore, I am of the view that right to speedy trial of the accused persons is not deprived of. It is true that speedy trial is an essential ingredients of "reasonable, fair and just" procedure granted by Article 21 of the Constitution of India and the parties in the trial have right to speedy trial, and apart from that, in every trial, the proceedings shall be held as expeditiously as possible as laid down under Section 309 Cr.P.C. In the instant case, no prejudice is caused either to the accused

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persons or the prosecution by the proceedings of the trial before the Court below.

9. Bare reading of the related order dated 8th December 2003 passed by the trial Court shows that three witnesses, namely, A. Sachdeva, Superintendent of Police, East; Avichal, AIG and ASI Karma T. Denzongpa were required to be cross-examined by the defence counsel on the same date as per order of the trial Court dated 2nd December 2002 and for that purpose, prosecution had taken adjournments and because of the absence of Shri Avichal, A.I.G., the other two witnesses could not be examined on 21st August 2003, 30th September 2003 and 28th November 2003. On 30th September 2003 the learned Public Prosecutor submitted before the trial Court that the said police officer Shri Avichal could not come from Delhi as he was pre-occupied and further on 28th November 2003 the learned Public Prosecutor contended that Shri Avichal was pre-occupied in assembly election for which the learned Public Prosecutor sought for adjournment of the case but the same was not granted by the trial Court and accordingly, two witnesses, namely, Shri A. Sachdeva, Superintendent of Police, East, who was examined in chief on 2nd December 2002 was cross-examined and the other witness Shri Karma T. Denzongpa was examined and cross-

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examined. From the order dated 2nd February 2004, it has been revealed that the said witness, Shri Avichal was present on that day and the prosecution made a prayer to examine the said witness who has duly been cited as one of the prosecution witnesses but the trial Court rejected the prayer on the main ground that the prosecution has not disclosed as to how and why this witness Shri Avichal is vital and essential when he was simply a supervisory officer. Now, a question arises under what circumstances, on the submissions of the learned counsel for the defence, Shri Avichal, A.I.G. in S.P.G. who was present on 2nd December 2002 before the trial Court was not examined on that day when the other witness Shri A. Sachdeva, S.P., East was examined in part on that day and the cross-examination of the said witness remained to be done! In my considered view, the learned trial Court ought to have allowed the prosecution to examine the said witness Shri Avichal, AIG either on 2nd December 2002 or on 2nd February 2004 to meet the ends of justice. Now, another question arises as to whether the order dated 8th December 2003 virtually amounts to review of the earlier orders dated 2nd December 2002 and 30th September 2003 as only two witnesses out of three were cross-examined (one of the witnesses was partly examined on 2nd December 2002)? For better appreciation in the present matter, the

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relevant portion of the related orders dated 2nd December 2002 and 30th September 2003 are quoted below: -

“2-12-2002

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.....
3 PWs present. Examined and recorded the statement of Shri V.B.Pathak, District Collector, East. Examination of Shri A.Sachadeva, Superintendent of Police, East is done in part and the cross examination of this witness remains to be done. Learned defence counsel submit that they may be allowed to cross examine all the police officers at a time so that their defence will not be disclosed at this stage. Otherwise it would be prejudicial to them. The other witness Shri Avichal, AIG, in SPG who is present in court to-day. However, because of the submissions made by the learned defence counsel his statement could not be recorded to-day. These two witnesses are directed to appear as and when summoned by this Court.”

“30-9-2003

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.....
To-day is the date fixed for examination of 3 police officers. However, learned P.P. submits that one Police Officer Shri Avichal could not come from New Delhi as he is pre-occupied there. As per the request of the learned defence counsel the three police officers are required to be cross examined on the same date. However, since one witness is absent to-day no useful purpose would be served.”

10. Further, on perusal of the order dated 2nd February 2004, the prayer for the prosecution to examine the said witness Shri Avichal who was present on that day, i.e. on 2nd

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February 2004 was rejected by the trial Court on the main ground that the learned Public Prosecutor did not disclose as to on which point the said witness is vital one and; the said witness was neither summoned by the trial Court nor was any direction to the prosecution to produce him on 2nd February 2004 and, the prosecution has not disclosed as to how and why the said witness is vital or essential when he was simply an supervisory officer and moreover, sufficient opportunities were given to the prosecution to produce the said witness along with the two other police officers. The relevant observations/orders of the trial Court passed on 2nd February 2004 is also quoted below for just determination of the real points in controversy between the parties: -

"02.02.2004

Today Ld. P.P. submits that Shri Avichal is a vital witness of the prosecution. He had supervised the investigation of the case. However, he did not disclose as to on which point this witness is vital one. Shri Avichal was neither summoned by this Court nor was the prosecution directed to produce him today.

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I have given my serious thought on the issue. Of course the discretion given by Sec. 311 Cr.P.C. is very wide but the very width requires a corresponding caution. I am conscious of the fact that where the evidence of any person is

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essential to the just decision of the case, it is obligatory on the Court to examine the witness in this case. As stated above the prosecution has not disclosed as to how and why this witness i.e. Shri Avichal is vital or essential when he was simply a supervisory officer. Moreover, sufficient opportunities were given to the prosecution to produce the said witness along with the two other police officers. As the prosecution has failed to produce the witness in the past and in the appropriate time, the request of the prosecution cannot be exceeded to at this stage particularly, when the other two police officers have already been cross-examined by the accused persons. It may further be mentioned here that on inquiry from the Court learned P.P. had submitted on 26.12.03 that he had only three witnesses left to be examined these three are present today. But today he wants to examine the said Shri Avichal also, who according to the Ld. P.P. is the supervisory officer.

Section 311 Cr.P.C. gives a sort of residuary discretionary power to the Court but essential evidence should be the purpose, and not the second thoughts of a litigant. Otherwise, there will be no end of argument, as each party can invite the Court to take further evidence to fill up its gaps in its evidence.

In view of the above, I am of the view that the prayer of the prosecution is without merit and the same is rejected."

11. Prosecution's prayer for examination of the said witness Shri Avichal was turned down by the trial Court on the grounds as highlighted above particularly, on the ground that

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prosecution did not disclose as to on which point the said witness is vital one. Thereafter, the prosecution filed the said application dated 13th April 2004 which is relevant in this case and the main grounds and reasons given by the prosecution in the said application are as follows: -

- "2. That the prosecution witness, Shri Avichal, A.I.G. S.P.G. has not been examined till date for various reasons which are on record. He was present in the Court for his evidence on 02/12/2002 and 02/02/2004 coming all the way from Delhi.
3. That the name of the said witness is mentioned the Charge-Sheet filed under section 173 Cr.P.C.
4. That the said witness has not been dropped by the prosecution nor an Order to that effect has been passed by the Ld. Court.
5. That the said witness is an essential witness to the prosecution being the supervisory Officer of the investigation. Besides this he has also heard the dying declaration of the deceased.
6. That the interest of the prosecution would be seriously prejudiced if he is not allowed to be examined on behalf of the prosecution.
7. That the examination of said witness is essential in the interest of justice and for proper decision of the case."

12. The statement of Shri Avichal, IPS recorded under Section 161 Cr.P.C. shows that while he was working as

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A.S.P., East District during the month of May 2000, he received a telephonic information from Ranipool P.S. about the incident of assault and rioting that took place in Ray Khola and he along with S.D.P.O./Gangtok; S.I. K. B. Gurung, S.I. Karma Denzongpa and their force raided the P.O. and they proceeded towards the S.T.N.M. hospital for inspecting the condition of the victim and when they questioned the victim, the victim narrated the story that the accused Thukchuk Lachungpa attacked him and asked his men around to kill him and thereafter, the victim was assaulted. From the said statement it is also seen that the said Shri Avichal, IPS had certain information and knowledge about the occurrence/case and subsequent development after the occurrence. At this stage, I hereby perused the statement Shri Kharga Bahadur Gurung, the police officer who accompanied with Shri Avichal, IPS for inspecting the condition of the victim at S.T.N.M. hospital partly recorded by the Sessions Judge i.e. the trial Court. The said witness Kharga Bahadur Gurung stated that he visited the place of occurrence along with his senior officers including Shri Avichal and he was also accompanied by Shri Avichal, IPS to S.T.N.M. hospital where the victim was admitted in Emergency Ward and when the victim was questioned as to how he sustained the injury, the victim Dawa Tashi Bhutia

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stated about the ill-treated manner and behavior of the accused No.1 and also assault of the victim by the men of accused No.1. In order to highlight the factual thing, the statement of Shri Avichal recorded under Section 161 Cr.P.C. is quoted below: -

“Statement of Shri Avichal, IPS, previously Addl. S.P./East, now Superintendent of Police, North Sikkim recorded u/s 161 Cr.P.C.

During May 2000, I was working as ASP East district. On receipt of telephonic information from Ranipool P.S. about the incident of assault and rioting that took place in Ray Khola, I along with SDPO/Gangtok, S.I. K. B. Gurung, S.I. Karma Denzongpa and force raided the P.O. However nobody could be arrested there. From there we all proceeded towards STNM hospital for inspecting the condition of the victim. The victim was in Emergency Ward of STNM hospital, Gangtok. When we saw him, his left hand was plastered, his nose was bandaged, his face was badly swollen, his eyes (both) were ventilated with bruises and he was moaning. However, he was in senses and was able to speak and understand. When we questioned him he narrated the story as follows: -

That he had gone to Ray Khola for bathing. While bathing he saw Thukchuk Lachungpa abusing and his men chasing the Bengali Tourists who also had come there. Upon this he came out of the pond and told Thukchuk that he should not behave in this manner to the outside tourists since it badly affects the image of our State. On hearing this Thukchuk attacked him and asked his men around to kill him and teach him a lesson for life. Afterwards he was assaulted and he did not remember what happened.

The father of the victim was also questioned who clearly told that it was Thukchuk Lachungpa who had incited and attacked his son who now might die. And for arresting others it was necessary to arrest Thukchuk Lachungpa since he had led and

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incited the attack and the other persons who were involved in assaulting his son were all his bhattus. This matter was then reported to S.P./East at his residence. On 15.5.2000 the victim expired.

Again on 15.5.2000 I along with SP/E was coming down towards Ranipool in connection with the case of murder. On the way at the Saraswati Mandir turning we saw Thukchuk Lachungpa going up towards Gangtok in his white car with two other persons. Since he is involved in the case (FIR No.12(5)2000 u/s 147/148/149/302 I.P.C. dt. 14.5.2000) he was stopped and asked to get out of the vehicle. He was told the grounds of his detention in presence of the two persons accompanying him in the car and brought to Ranipool P.S. In the P.S. he was found in possession of a barretta Pistol with five live rounds without any licence."

13. From the available materials on record, it is seen that the said witness Shri Avichal, A.I.G. is an important witness and his evidence appears to it to be essential to the just decision of the case. According to me, the question of the existence or non-existence of dying declaration of the victim and the proof of it whatsoever the case may be, shall be decided by the trial Court on the basis of the available evidences/materials on record.

14. The object of the provisions of law laid down under Section 311 Cr.P.C. obviously and patently made known is that the competent Court may, at any stage of the trial, summon any person as an witness or examine any person in attendance, though not summoned as a witness, and the

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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. Therefore, a reading of this provision of law under Section 311 Cr.P.C. makes it clear that if the evidence of such person appears to it necessary and essential to the just decision of the case, he/she should be examined. As highlighted above, the said witness Shri Avichal in his 161 Cr.P.C. statement specifically stated that when they questioned the victim, the victim narrated about the facts as highlighted in the foregoing paragraphs vide, statement of Shri Avichal, IPS recorded under Section 161 Cr.P.C. etc.

15. For better appreciation in the matter, the provision of Section 311 of the Cr.P.C. is relevant and accordingly, it is quoted below: -

“ 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. ”

According to me, the first part of Section 311 of the Cr.P.C. is discretionary which enables a Court at any stage to

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summon any person as a witness; or to examine any person in attendance or to recall and re-examine any witness already examined and, that the second part of this section is mandatory which further enables the Court to take any of the above steps if the new evidence of the person or witness appears to be essential to the just decision of the case. In other words, the object of this section is to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just decision of the case.

16. At this stage, I hereby recall a decision of the **Apex Court** rendered in **Mohanlal Shamji Soni v. Union of India** reported in **1991 CRI. L.J. 1521**, wherein the **Apex Court** in paragraph 10 of its judgment held thus: -

“ 10.

It is a well accepted and settled principle that a Court must discharge its statutory functions – whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though

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not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.”

17. In my considered view, the prosecution made its best effort for examination of its cited witness Shri Avichal, IPS in order to prove the related facts of the case but the trial Court did not afford the opportunity to the prosecution to examine the said witness on the grounds as discussed and highlighted above. According to me, the trial Court ought to have afforded the opportunity to the prosecution to examine the said witness for a just decision of the case as the said witness is an important witness and whose evidence is essential and material for just determination of the real points in controversy between the parties, in other words, for a just decision of the case. I am also of the view that in order to enable the Court to find out the truth and render a just decision, the evidence of said Shri Avichal is necessary and essential. This Court in a case between **Prem Subba & anr. v. State of Sikkim** reported in **2004 CRI.L.J. 1084** held that even if a new evidence of witness or any person appears to be essential to just decision of the case, it is obligatory for the Court to admit it at any stage of the proceedings, however,

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defence shall be given opportunity to cross-examine the said witness. In view of the above position, laws and facts of the case as well, I have no hesitation to opine that the trial Court mis-appreciated the provisions of law laid down under Section 311 Cr.P.C. while passing the impugned order inasmuch as the trial Court was of the view that the prayer of the prosecution made in its petition under Section 311 Cr.P.C. is of a review of earlier order(s). In the case in hand, no question of review of the earlier order(s) of the trial Court shall arise. It is made clear that by virtue of the earlier order dated 2nd February 2004 the prayer for examination of the said witness was turned down on the main ground that the prosecution did not disclose as to how and why the said witness Shri Avichal is vital and essential when he was simply a supervisory officer. According to me, the trial Court lost the sight of the importance of the witness of Shri Avichal in the case in hand as highlighted in the application under Section 311 Cr.P.C. filed by the prosecution while passing the impugned order, and apart from that, the trial Court also lost the sight of the evidences and statements of the witnesses including the statement of Shri Avichal recorded under Section 161 Cr.P.C. while passing the impugned order. I am also of the view that the case laws cited by Shri D. N. Choudhury, learned senior counsel, i.e. the decision of the

N. S. Choudhury



Jammu & Kashmir High Court rendered in **S. K. Mahajan v. Municipality, Jammu (supra)** does not help the case of the accused-respondents as the right of the prosecution to examine a vital witness mentioned above has been deprived of by and under the impugned order. Moreover, this Court in **Prem Subba v. State of Sikkim (supra)** laid down relevant laws as highlighted above. Hence, the impugned order, i.e. the rejection of the petition under Section 311 Cr.P.C. is not an interlocutory order and accordingly, the present revision petition is maintainable. I am also of the view that no prejudice shall be caused to the accused-persons if the said witness Shri Avichal is examined as one of the prosecution witnesses inasmuch as accused-persons shall get the opportunity to cross-examine the said witness for their defence.

18. This Court need not go more into depth as suffice is made with the above observations to set aside the impugned order dated 13th April 2004 passed by the Sessions Judge (South & West), Namchi in S.T. Case No.1 of 2004 and accordingly, it is set aside with the following directions: -

A. The prosecution shall produce the said witness Shri Avichal, the then A.I.G. S.P.G. before the trial Court on 9th August 2004 and the trial Court shall examine the said witness Shri Avichal. It is made clear that the


N. J. Qazi



defence/accused-persons shall be given reasonable opportunity for cross-examination of the said witness Shri Avichal on the same day and, it is further made clear that if the trial Court could not complete the examination of the said witness on the same day, the same shall be continued on the next day and so on and the trial Court may pass necessary order in the matter which deems it fit and proper, for which the learned counsel for the parties are hereby informed today accordingly and that, they shall assist the trial Court in the matter.

B. And that, while carrying out the above direction, the trial Court is to comply with the provision of law laid down under Section 309 Cr.P.C. and; to dispose of the case according to law expeditiously.

19. For the reasons, observations and directions made above, this Revision Petition is allowed. The Registry is directed to transmit the related case records to the learned Court below immediately.


(**N. S. Singh**)
Judge
26-07-2004