THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

Crl. M. C. No. 10 of 2016

State of Sikkim.

... Petitioner

versus

1. Shri Prem Singh Tamang
   S/o Kalu Singh Tamang,
   Singling Busty, P.O. Soreng,
   West Sikkim.

2. Shri Til Bdr. Gurung
   S/o Late Motilall Gurung,
   Below Housing Colony,
   6th Mile, Tadong, East Sikkim.

3. Shri Keshu Agarwal
   S/o Late Mahabir Prasad Agarwal,
   Nam Nam Road, Gangtok,
   East Sikkim.

4. Shri Subash Tamang
   S/o Shri B.B. Tamang,
   Soreng Bazar,
   West Sikkim.

5. Shri Sanjay Agarwal
   S/o Shri Sagarmull Agarwal,
   Lall Market Road,
   Gangtok, East Sikkim.

... Respondents.

Application under Section 482 of the Code of Criminal Procedure, 1973.

Appearance:

Mr. J.B. Pradhan, Public Prosecutor with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors for the State-Petitioner.

Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms. Malati Sharma, Advocates for Respondents No.2 and 5.

Mr. Sudesh Joshi, Mr. Raghvendra Kumar and Mr. Sishir Mothay, Advocates for Respondents No. 1, 3 and 4.

O R D E R
(07.11.2016)

Satish K. Agnihotri, CJ

Assailing the legality and correctness of the order dated 01.08.2016 rendered by the Court of the Special Judge, Prevention of Corruption Act, East and North Sikkim at Gangtok, in Sessions Trial Case No. 02 of 2009 (Vig), whereunder and whereby the application filed by the prosecution under Section 311 of the Code of Criminal Procedure, 1973 (for short 'Cr. P.C.'), to recall PW-1, Mr. D.K. Pradhan, for re-examination was rejected, the instant petition under Section 482 Cr. P.C. is filed.

2. The facts in brief emanating from the pleadings are that a charge-sheet was filed against the respondents/accused for having committed an offence under Section 403/409/420/468/120B of Indian Penal Code (for short, 'IPC') and Section 13(2), 13(1)(d) of Prevention of Corruption Act, 1988 (for short, 'P.C. Act, 1988'). Allegedly, the sanction to prosecute accused No. 1 and accused No. 2 was obtained under the provisions of Section 197 Cr. P.C. read with Section 19 (1) (c) of P.C. Act, 1988. The said sanction order was issued by one Mr. D.K. Pradhan, the then Deputy Secretary (Confidential), Home Department, Government of Sikkim. During the trial, Mr. D.K. Pradhan was examined as PW-1 to prove the sanction order, Exhibit-2, in respect of first respondent/accused and Exhibit-3, in respect of second respondent/accused on 03.06.2015. Mr. D.K. Pradhan, PW-1 was also duly cross-examined by the defence advocates wherein he stated as under: -

> "It is true that if the Law Department on vetting the file advises for not granting the Sanction, the Home Department refuses to grant Sanction for prosecution.
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> It is true that the Law Department had vetted the proposal of the Home Department for granting the Sanction Orders Exbts. 2 and 3.
>
> It is true that the said file pertaining to the Sanction Orders of Shri P.S. Tamang and Shri T.B. Gurung did not go to the Governor of Sikkim for approval.
>
> I have not produced before the Court any paper signed by the Minister In-charge according his approval for issuing the Sanctions Exbt. 2 and 3.

> Hon'ble Chief Minister Shri Pawan Chamling was the Minister In-charge of the Home Department at the relevant time.
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> I do not remember whether Shri Pawan Chamling has approved the proposal of issuing the Sanctions in the capacity of Chief Minister of Sikkim and not as the Minister In-charge of Home Department.
>
> It is not true that Shri Pawan Chamling did not approve the said proposal for issuing the Sanctions marked Exbt.2 and 3.
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> It is true that I can only remember that the approval for issuing Sanctions marked Exbt. 2 and 3 were given by the Minister In-charge, home Department."

3. The prosecution, it appears, being not satisfied with the statement made by Mr. D.K. Pradhan, PW-1, filed an application under Section 311 Cr. P.C. for re-examination of PW-1, Mr. D.K. Pradhan on the following grounds: -

> "4. That as per paragraph 28 of the sanction order Exhibit-2, issued in respect of accused No. 1, it has been categorically stated that the said Prosecution sanction has been accorded by the Governor of Sikkim.
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> 5. That whereas in his deposition dated 03.06.2015, PW-1 D.K. Pradhan, under whose requisition the sanction order Exhibit-2 was issued, has stated that the said Prosecution sanction was accorded by the Government of Sikkim.
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> 6. That in view of the above, it has become necessary to seek a clarification from PW-1 D.K. Pradhan as to whether the sanction for Prosecution in this case was accorded by the Governor of Sikkim or by the Government of Sikkim."

4. The learned trial Judge considering all aspects of the matter rejected the application holding as under: -

> "Under cross-examination, PW-1 has categorically stated thus "*It is true that the Law Department had vetted the proposal of the Home Department for granting the Sanction Orders Exbts. 2 and 3……. It is true that the said file pertaining to the Sanction Orders of Shri P.S.*

> *Tamang and Shri T.B. Gurung did not go to the Governor of Sikkim for approval".*
>
> The above categorical statements of Shri D.K. Pradhan (PW 1) makes it clear that Exbt. 2 and Exbt. 3 were issued by the Government of Sikkim and that it did not go to the Governor of Sikkim. Re-examination of this witness would not be proper since it would amount to asking him to state in exact opposition to what he has mentioned above."

5. Mr. J.B. Pradhan, learned Public Prosecutor submits that re-examination of Mr. D.K. Pradhan is necessary to seek clarification as to whether the sanction for prosecution in the matter against accused No. 1, Prem Singh Tamang was accorded by the Governor of Sikkim or by the Government of Sikkim, to come to just a decision. It is further contended that no prejudice will be caused to the defence, if Mr. D.K. Pradhan is re-examined for the purpose of clarification.

6. On the other hand, Mr. N. Rai, learned Senior Counsel appearing for respondents No. 2 and 5, Mr. Sudesh Joshi and Mr. Raghvendra Kumar, learned counsel appearing for respondents No. 1, 3 and 5, supporting the impugned order dated 01.08.2016 rendered by the learned trial Judge, would contend that the prosecution is trying to fill up the lacuna in the case, when the specific question was asked as to whether the approval was granted by the Governor or by the State Government, the witness has categorically stated that the sanction was granted by

the Government of Sikkim and not by the Governor. In such view of the categorical statement, no further clarification is necessary as sought for by the prosecution. It is further contended that the impugned order rendered by the trial Judge rejecting the application under Section 311 Cr. P.C. is just and proper in accord with the well settled principles of law.

7. Heard learned counsel for the parties. Perused the pleadings and documents appended thereto.

8. Indisputably the case is at the trial stage. Mr. D.K. Pradhan, the then Deputy Secretary, was examined fully by all the parties. A specific question was put to him in respect of which authority has granted the sanction. Mr. D.K. Pradhan was clear in his statement that the file pertaining to sanction order did not go to the Governor for approval and the same was granted by the Government. In such a clear statement, I am afraid the contention of the petitioner that re-examination of Mr. D.K. Pradhan is necessary to arrive at a just decision cannot be countenanced.

9. The application filed under Section 482 Cr. P.C. is maintainable as no revision is maintainable under Section 397 Cr. P.C. against the rejection of application under Section 311 Cr.

P.C., as held by the Supreme Court in ***Sethuraman vs. Rajamanickam***[1], as under:

> **"5.** Secondly, what was not realised was that the orders passed by the trial court refusing to call the documents and rejecting the application under Section 311 CrPC, were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) CrPC. The trial court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent-accused and the only defence that was raised, was that his signed cheques were lost and that the appellant complainant had falsely used one such cheque. The trial court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders i.e. one on the application under Section 91 CrPC for production of documents and other on the application under Section 311 CrPC for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed.**"**

10. In ***Rajendra Prasad vs. Narcotic Cell, Through its Officer In Charge, Delhi***[2], relied on by Mr. J.B. Pradhan, learned Public Prosecutor, PW-21 was though summoned for cross-examination, but never cross-examined. There was negligence on the part of the Public Prosecutor as he closed evidence twice without verifying whether cross-examination of all the witnesses has been concluded or not. In such view of the

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1 (2009) 5 SCC 153
2 (1999) 6 SCC 110

matter, application to recall PW-21 for cross-examination was granted by the trial Court, the Supreme Court upholding the order of the trial Court, held 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 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 prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a 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 oversight 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.**"**

11. In ***Iddar & Ors. vs. Aabida & Anr.***[3], the Supreme Court examined the ambit and scope of Section 311 Cr. P.C. and held as under: -

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

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3 AIR 2007 SC 3029

witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

12. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, ‘Evidence Act’) are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be “filling of loopholes”. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not, must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

13. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complaint he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the

> provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jagat Rai v. State of Maharashtra : AIR 1968 SC 178*.**"**

12. Again in ***Natasha vs. Central Bureau of Investigation***[4] the Supreme Court analyzed various judgments rendered by the Supreme Court on the exercise of power under Section 311 Cr. P.C. and held as under:-

> "**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 CrPC 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 CrPC 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

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4 (2013) 5 SCC 741

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 jeoparadised. 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 be zealous in ensuring that there is no breach of the same. [Vide. *Talab Haji Hussain v. Madhukar Purushottam Mondkar : AIR 1958 SC 376; Zahira Habibulla H. Sheikh v. State of Gujarat : (2004) 4 SCC 158; Zahira Habibulla Sheikh (5) v. State of Gujarat : (2006) 3 SCC 374; Kalyani Baskar v. M.S. Sampoornam : (2007) 2 SCC 258; Vijay Kumar v. State of U.P. : (2011) 8 SCC 136 and Sudevanand v. State : (2012) 3 SCC 387*.]"

13. In ***State (NCT of Delhi) vs. Shiv Kumar Yadav and another***[5] after prosecution evidence was closed, witnesses were duly cross-examined by the counsel for the accused and the statement of accused under Section 313 was recorded, application for recalling of prosecutrix and formal witnesses was made, but the same was rejected. Thereafter, another counsel was engaged, who filed another application under Section 311 Cr. P.C. for recalling of 28 prosecution witnesses, it was dismissed by the trial Court but allowed by the High Court.

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5 (2016) 2 SCC 402

The Supreme Court setting aside the order allowing the application passed by the High Court, held as under: -

> **"27.** It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.**"**

14. Yet again, in ***State of Haryana vs. Ram Mehar and others***[6], wherein there were 148 accused persons and their

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6 (2016) 8 SCC 762

statements were recorded under Section 313 Cr. P.C. The defence had examined 15 witnesses. The High Court, exercising its power under Section 482 Cr. P.C. taking note of the illness of the leading counsel for the defence during the trial and also due to inadvertence, certain important questions, suggestions with respect to the individual roles and allegations against the respective accused persons, the injuries sustained by the witnesses, as well as the alleged weapons of offence used had not been put to the said witnesses, allowed the application filed under Section 311 Cr. P.C. for recalling witnesses. The Supreme Court re-examined the law on the point and also factual matrix involved in the case and observed as under: -

> **"39.** There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief- was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can

> never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.
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> **40**. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is, 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weight with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction.**"**

and set aside the order rendered by the High Court.

15. Applying well settled principles of law while invoking jurisdiction under Section 311 Cr. P.C. to recall a witness in the facts of the case, wherein the case of the prosecution for recalling the witness Mr. D.K. Pradhan to seek clarification as to whether the sanction for prosecution in this case was accorded by the Governor of Sikkim or by the Government of Sikkim is not necessary in view of the categorical statement made by him during his cross-examination that the sanction orders Exhibits 2 and 3 were issued by the Government of Sikkim and it did not go to the Governor of Sikkim. Re-examination of the witness in

such factual background will amount to re-trial and to fill up the lacuna if any in the deposition of the said witness.

16. The Section 311 Cr. P.C. was enacted conferring the power on any Court at any stage of any inquiry, trial or other proceedings to summon any person as a witness or examine any person in attendance. The provision itself makes it abundantly clear that the jurisdiction under Section 311 Cr. P.C. is invokable to recall and re-examine any person if his evidence appears to be essential to the just and proper decision. Indisputably, the power is discretionary, however, the same is exercisable judiciously and objectively, on examining the entire factual matrix before recalling the witness for re-examination. If the power is not exercised carefully that may lead to injustice to one party and the stated object to come to a just decision may not be achieved. The trial Judge in the instant case had carefully examined the deposition made by the concerned witness in the light of the application made by the prosecution under Section 311 Cr. P.C. and it was rightly rejected. I do not find any merit in this petition to take any other view than the one taken by the trial Court.

17. For all the reasons mentioned herein above, the impugned order dated 01.08.2016 passed by the learned trial

Judge is unexceptionable, just and proper and does not warrant any interference. Resultantly, the petition is dismissed.

Sd/-
Chief Justice
07.11.2016

Approved for Reporting : Yes/~~No~~.
jk Internet : Yes/~~No~~.