THE HIGH COURT OF TRIPURA
A G A R T A L A

Crl. Rev. Pet. No.22/2017.

1. Md. Arman Ali, S/O. Late Hasmat Ullah,

2. Md. Manik Miah, S/O. Late Wahid Ullah,

3. Md. Nasim Ali, S/O. Late Abdul Gaffur,

4. Md. Farman Ali, S/O. Late Hasmat Ullah,

5. Md. Innuch Ali, S/O Md. Arjan Ali,

6. Md. Manjir Ali, S/O Late Abdul Gaffur,

7. Md. Rasid Ali, S/O. Late Bahar Ullah,

8. Md. Khurman alias Kurman Ali, S/O. Late Hasmat Ullah,

9. Abdul Chattar, S/O. Late Hatim Ullah,

10. Abdul Manaf, S/O Late Hatim Ullah,

11. Hazi Arjan Ali, S/O Late Hazi Sajid Ullah,

12. Abdul Sahid, S/O. Late Bahar Ullah,

13. Arjad Ali, S/O Late Hasmat Ullah,

14. Abdul Ali, S/O Chanur Ali,

15. Akkal Ali, S/O Late Ayat Ullah,

16. Hamid Ullah, S/O Late Hatim Ullah,

17. Junab Ali, S/O Md. Arjan Ali,

18. Ibrahim Ali alias Ibru, S/O. Md. Arjad Ali.

------ All of Village – Depacherra, P.S Irani, Kailashahar, District – Unakuti, Tripura.

……. **Petitioners.**

-: Vrs. :-

The State of Tripura. ……. **Respondent.**

B E F O R E
HON'BLE THE CHIEF JUSTICE

Counsel for the petitioners : Mr. P K Biswas, Sr. Advocate,
Mr. H K Bhowmik, Advocate,
Mr. P Majumder, Advocate.

Counsel for the respondent : Mr. R C Debnath, Addl. P. P.

Date of hearing : 16-6-2017.

Date of Judgment & Order : **30-6-2017**

JUDGMENT & ORDER

This criminal revision is directed against the order dated 11-4-2017 passed by the learned Additional Sessions Judge, Unakoti Judicial District, Kailasahar in ST(Type-1) No. 2 of 2015 rejecting the application of the petitioner U/s 311 for recalling the prosecution witnesses for further cross-examination ostensibly for the purpose of contradicting their statements recorded U/s 161, CrPC.

2. To appreciate the grievance of the petitioner, I will straightaway reproduce below the contents of Para1 of the application of the petitioner:

> "1. That prosecution witnesses PW-4, PW-5, PW-6, PW-7, PW-10 and PW-15 were examined by the prosecution and they are cross-examine (sic) by the defence at the time of cross-examination, the defence with a view to contradict those witnesses with reference with (sic) their earlier statements recorded U/s 161 CrPC put the question drawing the attention of the witnesses whether those statements were made to police at the time of recording their statements. Though the defence was allowed to put those question, in reply, they stated that they made those statements at the time of recording their statements by the police, but inadvertently attention of those witnesses will not be drawn (?) to the statements recorded U/s 161 CrPC which the recommence (?) of the law U/s 145 of Evidence Act."
>
> (Underlined for emphasis)

In my opinion, the petitioner has misconceived the procedure for contradicting a witness under Section 145, Evidence Act. Right from the time of ***Bhagwan Singh v. The State of Punjab, AIR 1952 SC 214*** through ***Tahsildar Singh and another v. State of U.P., AIR 1959 SC 1012*** *to* ***Raj Kishore Jha v. State of Bihar and others, (2003) 11 SCC 519,*** the law has been firmly

settled by the Apex Court that resort to Section 145, Evidence Act would be necessary only if the witness denies that he made the former statement. If the witness denies of having made such a statement, then it would be necessary to prove that he did, and if the former statement was reduced to writing, then Section 145 requires that his attention must be drawn to those parts which are used for contradiction. To draw the attention of the witness, it is not enough to say whether a particular exhibit is his previous statement; the witness should be questioned about each separate fact point by point and passage by passage, which should be duly exhibited. But that position does not arise when the witness admits the former statement. In such a case, all that is necessary is to look to the former statement on which no further proof is necessary because of the admission that it was made.

3. Judging the decision of the trial court rejecting the application against the backdrop of the principles enunciated above, I do not find any jurisdictional error in rejecting the application of the petitioner. There is no question of recalling the prosecution witnesses already discharged for the purpose of resorting to Section 145, Evidence Act when the remaining witnesses such as PW-5, PW-6, PW-7, PW-10, PW-19, PW-20 admitted their former statements upon which recourse to Section 145, Evidence Act is sought for. As a matter of fact, where contradictions were sought to be made by the petitioners, the trial court apparently did not fail to do so. For example, in the cross-examination of PW-5, the following comes to surface:- "I did not state before the police that my son lost his consciousness. Attention of the witness is drawn towards the part of her 161 statement that her son became like unconscious to which she denied to have made such statement. The part of the 161 statement is marked Ext.A., subject to confirmation by IO." In most of the questions put before the prosecution witnesses sought to be recalled, the petitioners did not even care to specifically ask whether such and such statements were made before the police U/s 161 CrPC. In my judgment, the petitioners cannot have any legitimate grievance against the manner in which

the prosecution witnesses were examined in the trial court warranting their recall; to accede to such prayer will amount to an abuse of process of court.

4. There is, therefore, no merit in this revision petition, which is hereby dismissed. The learned Additional Sessions Judge, Unakoti District shall now proceed with the case and conclude the trial in accordance with law. Interim order stands vacated. All the petitioners/accused are directed to appear before the trial Court on 12-7-2017 at 10.30 A.M. for further proceedings of the trial without fail. Transmit the L.C. record forthwith.

5. Before parting, I must, however, remind the trial courts once again that it is quite possible that the lawyers engaged by the accused may not be knowing the art of contradicting the witnesses U/s 145, Evidence Act with their previous statements made before the police U/s 161 CrPC. Such inadequacy on the part of defence lawyer may sometimes even cause prejudice to the accused in genuine cases requiring such contradiction. In a situation of this nature, the trial judge has an important role to play to ensure that the accused receives fair trial. In this context, the observations made by the Apex Court in ***Himanshu Singh Sabharwal v. State of MP & others, (2008) 3 SCC 602*** on the active role to be played by them in a criminal trial need to be reiterated. This is what it said:

> "15. 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 the 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 of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

16. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. Union of India 1991 Supp (1) SCC 271 this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any Court' 'at any stage', or 'any enquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers 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 any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court 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 and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth."

The Registry will circulate this judgment to all criminal courts for strict compliance.

CHIEF JUSTICE