

**Court No. - 80**

**Case :- APPLICATION U/S 482 No.- 22902 of 2021**

**Applicant :- Bheem Singh**

**Opposite Party :- State Of U.P Through Secretary Home, Govt.  
U.P. Lucknow**

**Counsel for Applicant :- Neeraj Pandey, Om Prakash Singh  
Sikarwar**

**Counsel for Opposite Party :- G.A.**

**Hon'ble Sanjay Kumar Pachori, J.**

1. The instant application under Section 482 of the Code of Criminal Procedure (in short "the Code") has been filed to quash the impugned order dated 7.10.2021 passed by Additional Sessions Judge Court No. 4, Deoria, in the Sessions Trial No. 40 of 2017 (State v. Bheem Singh and Another) arising out of Case Crime No. 458 of 2015 under Section 307 of Indian Penal Code (hereinafter referred as "IPC"), registered at Police Station - Lar, District Deoria by which two applications filed by the applicant/accused under Section 311 of the Code have been rejected by a common order dated 7.10.2021.

**BRIEF FACTS OF THE CASE:**

2. The prosecution case, in brief, is that the First Information Report (in short "FIR") dated 25.8.2015 has been lodged by PW-1 Vinod Singh (younger brother of the injured) against the applicant, Subhash Singh, and two other known persons stating that on 23.8.2015, elder brother of the first informant, Balindera Singh went to the market 'Lar' for some personal work by his motorcycle. After finishing his work, he was returning to his home and reached 400 meters from Dhamauli Tiraha at about 6:00 P.M. In the meantime, two motorcyclists reached there from his back side, the applicant and Subhash Singh were sitting as a pillion rider and both the motorcycles were being driven by unknown persons. Subhash Singh called Balindera Singh from the back side. No sooner did the brother of the first informant slow

down his motorcycle and turn behind on exhortation of Subhash Singh, the applicant shot fire upon Balindera Singh, who fell on the ground. At the time of the incident, Dhirendra Singh was roaming in his field situated some distance from the spot and Girjesh Singh was attending his natural call at that time. On hearing the gunshot, both rushed to the spot and the accused persons fled away from the spot rolling firearms in the air to Bhagalpur. The incident has taken place due to old enmity. The informant took the injured firstly to Government Hospital, Lar and then to District Hospital Deoria. Treatment of his brother is going on in Trauma Centre, Medical College Lucknow. When the condition of Balindera Singh improved to some extent, he told him about the incident.

3. The FIR of the present incident has been lodged by the PW-1 Vinod Singh at Police Station- Lar District Deoria on 25.8.2015 at 16:30 hours under Section 307 of IPC against the applicant, Subhash Singh, and two unknown persons after about 46 hours of the incident on the basis of Tahrir dated 25.8.2015 which are Annexure-2 and Annexure-3 to the affidavit.

4. The applicant has filed the statements of PW - 1 Vinod Singh (informant), PW- 2 Balindera Singh (injured), PW- 3 Dhirendra Singh (as eye-witness), and PW-5 Dr. Rajesh Yadav, who had conducted the medical examination of the injured on 23.8.2015 at 8:10 P.M. at District Hospital Deoria as Annexure-4, 5, 6, and 7 to the affidavit. The applicant has also filed the medical examination report dated 23.8.2015 as Annexure-1 and two applications which have been filed under Section 311 of the Code as Annexure- 9 and 10 to the affidavit.

5. As per the medical report of the injured Balindera Singh (age about 50 years), he has received injury no. 1 entry wound of firearm size 1 cm. x 1 cm. right side chest wall at the back region, 22 cm. below to right side top of the shoulder, 10 cm. from the middle part of the body, margin are inverted, blackening and blood oozing is present and injury no. 2 exit wound of firearm size 1 cm. x 1cm. situated at the middle part of the chest, 10 cm. from the right nipple and 21 cm. left nipple and

margins are everted.

6. Two applications have been filed by the applicant under Section 311 of the Code on 4.10.2021 with a prayer to recall PW-1 Vinod Singh and PW- 5 Dr. Rajesh Yadav for further cross-examination to ask 5 specific questions in the statement of PW-1 and four specific question in the statement of PW-5, which are as under:

"यह कि वादी मुकदमा (पी०डब्लू०-1) से, उसकी पुनः प्रतिपरीक्षा (re cross examination) में निम्नलिखित प्रश्न पूछा जाना न्यायहित में आवश्यक है-

- (i) अपनी मुख्य परीक्षा में, और प्रतिपरीक्षा दिनांकित 10.10.2017 में, आपने अपने जिस दोस्त 'सुरेश सिंह' से रोडवेज बस स्टेशन, लार पर दरखास्त लिखवाने वाली बात कही है उस सुरेश सिंह के पिता का नाम क्या है, वह कहाँ का निवासी है, उसकी शैक्षिक योग्यता क्या है और उसकी आजीविका का स्रोत क्या है ?
- (ii) आपके उक्त दोस्त सुरेश सिंह से आपकी दोस्ती कब, कहाँ और कैसे हुई ?
- (iii) आपके उक्त दोस्त सुरेश सिंह के परिवार के किस सदस्य/किन सदस्यों को आप जानते एवं पहचानते हैं ?
- (iv) आपके उक्त दोस्त सुरेश सिंह इस समय जीवित है या नहीं ?
- (v) यदि इस समय आपका उक्त दोस्त सुरेश सिंह जीवित नहीं है तो उसकी मृत्यु किस तिथि को हुई ?

यह कि डॉ० राजेश यादव (पी०डब्लू०-5) को माननीय न्यायालय में प्रतिपरीक्षा हेतु पुनः आहूत करना न्यायहित में आवश्यक है जिससे उनसे निम्नांकित प्रश्न पूछे जा सकें-

- (i) कोई मरीज "Oriented" है या "Disoriented", यह जानने के लिए डाक्टर क्या तरीका अपनाते हैं ?
- (ii) आपने चोटिल/बलेन्द्र सिंह/पी०डब्लू०-2 के "Orientation" का मूल्यांकन कैसे किया था ?
- (iii) आपने बलेन्द्र सिंह/ पी०डब्लू०-2 की injury report (प्रदर्श क-3) में उसे "Oriented" अंकित/दर्शित करने के पूर्व उससे क्या बात-चीत की थी और उसने आपसे क्या कहा था ?
- (iv) आपने अपने साक्ष्य में यह कहा है कि मरीज पूरी तरह होश में था और लोगों को पहचान रहा था, आपने यह किस आधार पर कहा है ?

**SUBMISSION BEFORE THIS COURT:**

7. Learned counsel for the applicant submits that according to the statement of PW- 1 Vinod Singh, he got his Tahrir of the present case written by his friend Suresh Singh at the Bus Station Lar, Deoria on 25.08.2015. In earlier cross-examination of PW-1, the question with regard to the identity of said Suresh Singh had not been asked. PW-2 Balindera Singh stated that Suresh Singh, son of Rama Shankar, resident of village Ajna was alive at the time of the incident and he had not written his report. But Suresh Singh son of Rama Shankar resident of village Ajna was not alive on 25.8.2015 because he had died on 1.9.2014 before the incident. If the alleged Suresh Singh died about one year before the incident, the very genesis of the prosecution case would be proved false.

8. Learned counsel further submits that the family member of the applicant did not know about the date of the death of Suresh Singh. After examination of PW-2, it was revealed that Suresh Singh has died on 1.9.2014. Due to these reasons, questions regarding the identity of the said Suresh Singh had not been asked during earlier cross-examination of PW-1 are essential to the just decision of the case.

9. It is further submitted that PW-5 Dr. Rajesh Yadav, who conducted the medical examination on 23.8.2015 indicates that the injured was "oriented" but in his evidence, he stated that the injured was conscious and was recognizing people but unable to speak which is contrary to the medical report.

10. He further contended that there is contradiction and ambiguity between the medical report of the injured, wherein it has been mentioned that at the time of medical examination injured was "oriented" and in the cross-examination of PW-5 Dr. Rajesh Yadav stated that the injured was conscious. Questions had not been asked in earlier cross-examination to the PW-5 Dr. Rajesh Yadav with regard to the consciousness of the injured which are also essential to the just decision of the case. Learned counsel for the applicant relied upon the judgment of the

Supreme Court of case **The State represented by the Deputy Superintendent of Police v. Tr. N. Seenivasagan**, 2021 SCC Online SC 212.

11. Learned A.G.A. has supported the impugned order and vehemently opposed the prayer of the applicant and submitted that PW-1 Vinod Kumar Singh is not an eye-witness of the incident. The FIR of the present case has been lodged by PW-1 Vinod Kumar Singh after about 46 hours of the incident on the basis of information received from the injured. The application for recalling PW-1 has been filed after about 4 years of recording the statement-in-chief of PW-1 Vinod Kumar Singh and another application for recalling PW-5 Dr. Rajesh Yadav has been filed after about one year of recording the examination-in-chief of PW-5. Both the applications have been filed when the case was fixed in defence evidence.

12. He further submits that as per the police report of the present case Suresh Singh was not a scribe of the Tahrir of the complaint and was not an eye-witness of the incident. PW-2 Balindera Singh has disclosed the identity of said Suresh Singh in his cross-examination that he was resident of his village and was not posted in police department at Balia. He has died after the incident. It is not true that the identity of Suresh Singh has not been disclosed. The evidence of PW-1 Vinod Kumar Singh has been recorded on 5.9.2017, 21.9.2017, 10.10.2017, and 27.10.2017 and elaborate cross-examination has been done. It has been disputed that Suresh Singh has died before the incident, the applicant can lead oral or documentary evidence in defence.

13. Learned A.G.A. further contended that the applications have been filed after 8 dates from closing the prosecution evidence. There is the direction of the Apex Court to conclude the trial expeditiously. If any material contradiction or ambiguity is found in the prosecution evidence, the applicant would be entitled to the benefit of the doubt. The applications for recalling PW-1 and PW-5 are not bona fide, the reasons assigned are also not satisfactory and have been filed after a long delay.

14. Heard, Sri Om Prakash Singh Sikarwar, learned counsel for the applicant, Sri Manoj Kumar Dwivedi, learned A.G.A for the State and perused the materials on record.

**DISCUSSION:**

15. The trial court by its order dated 7.10.2021 dismissed the applications for recalling the witnesses for further cross-examination and rejected the submission urged on behalf of the applicant on the ground that the defence has elaborately cross-examined PW-1 and PW-5. The applicant has ample opportunity to lead oral or documentary evidence in defence. The applicant can also make an argument on this point. If there is any contradiction or ambiguity in the prosecution evidence. It is a settled position of law that the accused would be entitled to benefit of the doubt.

16. The order of the trial court has been assailed on two grounds, *firstly*; after reading the evidence of PW-1 and PW-2 the identity of scribe Suresh Singh is not clear. Secondly; if the complaint has been written by Suresh Singh, son of Rama Shankar, who died about one year before the incident, in that case, the genesis of the prosecution case would be proved false.

17. Before I proceed to examine the weight of the submissions made by learned counsel for both parties, it would be useful to notice the law with regard to the scope of Section 311 of the Code.

18. Section 311 is manifestly in two parts, the first part of the Section has given discretion to the Court and enables it any stage of an inquiry, trial, or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded; on the other hand, the second part of the Section is mandatory and imposes an obligation on the Court, to do one of aforesaid three things if the new evidence appears to it essential to the just decision of the case. In order to appreciate the submission of the applicant it will be worthwhile to refer to Section 311 of the Code, which reads as

under:

*'311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.'*

19. In this backdrop, it would be useful to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 of the Code, wherein the Apex Court highlighted the basic principles which are to be borne in mind while dealing with an application under Section 311 of the Code.

20. In **Natasa Singh v. C. B. I., (2013) 5 SCC 741**, the Apex Court, after referring the various decisions of the Supreme Court, has observed and held as under: (SCC, p. 748-49, para 15,16)

*"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 of 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 interest 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 jeopardised. 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.<sup>1</sup>, Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.<sup>2</sup>, Zahira Habibullah & Anr. v. State of Gujarat & Ors.<sup>3</sup>, Kalyani Baskar (Mrs.) v. M. S. Sampooram (Mrs.)<sup>4</sup>, Vijay Kumar v. State of U.P. & Anr.<sup>5</sup>, and Sudevanand v. State through C.B.I.<sup>6</sup>)*

21. In **Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461**, the Supreme Court held as under: (SCC, p. 473-74, para 17)

*"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. PC. 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*

1. AIR 1958 SC 376  
 2. AIR 2004 SC 3114  
 3. AIR 2006 SC 1367  
 4. (2007) 2 SCC 258  
 5. (2011) 8 SCC 136  
 6. (2012) 3 SCC 387

*examine or recall and re-examine any such person.*

*17.4. The exercise of power under Section 311 Cr.PC. 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. PC. 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 safeguard, 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.PC. 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."*

22. In **Swapan Kumar Chattarjee v CBI, (2019) 14 SCC 328**, the Supreme Court observed as under: (SCC p. 331, para 11 & 12)

*"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.*

*12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."*

23. Section 311 of the Code gives a wide power to the court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers a wide discretion on the court to act as the exigencies of justice require. The word "just" cautions the court against taking any action which may result in injustice either to the accused or to the prosecution. Where the court exercise the power under the second part, the inquiry cannot be as to whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a

just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction. [Vide: **Jamatraj Kewalji Govani v. The State of Maharashtra, AIR 1978 SC 178 (3 Judge Bench)**].

24. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the court. But the second part does not allow any discretion; it binds the court to examine fresh evidence and the only condition prescribed is that this evidence must be essential to the just decision of the case. 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. (Vide: **Ram Jeet and 8 others v. State of U.P., AIR 1958 All 439**)

25. In the case of **The State represented by the Deputy Superintendent of Police v. Tr. N. Seenivasagan**, in this case, the prosecution had sought to produce a copy of the Approval order granted the authority on record and had it marked as an exhibit in the evidence, for which purpose witnesses were sought to be recalled. In its applications, the prosecution noted that the witnesses were required to mark the relevant document, which was crucial for the decision of the case. It was submitted that Exhibit. P-1 the order of sanction itself shows that the order was issued by the Board and at the time of filing the charge sheet the Investigation Officer had obtained the Approval Order of the Board but not submitted it before the court. With great respect to the judgment of the Apex Court, which does not help the applicant in the present case, because the documentary evidence had been obtained at the time of filing of charge sheet which had not been filed before the court.

26. Keeping in mind the position of law, now I revert back to the facts of the present case. It is admitted case that PW-1 Vinod Kumar Singh is not an eye-witness of the incident; the FIR has been lodged by PW-1 after about 46 hours of the incident on the basis of information received from the injured PW-2 Balindera

Singh; the name of said Suresh Singh has not been mentioned in the Tahrir of the present case.

27. The application for recalling PW-1 has been filed after about 4 years of recording the statement-in-chief of the PW-1 Vinod Kumar Singh and another application for recalling PW-5 Dr. Rajesh Yadav has been filed after about one year of recording the examination-in-chief of PW-5. It has been informed by the learned counsel for the applicant during the argument that the applicant is in judicial custody. It is appropriate to mention here that PW-2 Balindera Singh stated in his cross-examination that Suresh Singh son of Rama Shankar was not his friend and he was resident of his village and he died after the incident. The identity of said Suresh Singh has been disclosed by PW-2 in his statement. There is no occasion to appreciate the prosecution evidence in detail at this stage.

28. In view of the facts and circumstances and keeping in mind the position of law I am of the considered opinion that learned trial judge gave well-founded reasons for rejecting the applications. Therefore, the order dated 7.10.2021 passed by the learned trial court is liable to be affirmed for the following reasons:

- (i) The applications for recalling the witnesses PW-1 and PW-5 have been filed after a long delay of 4 years, 1 year after recording the chief-examination of PW-1 and PW-5 respectively, and the reasons assigned therein are unsatisfactory.
- (ii) The trial of the present case is pending since 2015 and the applicant is in judicial custody and the trial is pending for defence evidence.
- (iii) The identity of scribe Suresh Singh has been disclosed by PW-2 Suresh Singh and he was not an eye-witness.
- (iv) The applicant has an opportunity to produce oral or documentary evidence with regard to the fact that Suresh Singh has died before/or after the incident.

(v) The FIR has been lodged about 46 hours after the incident on the basis of information received from the injured PW-2 Balindera Singh.

(vi) According to PW-1 Vinod Kumar Singh, Suresh Singh was scribe of the complaint (Tahrir). However, this fact has not been disclosed in the Tahrir.

29. For the aforesaid reasons, impugned order dated 7.10.2021 passed by the trial court is affirmed. Accordingly, the present application is dismissed along with the applications filed by the applicant under Section 311 of the Code.

30. Before parting with the judgment, it is made clear that the observations made in this judgment are limited to the purpose of determination of this application and will in no way be construed as an expression on the merits of the case. The trial court will adjudicate the matter on its own merits uninfluenced by any of the observations made therein.

**Order Date :- 18.1.2022**  
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**(Hon'ble Sanjay Kumar Pachori)**