

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.PETN NO.08 OF 2022

Dr. Kaushik Das,
S/o. Sri Jagat Chandra Das,
R/o: Arabinda Colony, Amarpur,
P.S. Birganj, Gomati, Tripura,
Pin:799101

..... Petitioner(s)

Vs.

The State of Tripura.

.....Respondent(s)

For the Petitioner(s) : Mr. S. Kar Bhowmik, Sr. Advocate.
Mr. J. Das, Advocate.

For the Respondent(s) : Mr. R. Datta, P.P.
Mr. S. Debnath, Addl. P.P.

Date of hearing and delivery of
Judgment & Order : 04.02.2022.

Whether fit for reporting : YES.

HON'BLE MR. JUSTICE T. AMARNATH GOUD

JUDGMENT AND ORDER(ORAL)

The facts in brief in the instant revision petition are that on 05.11.2013, one Sri Ashish Kanti Saha, S/o Lt. Manomohan Saha, R/o Town Sukumar Colony, P.S. Birganj, Amarpur, Gomati Tripura lodged a written ejarah to the O/C Nutan Bazar P.S. to the effect that on 03.11.2013, evening

at around 5 P.M., accused-Kaushik Das came to his house and told him that he will visit Natunbazar to see the Kali Puja along with the son of the informant, namely, Prasenjit Saha. Despite the objection of the informant, accused Kaushik Das took his son Prasenjit to Natunbazar to see the Kali Puja. On 04.11.2013, evening at around 4 PM, when the informant called his son over the telephone, both of them informed him that on 04.11.2013 they won't return to Amarpur. On 05.11.13 morning at around 8.30 AM when the informant called his son, he found his mobile to be switched off. Later, on 05.11.2013, morning at around 11 A.M., the maternal uncle of Kaushik Das, namely, Sri Bikash Shil (Bhutta) called in the mobile of the elder son of the informant and informed that both his son and Kaushik Das are untraceable since yesterday night. Thereafter, the informant and his wife visited Nautunbazar and came to know that Kaushik Das, Shankar Banik, Sajar Sarkar, and 4/5 others conjointly kidnapped his son and kept him in their custody. From different people, the informant came to know that his son Prasenjit Saha and Kaushik Das spent their night in the house of the one Abinash Shil near Juva Samaj Club. As the informant visited the house of Abhinash Shil, he could see Kaushik Das but did not find his son.

From this, it was quite clear to the informant that Kaushik Das, Shankar Das, Sajal Sarkar, and 4/5 others conjointly kidnapped his son. The informant thus prayed for proper investigation.

2. Based upon the aforesaid written ejahar Natunbazar P.S. Case No.46/2013 dated 05.11.2013 was registered against the petitioner herein, Shankar Das, Sajal Sarkar and 4/5 unnamed persons under Section 365/34 IPC. Subsequently, the case was investigated by CID and vides C.S. No.05/15 and Natunbazar P.S. dated 10.03.2015 charge sheet was laid against the present petitioner under Section 202 of IPC the definition of which is as follows:-

"202. Intentional omission to give information of offence by person bound to inform.- Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment or either description for a term which may extend to six months, or with fine, or with both."

3. During hearing on framing of charge, vide order dated 28.08.2015, the learned Trial Court after considering all materials discharged the present accused-petitioner from the liability of the case. Thereafter, the informant Sri Ashish Kanti Das before this Hon'ble High Court filed CrI. Petn No.49 of 2015 challenging the aforesaid order of discharge

and vide order dated 22.11.2018, this Hon'ble Court was kind enough to set aside the order of discharge dated 28.08.2015 and directed the learned trial Court to frame charge against the present petitioner under Section 202 of IPC or other appropriate charging provision.

4. Thereafter, vide order dated 13.02.2019, charge under Section 364/202 of IPC was framed against the present petitioner and trial commenced. Vide order dated 10.05.2019, learned P.P. filed a petition under Section 216 of Cr.P.C., with a prayer to frame charge against the present petitioner under Section 302/201/34 of IPC. Thereafter, vide order dated 19.06.2019, the prayer of the learned P.P. was allowed and as per order dated 26.07.2019, additional charge under Section 302 of IPC was framed against the present petitioner.

5. In the instant case, the prosecution examined 54 witnesses to prove the charge. After the examination of the prosecution witnesses, the present accused person was examined under Section 313 of Cr.P.C. on 05.08.2021 and thereafter the case was fixed for argument. On 11.11.2021, the present petitioner appointed his new set of counsels to conduct his defence, and time was sought for preparation. Thereafter, on 15.11.2022 a petition under Section 311 of

Cr.P.C. was filed before the learned Sessions Judge, Gomati Judicial District, Udaipur on behalf of the present petitioner with a prayer to recall and re-examine P.W.-15, P.W.-18, P.W.-20, P.W.-28, P.W.-49 and to summon the then Judicial Magistrate(1st Class), Amarpur South Tripura, Sri S.K. Singh who recorded the statement under Section 164 of Cr.P.C. of P.W.28 Sri Prasenjit Saha. The aforesaid petition under Section 311 of Cr.P.C. was heard on 15.01.2022 and vide order dated 21.01.2022, the learned trial Court had dismissed the petition filed by the present-petitioner. The learned counsel appearing for the present petitioner in the Court below also relied upon certain judgments including Apex Court judgment but the Court below has not inadvertently looked into the citations as relied upon and has appreciated the arguments and has rejected the petition filed by the petitioner.

6. Aggrieved by and dissatisfied with the order dated 21.01.2022 passed by the learned Sessions Judge, Udaipur, Gomati District the petitioner has filed the instant petition and prayed for the following reliefs:-

" a) Be kind enough to stay further proceeding of case No.ST(T-1)34 of 2015 pending in the Court of learned Sessions Judge, Gomati Judicial District, Udaipur, Tripura.

AND

b) Call for the records of case No.ST(T-1)34 of 2015 pending in the Court of learned Sessions Judge, Gomati Judicial District, Udaipur.

AND

c) Issue notice to the parties.

AND

d) After hearing be kind enough to quash the order dated 21.01.22 passed by the learned Sessions Judge, Gomati Judicial District Udaipur

And

e) Allow the petition dated 15.01.2022 filed by the accused-petitioner under Section 311 of Cr.P.C.

AND

f) Pass such other order or orders as Your Lordship deem fit and proper"

7. Heard Mr. S. Kar Bhowmik, learned Sr. counsel assisted by Mr. J. Das, learned counsel appearing for the petitioner as well as Mr. R. Datta, learned P.P. appearing for the State-respondent.

8. Mr. Kar Bhowmik, learned Sr. counsel, appearing for the petitioner in support of his contentions, placed on record Paras-5, 6 & 7 of the judgment of the Apex Court bearing registration No. **Criminal Appeal Nos.1018-19 of 2011** reported in **(2003)11 SCC 486** titled as **P. Chhaganlal Daga Vs. M Sanjay Shaw** which is reproduced here-under:-

"5. *In Rajendra Prasad v. Narcotic Cell* , this court has explained what is meant by lacuna in the prosecution case. The following passage of the said decision will be apposite in this contest (page 113) :

"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 fall out 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 lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up."

6. *In deciding so, this court has taken into account some of the earlier decisions of this court including [Mohanlal Shamji Soni v. Union of India](#) [1991] Suppl. 1 SCC 271. In the said decision this court had observed that the power to receive evidence in exercise of [Section 311](#) of the Code could be exercised "even if evidence on both sides is closed" and such jurisdiction of the court is dictated by the exigency of the situation and fair play. The only factor which should govern the court in exercise of powers under [Section 311](#) should be whether such material is essential for the just decision of the case. Even a reading of [Section 311](#) of the Code would show that Parliament has studied the said provision lavishly with the word "any" at different places. This would also indicate the widest range of power conferred on the court in that matter. It is so stated by this court in [Ram Chander v. State of Haryana](#) .*

7. *We are of the opinion that the learned single judge of the High Court has improperly interfered with the order passed by the trial court. It is unfortunate that even after his attention was drawn to the decision of this court in [Rajendra Prasad v. Narcotic Cell](#) he has chosen to sideline the dictum contained therein.*

9. Mr. Kar Bhowmik, learned Sr. counsel further placed on record Para-5,9,16 & 21 of the Judgment of the Gauhati High Court bearing registration No. **Criminal Revision Petition No.97 of 2009** reported in **2010 Crl.J. 2492** titled as **Ajit Kumar Nath and ors. Vs. The state of Tripura**, which are reproduced hereunder:-

" 5. While criticizing the order of the learned Trial Court as impugned, Mr. Talapatra, learned senior counsel for the petitioners contended that the learned Trial Court failed to understand the scheme of the provisions under Section 311, Cr.P.C. Accordingly to him, the said section has two parts, one is whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. Therefore, the first part is a discretionary power of the court which enables it 'at any stage of enquiry. Trial or other proceedings' under the Code to act in one of the three ways, namely, (1) to summon any person as a witness, or (2) to examine any person in attendance, though not summoned as a witnesses, or (3) to recall and re-examine any person already examined and the second part is mandatory which imposes an obligation on the court (a) to summon and examine, or (b) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. He

further contended that the first part as aforesaid being the discretionary power of the Court, it is the court who will decide whether it will exercise the power vested in it under section 311, Cr.P.C. or not, but so far the second part is concerned, it is mandatory in nature, which binds and compels the court to summon and examine or to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case, His further contention was that in the second part of the section, the word, 'examine' and 're-examine' both are there. The word 'examine' is used by the Legislature so that a witness who was not examined earlier by either of the parties, but his/her examination is necessary for the just decisions of the case, can be examined and the word 're-examine' is used to provide opportunity either to prosecution or to the defence to 're-examine' the witnesses who were examined earlier. **The word 're-examine' also includes further cross-examination. Therefore, the views of the learned trial Court, inter alia, unless the witnesses are re-examined or that new evidence are not revealed, the question of re-cross-examination does not arise is not correct.**

9. The very usage of the words such as 'any court', 'at any stage' or 'of any enquiry, or trial or other proceedings' 'any person' and 'any such person' clearly spells out that this Section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice requires and exercised judicially with circumspection and consistently with the provisions of the Code. **The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.**

16. Upon perusal of the judgment of the Apex Court in Rajendra Prasad(supra) this court is of considered opinion that the learned trial court failed to discharge its duties cast upon it by the Legislature and consequently, committed gross injustice to the accused-petitioners when the accused-petitioners in their application under section 311, Cr.P.C. specifically stated that due to mistake some questions relating to their (PWs) earlier statement before the investigating agency could not be asked to the prosecution witnesses for which their further examination is necessary or other they (accused-petitioners) would be prejudiced. This Court is of the further opinion that the findings of the learned trial court that unless the witnesses are re-examined or that new evidence are not revealed, the question of recross-examination does not arise at all cannot sustain in view of the decision of the Apex Court in Rajendra Prasad (supra) as even if a witness was not re-examined or new evidence are not produced by the prosecution then also the accused-petitioners are entitled to further cross-examination the prosecution witnesses if due to mistake some questions could not be asked to them which were necessary for the defence as well as for the ends of justice.

21. **Hence, for the aforesaid reasons the petition is allowed, the impugned order of the learned trial Court dated 10.11.2009 is set aside and the petitioners are permitted to cross-examined PWs.1 to 4.** They are directed to appear before the learned Trial Court on 17.05.2010 and on their appearance, the learned trial Court shall fix the date for such re-examination. No further adjournment shall be sought for, for this purpose."

10. Mr. Kar Bhowmik, learned Sr. counsel further submits that if an opportunity is given to the petitioner, it would be just and proper to meet the ends of justice to prove that the petitioner is not guilty and he cannot be punished under Section 302 and other relevant Section of IPC., and thus prayed to give an opportunity.

11. Mr. R. Datta, learned P.P. appearing for the State-respondent has opposed the above-mentioned prayer and submitted that this is only a delay tactic and to fill up the lacuna in the proceeding, the accused person has presented the present application before this Court. Further, Mr. Datta, learned P.P. submitted that several opportunities have been given to the accused since the matter is pending from the year 2013 and now when almost evidence has been completed and at the stage of 313 Cr.P.C., when arguments were about to be concluded in the Court below, the present petition is filed and this kind of delay tactics of prolonging and protracting the litigation cannot be entertained. Learned P.P. further prayed to dismiss the instant petition.

12. This Court considers the argument of the learned P.P. to some extent, and at that juncture, the counsel for the petitioner-accused volunteers and gives an undertaking before this Court that if just one hearing opportunity is given, he would utilize the same to complete his recall and re-examination of the witnesses.

13. Having perused the record and after hearing both the parties, this Court feels that to meet the ends of justice more particularly, in criminal cases opportunity to prove that the accused is not guilty has to be exercised more in favour of the accused person since his rights conferred under Article 21 of the Constitution of India stand on a better footing compared to the procedure contemplated under Section 311 of Cr.P.C., which is the subject matter of the present petition. Thus, it is needless to observe that as and when an occasion arises before the Court to exercise the discretion, it should always go in favour of the accused person.

14. In view of the above, this Court directs the Court below to give an opportunity to the petitioner and complete the recall and re-examination of the witnesses as prayed for. Learned Public Prosecutor appearing before the Court below shall ensure the presence of all witnesses on the date fixed by the Court below and ensure the trial is completed.

The said exercise shall be completed on/or before **10th March 2022**. Accordingly, the impugned order dated 21.01.2022 passed in ST(T-1)34/15 which is under challenge stands set aside.

15. With the above observation and directions, the instant Criminal petition stands allowed and thus disposed of.

JUDGE



suhanjit