HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
Crl. Rev. P. No. 40 of 2022

1. The State of Tripura, to be represented by Secretary, Home Department, Government of Tripura.

….. Petitioner

-V E R S U S-

1. Sri Sumit Banik, son of Sri Naresh Chandra Banik, resident of Ramthakur Road, College Tila, Adarsha Palli, P.O. College Tila, P.S. East Agartala, District: West Tripura, Pin:799004.

2. Sri Sukanta Biswas, son of late Sitendra Chandra Biswas, resident of Akhaura Road, Border Gol Chakkar, P.O. Ramnagar, P.S. West Agartala, District: West Tripura, Pin:799002.

3. Sri Sumit Chowdhury, son of Sri Sisir kanti Chowdhury, resident of Ramthakur Road, near Udiaman Sangha, P.O. College P.O. & P.S. East Agartala, District: West Tripura, Pin:799004.

4. Sri Omar Sharif @ Sueb, son of Sri Anu Miah, resident of Masjid Patti Road, Santipara, P.O. Head P.O., P.S. East Agartala, District: West Tripura, Pin:799001.

..... Respondents

B_E_F_O_R_E
HON'BLE MR. JUSTICE T. AMARNATH GOUD

For Petitioner(s)	:	Mr. S. Kar Bhowmik, Spl. P.P. Mr. R. Datta, Public Prosecutor. Mr. Srikanta Bol, Advocate.
For Respondent(s)	:	Mr. P. K. Biswas, Sr. Advocate. Mr. P. Majumder, Advocate. Mr. A. K. Banerjee, Advocate.
Date of hearing	:	***08.08.2022***
Date of delivery of judgment and order	:	***12.08.2022***
Whether fit for reporting	:	***YES***

JUDGMENT & ORDER

Heard Mr. S. Kar Bhowmik, learned senior counsel assisted by Mr. S. Bol, learned counsel and Mr. R. Datta, learned Public Prosecutor appearing for the petitioner. Also heard Mr. P. K. Biswas, learned senior counsel assisted by Mr. P. Majumder and Mr. A. K. Banerjee, learned counsel appearing for the respondents.

[2] By means of filing this revision petition under Sectin-397 read with Section-401 of Cr. P.C. challenging the order dated 27.06.2022 passed by the learned Sessions Judge, West Tripura, Agartala in connection with ST(T-1) 103 of 2019 allowing the 311 Cr. P.C. petition filed by the accused-persons at the stage of 313 Cr. P.C.

[3] The facts in brief are that the instant petition has been filed by the State of Tripura, challenging the order dated 27.06.2022 passed by the learned Sessions Judge, West Tripura, Agartala in the above mentioned case allowing the 311 Cr.P.C. petition filed by the accused-persons at the stage of 313 Cr.P.C. Vide order dated 27.06.2022, the learned Court below allowed the said petition without application of mind for which the same is challenged before this Court.

[4] On 23.05.2022 the prosecution closed its evidence and the next date was fixed on 03.06.2022 for examination of the accused persons under Section-313 of Cr. P.C. On 03.06.2022, on behalf of the accused-persons conjointly filed a petition under Section-311 of Cr. P.C. with a prayer to recall and re-examine PW-2, Sri Kishore Kumar Paul, PW-10, Smt. Mitra Das and PW-54, the 1st I.O. S.I. Sumanullah Kazi on the pretext that in his examination in chief PW-2 stated "*Sukanta Biswas lied Budhisatta down on the ground and sat himself on his chest and assaulted Budhisatta severely and Sumit Chowdhury and Sumit Banik also joined Sukanta and started assaulting Budhisatta."* It is stated in the petition that the said statement is missing from the statement recorded under Section-

161 of Cr. P.C. of PW-2, recorded by PW-54 and also in the statement of the said witness recorded under Section-164 Cr. P.C. by the than J.M.(1st Class) PW-10 Smt. Mitra Das and thus wanted to contradict the aforesaid witness with the said statement after their recall.

[5] Subsequently, the matter was heard at length and by the impugned order dated 27.06.2022 the learned Court below allowing the 311 Cr. P.C. petition filed by the defence at the state of 313 Cr. P.C. Being aggrieved by and dissatisfied with the order dated 27.06.2022 passed by the Court below this present revision petition has been filed.

[6] Learned special P.P. appearing for the petitioner has submitted that the impugned order dated 27.06.2022 passed by the learned Court below is neither legal nor proper or correct for which the same is liable to be quashed. The impugned order dated 27.06.2022 passed by the Court below is bad in law and in facts for which the same is not sustainable. He has further argued that there is total non-application of mind on the part of the Court below since in a mechanical manner the petition under Section-311 of Cr.P.C. was filed.

[7] The law is trite that application of Section-311 of Cr. P.C. cannot be used to fill up the lacuna also the examination of the witnesses cannot be an endless process. In the present case PW-2 is the eye witness of the gruesome murder and PW-10 is the Judicial Magistrate who recorded the statement under Section-164(5) of Cr. P.C. of the aforesaid witnesses and PW-54 is the 1st Investigating Officer. The statement recorded under Section-164(5) Cr. P.C. is on record and the same has been marked as Exbt.2(i) to 2(iv). Since the statement has been exhibited and is on record, calling of the aforesaid 3 witnesses for the purpose of contradiction will not serve any practical purpose and has only delayed the trial.

[8] The examination-in-chief of PW-2 was recorded on 09.03.2021 and subsequently, he was cross-examined on 24.03.2021 as per the order of this Court dated 19.03.2021 in Crl. Petn. No.11 of 2021 and thereafter he was again called and examined on 20.12.2021 as per order dated 14.12.2021. He has further contended that further examination-in-chief and cross-examination of PW-10 was recorded on 17.03.2021 through VC and subsequently, she was again called under Section-311 of Cr. P.C. and examined on 17.12.2021 as per order of the learned Court below dated 14.12.2021. Further, PW-54 the investigating officer was examined and cross-examined on 07.12.2021, 09.12.2021, 10.12.2021 and 14.12.2021.

[9] He has categorically stated that the above chronology it is evident that the defence had been granted amply opportunity to examine the aforesaid three witnesses and any further indulgence in this regard would be an abuse of process of the learned Court below.

[10] It has been further averred that as per record, PW-2 and PW-3 were the eye witnesses of the incident. Amongst them, PW-3 already turned hostile and a separate police case bearing No.2021WAG 049 dated 16.03.2021 under Section-195(A)/506/120(B) of IPC is pending against the same witnesses wherein at least two defence counsels were also found to be actively involved and have been arrayed as accused. It is the reasonable apprehension of the prosecution that by this time PW-2 might have been won over for which this belated 311 Cr. P.C. petition has been filed to damage the prosecution case by recalling the said witnesses.

[11] To counter the submission of the learned special P.P., Mr. P. K. Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel appearing for the respondents has submitted that PW-2 during his examination deposed that Sukanta Biswas lied Bodhisattwa down on the ground and sat himself on his chest and assaulted Bodhisattwa severely

and Sumit Chowdhury, Sumit Banik also joined Sukanta and started assaulting Budhisattwa but said statement is found missing in the statement of the witness recorded by the I.O., PW-54 under Section-161 of Cr.P.C. It was also submitted that PW-10 recorded the judicial statement of PW-2 and in the statement also the aforesaid facts is found missing. Learned Senior counsel accordingly submitted that further cross examination of the aforesaid three witnesses is necessary in order to draw the contradiction as indicated above. Learned Senior Advocate also submitted that further cross examination of the said witnesses is necessary to arrive at a just decision in this case.

[12] Record reveals that the aforesaid PW-2, PW-10 and PW-54 were examined and cross examined initially. Subsequent to that, PW-2 was further cross examined on 20.12.2021 and PW-10 was further cross examined on 17.12.2021 on application filed under Section-311 of Cr.P.C. by the accused side. This indicates that the accused side were given a fair opportunity after initial cross examination of said two witnesses to further cross examine them. However, the instant application filed under Section-311 of Cr.P.C. reveals that the accused persons should get a fair opportunity to draw contradiction as indicated above.

[13] The very spirit of Section-311 of Cr.P.C. is to extend an opportunity for further re-examination or re-cross examination to either of the party if the same is essential to arrive at a just decision in the case. So far PW-54 is concerned; he recorded the statement of PW-2 under Section-161 of Cr.P.C. and further cross examination of PW-54 is necessary to draw his attention to the contradiction as indicated above.

[14] In support of his case, Mr. Biswas, learned senior counsel has placed his reliance in a decision of the Apex Court in ***State of Delhi v. Shri Ram Lohia,*** reported in ***AIR 1960 SC 490***, wherein the Court held thus:

> ***"13. The Additional Sessions Judge observed in his judgment with reference to Aggarwal as follows:***
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> ***"He no doubt in his further cross-examination made certain damaging statements which would throw doubt on his previous statement but as the statement was made long after the first statement and at a time when Tara Chand accused had been discharged it seems to me that this witness was won over & he has intentionally prevaricated under the influence of the accused whose ex-employee he was. This inference finds support from the fact that in his statement under Section 164, Criminal Procedure Code made on 20th October, 1951, he stated that he was still in the employment of Messrs. Iron and Hardware (India) Company, while has now asserted in Court that he had been already dismissed by Sri Ram accused because of Sri Ram's differences with Tara Chand accused". It is clear therefore that the learned Judge relied on some statement of Aggarwal recorded under Section 164 of Criminal Procedure Code. The statement under Section 164 referred to was not specifically put to Aggarwal even to contradict him. Statements recorded under Section 164 of the Code are not sustantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under Section 164 of the Code and that what he had stated there was true would not make the entire statement admissible much less that any part of it could be used as substantive evidence in the case. The Additional Sessions Judge therefore erred in law in using the statement of Aggarwal under Section 164 to come to the conclusion that he had been won over. If that statement is excluded from consideration it is a matter of pure guess that Aggarwal had been won over after his examination-in-chief was over."***

[15] Another decision of the Hon'ble Apex Court in ***Mohanlal Shamji Soni v. Union of India***, reported in ***AIR 1991 SC 1346***, wherein, the Court has observed thus:

> ***"6. 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 by saying that the Court could not fill the lacuna in the prosecution case. a lacuna in 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 proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up."***

[16] Another decision of the Hon'ble Apex Court in ***Mannan Sk & Ors. v. State of West Bengal***, reported in ***2014 AIR (SC) 2950***, wherein, the Court has observed thus:

> ***"15. It is true that PW15-SI Dayal Mukherjee was once recalled but that does not matter. It does not prevent his further recall. Section-311 of the Code does not put any such limitation on the court. He can still be recalled if his evidence appears to the court to be essential to the just decision of the case. In this connection we must revisit Rajendra Prasad where this Court has clarified that the court can exercise power of re-summoning any witness even if it has exercised the said power earlier. Relevant observations of this Court run as under:***
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> ***"We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."***
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> ***16. It was strenuously contended that the incident had taken place on 13/12/1992 and, therefore, the application made after a gap of 22 years must be rejected. This submission must be rejected because PW15-SI Dayal Mukherjee was re-examined on 17/5/2011 and application for his recall was made just one month thereafter. It is true that the incident is dated 13/12/1992 and the trial commenced in 2001. These are systemic delays which are indeed distressing. But once the trial began and the Investigating Officer was re-examined on 17/5/2011, the prosecution made an application for recall just one month thereafter. There was no delay at that stage. The submissions that PW15-SI Dayal Mukherjee has grown old; that his memory must not be serving him right; that he can be tutored are conjectural in nature. In any case, the accused have a right to cross- examine PW15-SI Dayal Mukherjee. The accused are, therefore, not placed in a disadvantageous position.***
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> ***20. In the ultimate analysis we must record that the impugned order merits no interference. We must, however, clarify that oversight of the prosecution is not appreciated by us. But cause of justice must not be allowed to suffer because of the oversight of the prosecution. We also make it clear that whether deceased Rupchand Sk's statement recorded by PW15-SI Dayal Mukherjee is a dying declaration or not, what is its evidentiary value are questions on which we have not expressed any opinion. If any observation of ours directly or indirectly touches upon this aspect, we make it clear that it is not our final opinion. The trial court seized of the case shall deal with it independently."***

[17] Mr. Biswas, learned senior counsel has further relied on a decision of ***State represented by the Deputy Superintendent of Police v. Tr. N. Seenigasagan,*** reported in ***2021 AIR (SC) 2441***, where the Apex Court has observed thus:

> ***"13 In our view, having due regard to the nature and ambit of Section-311 of the CrPC, it was appropriate and proper that the applications filed by the prosecution ought to have been allowed. Section-311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the CrPC, 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". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case."***
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> ********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 should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."***

[18] This Court is of the view that lacuna in 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 over sight 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 in-adventure, the

Court should be magnanimous in permitting such mistakes to be rectified, more so, when the rights conferred by Constitution of India upon a citizen.

[19] The argument of the learned Special P.P. on the point that PW-2 might be turned hostile in collusion with the accused-person cannot be appreciated. As on the same pretext, to meet the ends of justice, the door cannot be shut against the accused-person without giving an opportunity and the State Government having all infrastructures and fully equipped, cannot expressed its doubt against its witnesses. They can take all measures in the interest of truth to protect the witnesses from the clutches of the accused-person if there is any such apprehension of hostality.

[20] After meticulous discussion and perusing the observation of the Apex Court, this Court cannot therefore accept the contention of the counsel appearing for the petitioner as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments.

[21] Hence, this Court finds no infirmity in the findings arrived at by the Court below and thus, affirmed. Since the petitioner herein has failed to make out his case before the Court below, this Court has no hesitation to say that in the revision, appreciation of the factual issues are not permissible.

[22] Accordingly, the instant revision petition stands dismissed. As a sequel, miscellaneous applications pending, if any, shall stand closed.

JUDGE

A.Ghosh