Sikkim High Court Prem Subba And Anr. vs State Of Sikkim on 8 December, 2003 Equivalent citations: 2004 CriLJ 1084 Author: N Singh Bench: N Singh ORDER N.S. Singh, J. 1. The order dated 12th August, 2003 passed by the learned Sessions Judge (S & W), Namchi in Criminal Case No. 7 of 2003 is the subject matter under challenge in this revision petition. 2. The facts of the case, in a short compass, leading to the filing of this revision petition are as follows :– The petitioner who is the accused person in connection with a Criminal Case No. 7 of 2003 stood trial for offence punishable under Section 307 of the Indian Penal Code before the Court below and the related charge has been framed against the accused-petitioner did not plead guilty, and claimed for trial; the trial Court started examination of as many as prosecution witnesses and, later on, the trial Court below fixed date for examination of the Investigating Officer (I.O.) and, in the mean time, the prosecution filed an application on 12th August, 2003 for examination of a witness, namely, Shri Pem Tshering Bhutia, son of Shri Chadar Bhutia, resident of Siribadam, West Sikkim by stating that the said Pem Tshering Bhutia is a material witness who could not be examined during the investigation of the case and, as such, an opportunity be given to the prosecution to examine the said witness for proper adjudication of the case. The learned trial Court allowed the petition thus affording an opportunity to the prosecution to produce the said witness and the I.O. of the case on the next date for examination vide impugned order dated 12th August, 2003. Being dissatisfied with the impugned order dated 12th August, 2003, the accused-petitioner preferred/filed this revision petition. The accused-petitioner questioned the validity of the impugned order dated 12th August, 2003 with the following grounds as highlighted in the revision petition which is quoted below :– "a) For that the impugned order is bad in law as well as facts of the case. b) For that the impugned order is against the spirit and letter of Section 311 of the Code of Criminal Procedure, 1973. c) For that it is settled law that the object of the provisions of Section 311 as a whole is to do Justice not only from the point of view of the accused and the prosecution, but also from the point of view of the orderly society. d) For that it is settled law that under Section 311 Courts examine evidence neither to help the prosecution nor to help the accused and further it is done neither to fill up any gaps in the prosecution evidence nor to give any unfair advantage against the accused. e) For it is settled law that the discretionary power is to be exercised judicially for the ends of justice and not to fulfill the grievances of either prosecution or the accused. f) For that the impugned order does not indicate whether discretion is exercised or mandate of Section 311 is followed. g) For that the learned trial Judge failed to appreciate the facts of the case, which negate the exercise of discretionary power in the present case. h) For that there was no application of the I.O. of the case for examination of the so-called witness who happens to be from same village of the de facto complainant. i) For that the learned trial Judge ought to have considered the evidence of the de facto complainant given in the Court as P.W. 10 before allowing the belated application of the learned Public Prosecutor based on the application of the de facto complainant. j) For that learned trial Judge failed to appreciate that one of the grounds raised by the defence to

oppose the application was that there is every likelihood of procurement of got-up witness. k) For that the facts and circumstances of the case the evidence of the de facto complainant crystal clearly prove that the so-called witness is a got up witness and was not present at the alleged place of occurrence. l) For that the grounds of the objection given by the learned Defence Counsel ought to have been considered in the light of the facts and circumstances of the case. m) For that other grounds if necessary shall be raised with the prior permission of the Hon'ble Court." 3. Supporting the case of the accused-petitioner, Mr. K. T. Bhutia, learned Counsel contended that the prosecution filed the petition under Section 311 of the Cr. P.C. at a belated stage and apart from that the said witness Shri Pem Tshering Bhutia was not examined by the Police under Section 161 of the Cr. P.C. at the time of investigation of the case as the said witness is not a material witness. Mr. K. T. Bhutia, learned Counsel further argued that the prosecution sought for examination of the said witness, namely, Shri Pem Tshering Bhutia so as to enable the prosecution to fill up lacunae/gaps found in the prosecution evidence and that the said witness is a got-up witness who was not present at all at the relevant time and place of occurrence. The learned Counsel has also relied upon a decision of the Apex Court rendered in Mohanlal Shamji Soni v. Union of India, reported in AIR 1991 Sc 1346 : (1991 Cri LJ 1521). 4. At the hearing, Mr. N. B. Khatiwada, learned Public Prosecutor contended that there is no infirmity and illegality in the impugned order as the learned trial Court had rightly passed the same. According to Mr. Khatiwada, learned Public Prosecutor, Section 311 of the Cr. P.C. gives wide and ample power to the Court to call, summon or examine any material witness for just decision of the case as the Courts are meant to do justice and not for only disposing the case and to declare who win the case. It is also argued by the learned Public Prosecutor that the present revision petition is devoid of merit and accordingly, it should be quashed. Supporting the case of the prosecution, the learned Public Prosecutor also relied upon a decision of Rajasthan High Court rendered in Sama Ram v. State of Rajasthan, reported in 2002 Cri LJ 3134. 5. For better appreciation in the matter, the provision of Section 311 of the Cr. P.C. is relevant and accordingly, it is quoted below :– "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." According to me, the first part of Section 311 of the Cr. P.C. is discretionary which enables a Court at an stage to summon any person as a witness; or to examine any person in attendance or to recall and re-examine any witness already examined and, that the second part of this section is mandatory which further enables the Court to take any of the above steps if the new evidence of the witness appears to be essential to the just decision of the case. In other words, the object of this section is 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 decision of the case. 6. In the instant case, the prosecution filed the related application under Section 311 of the Cr. P. C. after giving due weightage and reliance on an application filed by the victim Shri Parsuram Sharma before the learned trial Court. It may be mentioned that in the said application, the said Shri Parsuram Sharma specifically stated that on his enquiry it has been learnt that the said witness was also present at Jorethang when he was struck/assaulted and he (witness) knows all about the occurrence/incident. 7. I have perused all the available materials on record including the petition under Section 311 of the Cr. P.C. filed by the prosecution as well as the application filed by the victim before the Court below. According to me, if the Court finds that the new evidence is essential to just and proper decision of the case, it is obligatory to admit it at any stage of the proceedings; in other words, even after the close of the prosecution and defence and the Court is to afford the opportunity to the prosecution or the defence to produce evidence which is necessary for a just decision of the case. In my considered view, the learned Court below had examined the matter pros and cons and was of the view that the said application was filed by the prosecution for just decision of the case and as such, no prejudice shall be caused to the accused-petitioner as the accused-petitioner shall get opportunity to cross-examine the said witness for his defence. So far, the case laws cited by Mr. K. T. Bhutia, learned Counsel, namely, Mohanlal Shamji Soni v. Union of India (1991 Cri LJ 1521) (supra) do not support the case of the defence at this stage. Instead, it supports the case of the prosecution inasmuch as in that case, Mohanlal Shamji Soni v. Union of India (supra), the Apex Court affirmed the related judgment and orders of the Gujarat High Court, whereby the High Court set aside the related judgment and orders of the Sessions Judge confirming the orders of the learned Judicial Magistrate, First Class who rejected the application under Section 540 of the Cr. P.C. (old) (now Section 311 of the new Code). In that case, the Apex Court held thus– "10. ..... It is a well accepted and settled principle that a Court must discharge its statutory functions – whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated." 8. In my considered view, the prosecution did its best by filing the said petition under Section 311 of the Cr. P.C. in order to prove the fact of the case, in other words, to establish its case by producing the said witness and that for a just decision of the case, the said application under Section 311 of the

Cr. P.C. was allowed by the learned trial Court. However, it is made clear that the defence shall be given the opportunity to cross-examine the said witness. 9. For the reasons, discussions and observations made above, I am of the view that the accused-petitioner could not make out a case to justify interference with the impugned order dated 12th August, 2003 passed by the learned Sessions Judge (S & W), Namchi in Criminal Case No. 7 of 2003. 10. In the result, this revision petition is devoid of merit and accordingly, it is dismissed thus affirming the impugned order passed by the learned Court below in Criminal Case No. 7 of 2003. The Registry is directed to transmit the related case records to the learned Court below immediately. Earlier ad interim order dated 23rd September, 2003 passed in the present case stands vacated. No order as to costs.