Sister Mina Lalitha Baruwa vs State Of Orissa & Ors on 5 December, 2013

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Author: Fakkir Mohamed Ibrahim Kalifulla

Bench: Fakkir Mohamed Ibrahim Kalifulla

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2044 OF 2013
(@ SLP (CRL.) No.1103 of 2012)

Sister Mina Lalita Baruwa …. Appellant

VERSUS

State of Orissa and others …. Respondent

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

1. Leave granted.

2. This appeal is directed against the order of the High Court of Cuttack in Criminal Miscellaneous Case No.1746 of 2011 dated 05.01.2012. The informant is the appellant before us. The informant is stated to be a Catholic Nun and according to her she was brutally assaulted, molested and also gang raped by the assailants who have been arrayed as accused in the session's case which is being tried by the District & Sessions Judge in S.T. No.243 of 2010.

3. Briefly noting the contents in the charge-sheet, we find that one Swamy Laxmananda Saraswati was killed in Kandhamal District, which led to a communal violence in the entire district. The appellant and another Jesuit father by name Thomas Chellan and some others who were residents of Jesuit Home called 'Divyajyoti Pastoral Centre', Kanjamendi of district Kandhamal, fearing attack by the unruly mob took shelter in the house of one Prahallad Pradhan of village Kanjamendi on 24.08.2008.

4. On 25.08.2008, according to the appellant, around 1 p.m. a mob of about 40 to 50 persons came to the residence of the said Prahallad Pradhan, dragged her and other priests to the road while some of the members of the mob molested her and also brutally assaulted her. The appellant was stated to have been dragged to a nearby building called 'Jana Vikash' where the 8th accused, respondent No.9 herein, alleged to have raped her while the other accused aided for the commission of the said offence apart from molesting her.

5. The appellant was stated to have been subsequently handed over to the Block Development Officer of K. Nuagaon who in turn produced the appellant and the Jesuit father Chellan to the Inspector In-charge of Baliguda Police Station for necessary action. Thereafter, the appellant filed her complaint on 26.08.2008, whereafter she was medically examined at Baliguda Sub-Divisional Hospital and that her wearing apparels were sealed and sent to State FSL, Bhubneswar along with the exhibits collected by the medical officer. Those materials were stated to have been subsequently sent to CFSL Kolkata for DNA Profiling Test.

6. Appellant in her complaint stated that she would be in a position to identify the assailants though she was not knowing their names.

7. The issue with which we are now concerned relates to an alleged incorrect version stated by PW-18 before whom the Test Identification Parade was held on 05.01.2009. PW-18 was the Sub-Divisional Judicial Magistrate, Cuttack on that date. In the course of examination of PW- 18, the prescribed format of Schedule XLVII of Cr.P.C. along with the proceedings recorded by him were marked as Exhibit-8. The signatures of the witnesses were marked as Exhibits-8/1 to 8/5. The description of test identification parade, conducted by him, was marked as Exhibit- 8/6.

8. It was pointed out by Mr. Colin Gonsalves, learned senior counsel appearing for the appellant, that in Exhibit-8 either in the note or in the various columns of the format or in the proceedings recorded by PW-18 on 05.01.2009, there was no reference to any statement made by the appellant as regards the behaviour of respondent No.9 except mere identification of the suspects, namely, respondents No.3 and 9 and wrong identification of an under trial prisoner by name Santosh Kumar Swain. The learned senior counsel then brought to our notice a specific statement made by PW-18 in the course of the chief- examination which reads as under:

> "Sister Mina Baruwa identified accused Santosh Patnaik as the said suspect gave her a slap, pulled her wearing Saree, squeezed her breasts and did not commit any other overt act."

9. The grievance of the appellant is that while such an incorrect version was spoken to by PW-18 as an authorized officer who conducted the test identification parade, there was not even a suggestion put to PW-18 by the prosecution and thereby the said statement remained uncontroverted in so far as it related to the evidence of PW-18 vis-à-vis respondent No.9. The learned senior counsel submitted that since such a statement contained in the chief-examination of PW-18 was to the effect as though the appellant told him that apart from the alleged overt act of slapping, pulling of the saree worn by her and squeezing of the breasts nothing more was committed, it was imperative for the prosecution to have confronted PW-18 with particular reference to Exhbit-8 in order to make the recording of the evidence without any ambiguity or else it would seriously prejudice the case of the prosecution and the whole grievance of the appellant in having preferred the complaint as against the accused would be frustrated. The learned senior counsel further pointed out that when the appellant was cross-examined, she specifically refuted the above version of PW- 18 as under in paragraph 26:

> "....It is not a fact that I stated before the S.D.J.M. Cuttack while identifying accused Santosh Kumar Patnaik that the said accused had given me a slap, pulled my saree and squeezed my breast and he did not commit any other offence. It is a fact that I did not state before the Magistrate when I identified accused Santosh @ Mitu Patnaik that the said accused sat on my thighs and raped me on the date of occurrence at Jana Vikash Kendra....."

> 10. It was in the above stated background, according to the appellant, she approached the Special Public Prosecutor to set right the said deliberate misstatement of PW-18 in the evidence and confront PW-18 as to whatever stated by him was not reflected in the test identification parade report or the Annexure marked alongwith Exhibit-8. According to the appellant, the Special Public Prosecutor having not bothered to take any steps, an application was moved by the appellant herself before the learned trial Judge on 01.05.2011. In the proceedings of the learned Sessions Judge dated 16.05.2011 while making reference to the petition filed by the appellant for recalling PW-18, the learned trial Judge by stating that such a petition at the instance of the victim not having been filed by the Special Public Prosecutor, the same was rejected after hearing the appellant solely on the ground of maintainability.

> 11. Aggrieved by the said order, the appellant moved the High Court of Cuttack by way of Criminal M.C. No.1746 of 2011 in which the order impugned in this appeal came to be passed. The High Court while making reference to Section 301 of Cr.P.C., took the view that the appellant as an informant had a very limited role to play so far as the trial is concerned, that she could not have filed the petition to recall certain witnesses and that such a step was beyond the authority granted to an informant or a private person under Section 301 Cr.P.C.

The High Court proceeded further and stated that reposing confidence in the trial Court that the learned trial Judge would eschew any fact not found on record or irrelevant and just decision would be rendered and further observed that it would however be open for the appellant to file a written

submission in which event the trial Court should accept such written submission and consider the same while passing the judgment.

12. Mr. Colin Gonsalves, learned senior counsel while assailing the orders impugned in this appeal submitted that in a case of this nature where the victim suffered a diabolical crime at the hands of the respondent- accused and the Judicial Magistrate who was expected to depose before the Court in exactitude of what actually transpired in the course of the conduct of test identification parade, made a deliberate misstatement in contravention to what was found in Exhibit-8 which was a record prepared by him, it was incumbent upon the prosecution and also the Court to have ensured that no part of the evidence was allowed to be placed that would mislead the Court or which totally conflicts with the document, the author of which is the witness himself. The learned senior counsel submitted that in the light of the various decisions of this Court on interpretation of Section 301 read along with Section 311 of Cr.P.C and also on the locus of the appellant as a victim to seek for appropriate steps to be taken to rectify such grave error in the recording of evidence, submitted that the learned trial Judge, as well as the High Court, committed a serious error of law.

13. The learned senior counsel submitted that once the appellant brought to the notice of the learned Special Public Prosecutor and the learned trial Judge such an error apparent on the face of the record, having regard to the enormous powers vested with the learned trial Judge under Section 311 Cr.P.C., appropriate steps should have been taken to correct the errors by directing the Special Public Prosecutor to confront PW-18 on the particular statement by recalling him. The learned senior counsel, therefore, contended that the failure of the trial Judge, as well as, the High Court in doing so while passing the orders impugned in this appeal, persuaded the appellant to knock at the doors of this Court. Reliance was placed upon the decisions in Mohanlal Shamji Soni vs. Union of India and another - (1991) Supl.1 SCC 271, Rajendra Prasad vs. Narcotic Cell - (1999) 6 SCC 110, Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) - (2010) 6 SCC 1, K. Pandurangan vs. S.S.R. Velusamy and another - (2003) 8 SCC 625, J.K. International vs. State (Govt. of NCT of Delhi) and others - (2001) 3 SCC 462 and Suga Ram alias Chhuga Ram vs. State of Rajasthan and others - (2006) 8 SCC 641.

14. The learned standing counsel appearing for the first respondent-State would only contend that the appellant never ever approached the Special Public Prosecutor in order to work out the remedies under Section 301 Cr.P.C. and, therefore, the order of the learned trial Judge, as well as the High Court, cannot be found fault with. The learned standing counsel only contended that PW-18 was examined on 30.07.2010 while the present application at the instance of the appellant was filed belatedly on 11.05.2011, nearly after 10 months and therefore, on the ground of delay as well the grievance of the appellant could not be redressed.

15. On behalf of 9th respondent, Mr. Rana Mukherjee, learned counsel by relying upon Shiv Kumar vs. Hukam Chand and another - (1999) 7 SCC 467, contended that the appellant had no locus to seek the remedy as prayed for before the trial Judge and the High Court.

16. Having heard the learned senior counsel for the appellant as well as the Public Prosecutor, the State counsel and counsel for the 9th respondent and having perused Exhibit-8, the evidence of

PW-18 and PW- 25, who was the victim, the order of the learned trial Judge, as well as that of the High Court, we are of the considered view that both the learned trial Judge, as well as the High Court, miserably failed to come alive to the situation while dealing with a case of this nature where a charge under Section 376(2)(g) has been alleged against the accused in which PW-18 a Judicial Officer as a statutory authority who held the identification parade made a totally blatant and wrong statement not in consonance with the record of identification parade, namely, Exhibit-8 and thereby provided scope for serious illegality being committed for dispensing justice. At the very outset, however, we must state that whatever views which we express in the judgment are mainly pertaining to the nature of documentary evidence as recorded prior to the examination of PW-18 and PW-25, as well as, the oral evidence in the course of their examination before the trial Court.

17. Having perused the said evidence with particular reference to the issue brought to the notice of this Court, we are of the firm view that the inability of the trial Court in failing to take appropriate action as and when it was brought to its notice about the fallacy in the oral version, would certainly cause a serious miscarriage of justice, if allowed to remain. Unfortunately, in our considered view, the High Court appears to have adopted a very casual approach instead of attempting to find out as to the appropriate procedure which the trial Court should have followed in a situation like this. The High Court also committed a serious illegality in merely stating that under Section 301 Cr.P.C. there is no scope for a victim as a private party to take any effective step to rectify a serious fallacy committed by a statutory witness who is supposed to maintain cent per cent neutrality while giving evidence before the Criminal Court. Where the said witness is a Judicial Officer whose version before the Court carries much weight, by virtue of his status as a Judicial Officer while acting as a statutory witness, namely, as an officer who was authorized to hold a test identification parade, it was incumbent upon such witness to maintain utmost truthfulness without giving any scope for any party to gain any advantage by making a blatantly wrong statement contrary to records. We, therefore, find serious irregularity in the orders impugned in this appeal.

18. We are convinced that the grievances as projected by the appellant as a victim, who was a victim of an offence of such a grotesque nature, in our considered view, the trial Court as well as the High Court instead of rejecting the application of the appellant by simply making a reference to Section 301 Cr.P.C. in a blind folded manner, ought to have examined as to how the oral evidence of PW-18 which did not tally with Exhibit-8, the author of whom was PW-18 himself, to be appropriately set right by either calling upon the Special Public Prosecutor himself to take necessary steps or for that matter there was nothing lacking in the Court to have remedied the situation by recalling the said witness and by putting appropriate Court question. It is well settled that any crime is against the society and, therefore, if any witness and in the case on hand a statutory witness happened to make a blatantly wrong statement not born out from the records of his own, we fail to understand why at all the trial Court, as well as the High Court, should have hesitated or adopted a casual approach instead of taking appropriate measures to keep the record straight and clear any ambiguity in so far as the evidence part was concerned and also ensure that no prejudice was caused to any one. In our considered view, the Courts below should have made an attempt to reconcile Sections 301 and 311 Cr.P.C. in such peculiar situations and ensured that the trial proceeded in the right direction.

19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution failed to note the situation at that moment or later when it was brought to light and whereafter also the prosecution remained silent, the Court should have acted promptly and taken necessary steps to rectify the situation appropriately. The whole scheme of the Code of Criminal Procedure envisages foolproof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and innocent is not punished. It is with the above background, we feel that the present issue involved in the case on hand should be dealt with.

20. Keeping the said perspective in mind, we refer to Sections 301 and 311 of Cr.P.C.

“301. Appearance by public prosecutors.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

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.”

21. Having referred to the above statutory provisions, we could discern that while under Section 301(2) the right of a private person to participate in the criminal proceedings has got its own limitations, in the conduct of the proceedings, the ingredients of Section 311 empowers the trial Court in order to arrive at a just decision to resort to an appropriate measure befitting the situation in the matter of examination of witnesses. Therefore, a reading Sections 301 and 311 together keeping in mind a situation like the one on hand, it will have to be stated that the trial Court should have examined whether invocation of Section 311 was required to arrive at a just decision. In other

words even if in the consideration of the trial Court invocation of Section 301(2) was not permissible, the anomalous evidence deposed by PW-18 having been brought to its knowledge should have examined the scope for invoking Section 311 and set right the position. Unfortunately, as stated earlier, the trial Court was in a great hurry in rejecting the appellant's application without actually relying on the wide powers conferred on it under Section 311 Cr.P.C for recalling PW-18 and ensuring in what other manner, the grievance expressed by the victim of a serious crime could be remedied. In this context, a reference to some of the decisions relied upon by the counsel for the appellant can be usefully made.

22. In the decision reported in J.K. International (supra), this Court considered the extent to which a complainant can seek for the redressal of his grievances in the on going criminal proceedings which was initiated at the behest of the complainant. Some of the passages in paragraphs 8, 9, 10 and 12 can be usefully referred to which are as under:

> 8.....What is the advantage of the court in telling him that he would not be heard at all even at the risk of the criminal proceedings initiated by him being quashed. It is no solace to him to be told that if the criminal proceedings are quashed he may have the right to challenge it before the higher forums.
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> 9. The scheme envisaged in the Code of Criminal Procedure (for short "the Code") indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge-sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance.....
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> 10. The said provision falls within the Chapter titled "General Provisions as to Inquiries and Trials". When such a role is permitted to be played by a private person, though it is a limited role, even in the Sessions Courts, that is enough to show that the private person, if he is aggrieved, is not wiped off from the proceedings in the criminal court merely because the case was charge-sheeted by the police. It has to be stated further, that the court is given power to permit even such private person to submit his written arguments in the court including the Sessions Court. If he submits any such written arguments the court has a duty to consider such arguments before taking a decision.
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> 12.....The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them." (Emphasis Added)

23. In the famous Best Bakery case in Zahira Habibullah H. Sheikh and another vs. State of Gujarat and others - (2004) 4 SCC 158, this Court has reminded the conscientious role to be played by the criminal Courts in order to ensure that the Court is alive to the realities, realizing its width of power available under Section 311 of the Cr.P.C read along with Section 165 of the Evidence Act. The relevant part of the said decision can be culled out from paragraphs 43, 44, 46 and 56, which are as under:

> "43. 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 the 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.
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> 44. 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 Mohanlal v. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words 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.....
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> 46. .....Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts

> or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.
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> 56. As pithily stated in Jennison v. Baker: (All ER p. 1006d) "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope." Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble.)" (Emphasis added)

24. The said decision was also subsequently followed in a recent decision of this Court in Sidhartha Vashisht alias Manu Sharma (supra), wherein one sentence in paragraph 188 is relevant for our purpose, which reads as under:

> "188. It is also important to note the active role which is to be played by a court in a criminal trial. The court must ensure that the Prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in Zahira Habibulla H. Sheikh v. State of Gujarat, has noted the daunting task of a court in a criminal trial while noting the most pertinent provisions of the law.....
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> (Emphasis added)

25. In one of the earlier decisions of this Court in Mohanlal Shamji Soni (supra), wherein Section 540 of Cr.P.C of 1898 which corresponds with Section 311 Cr.P.C of 1973, this Court has pithily stated the purport and intent of the said section, which is to be worked out at times of need by the Criminal Courts in order to ensure that justice always triumphs. Paragraph 16 of the said decision is relevant for our purpose which reads as under:

> "16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice. In this connection we would like to quote with approval the following views of Lumpkin, J. in Epps v. S., which reads thus:

> "... it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly .... Counsel seek only for their client's success; but the judge must watch that justice triumphs." (Emphasis added)

26. In the decision in Rajendra Prasad (supra), this Court pointed out the distinction between lacuna in the prosecution and a mistake or error inadvertently committed which can always be allowed to be set right by permitting parties concerned by the Criminal Courts in exercise of its powers conferred under Section 311 Cr.P.C or under Section 165 of the Evidence Act. In paragraph 7, this Court has clarified as to what is a lacuna which is distinct and different from an error committed by a public prosecutor in the course of trial. The relevant part of the said paragraph reads as under:

> ".....A lacuna in the 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....."

27. Again in paragraph 8, this Court has pointed out as to the duty of the Criminal Court to allow the prosecution to correct such errors in the interest of justice. Paragraph 8 of the said judgment reads as under:

> "8. Lacuna in the 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 oversight 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 inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better." (Emphasis added)

28. On behalf of the 9th respondent, Mr. Rana Mukherjee, learned counsel placed reliance upon the decision in Shiv Kumar (supra). By relying upon the said decision the learned counsel contended that the complainant cannot be permitted to conduct the prosecution by simply relying upon Section 301 of Cr.P.C. When we consider the said submission of the learned counsel with reference to the decision relied upon by him, we find that the said decision can have no application to the case on hand. That was a case where the complainant engaged his counsel and wanted to conduct the chief examination when he was to be examined as a witness for the prosecution. The said prayer of the complainant was objected to on behalf of the accused on the premise that a private counsel cannot conduct prosecution in a session's trial. Though the trial Court allowed an application to be filed on behalf of the complainant, which was also endorsed by the public prosecutor, the revision filed by the accused was allowed and the order of the trial Court was set aside. While dealing with the said situation, this Court observed as under in paragraph 14:

> "14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

29. As stated by us earlier the facts involved in the said case are drastically different from what is prevailing in the case on hand. From what has been stated in paragraph 14 of the said decision, when the complainant wanted to conduct the case of the prosecution itself, though with the permission of the public prosecutor, the Court has found that such a course, though was permissible to some extent before the Magistrate under Section 302 of Cr.P.C, the same cannot be permitted to the extent allowed to by the Court of Sessions by invoking Section 301 of Cr.P.C. We, therefore, do not find any scope to apply the said decision to the facts of this case.

30. Learned counsel for the State relied upon the decision in Umar Mohammad and others vs. State of Rajasthan - (2007) 14 SCC 711, in particular paragraph 38 of the said decision, and contended that even by invoking Section 311 of Cr.P.C. the Court cannot come to the aid of the appellant. On a reading of paragraph 38, we do not find any scope at all to apply the ratio laid down in the said decision to the case on hand. That was a case where PW-1 who was examined in Court in July 1994 later on filed an application in May 1995 stating that five accused persons named in the case were innocent and, therefore, they should be discharged by relying upon Section 311 of Cr.P.C. The said application was rejected by the trial Court, as well as by the High Court in revision. Finding that 311 of Cr.P.C has no application to the fact of the said case, this Court held that PW-1 having been won over by virtue of the fact that the application came to be filed after nine months of his chief examination, there was absolutely no bona fides and the rejection of the application was therefore well in order.

31. Having noted the various decisions relied upon by the learned counsel for the appellant referred to above on the interpretation of Sections 301 and 311 of Cr.P.C, as well as Section 165 of the Evidence Act, it will have to be held that the various propositions laid down in the said decisions support our conclusion that a Criminal Court, while trying an offence, acts in the interest of the society and in public interest. As has been held by this Court in Zahira Habibullah H. Sheikh (supra), a Criminal Court cannot remain a silent spectator. It has got a participatory role to play and having been invested with enormous powers under Section 311 of Cr.P.C, as well as Section 165 of the Evidence Act, a trial Court in a situation like the present one where it was brought to the notice of the Court that a flagrant contradiction in the evidence of PW-18 who was a statutory authority and in whose presence the test identification parade was held, who is also a Judicial Magistrate, ought to have risen to the occasion in public interest and remedied the situation by invoking Section 311 of Cr.P.C, by recalling the said witness with the further direction to the public prosecutor for putting across the appropriate question or court question to the said witness and thereby set right

the glaring error accordingly. It is unfortunate to state that the trial Court miserably failed to come alive to the realities as to the nature of evidence that was being recorded and miserably failed in its duty to note the serious flaw and error in the recording of evidence of PW-18. In this context, it must be stated that the prosecutor also unfortunately failed in his duty in not noting the deficiency in the evidence. The observation of the High Court while disposing of the revision by making a casual statement that the appellant can always file the written argument equally in our considered opinion, was not the proper approach to a situation like the present one. What this court wishes to ultimately convey to the courts below is that while dealing with a litigation, in particular while conducting a criminal proceeding, maintain a belligerent approach instead of a wooden one.

32. Having noted the above-mentioned decisions laid before us by the learned counsel for the parties on the scope of Section 311 Cr.P.C., we wish to refer a recent decision rendered by this Court in Rajaram Prasad Yadav vs. State of Bihar and another – AIR 2013 SC 3081, wherein in paragraph 14 the law has been stated as under:

> 14. A conspicuous reading of Section 311, Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case..... Therefore, a reading of Section 311, Cr.P.C.

and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311, Cr.P.C. It is, therefore, imperative that the invocation of Section 311, Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

33. Having regard to our above conclusions we find that the order of the trial Court, as well as that of the High Court cannot be sustained and while setting aside the same, we direct the trial Court to recall PW- 18 and call upon the prosecutor to cross-examine the said witness on the aspect relating to the statement, namely, "Sister Mina Baruwa identified accused Santosh Patnaik as the said suspect gave her a slap, pulled her wearing Saree, squeezed her breasts and did not commit any other overt act" vis-à-vis the contents of the statement recorded by PW-18 in Exhibit-8 at the time of test identification parade when the appellant as PW-25 identified the respondent No.9 as has been prayed for on behalf of the appellant and also provide an opportunity to the appellant to file the written arguments on her behalf as provided under Section 301 of Cr.P.C. Since the trial was withheld by virtue of the pendency of this appeal till this date, the trial Court is directed to comply with the directions as above and conclude the proceedings in accordance with law expeditiously, preferably within three months from the date of production of the copy of this order. The appeal stands allowed on the above terms.

.....J. [Surinder Singh Nijjar] .....J. [Fakkir Mohamed Ibrahim Kalifulla] New Delhi;

December 05, 2013.