U.T. Of Dadra & Haveli & Anr vs Fatehsinh Mohansinh Chauhan on 14 August, 2006

Equivalent citations: 2006 AIR SCW 4840, 2006 (7) SCC 529, 2006 (6) AIR BOM R 194, 2006 (6) AIR KANT HCR 428, (2006) 35 OCR 269, (2006) 3 RAJ CRI C 554, (2006) 4 RECCRIR 113, (2006) 3 CURCRIR 267, (2006) 6 SUPREME 447, (2007) 1 JLJR 10, (2006) 3 CRIMES 284, (2007) 1 ALLCRILR 122, 2006 CRILR(SC&MP) 719, (2006) 8 SCALE 36, 2006 ALLMR(CRI) 3545, (2006) 45 ALLINDCAS 29 (SC), (2007) 1 PAT LJR 10, (2006) 3 ALLCRIR 2663, (2006) 2 MAD LJ(CRI) 893, 2006 BOM LR 3 2515, (2006) 2 ALD(CRL) 574, (2006) 2 BOMCR(CRI) 613, 2006 CALCRILR 2 504, (2007) 1 MADLW(CRI) 7, (2006) 4 EASTCRIC 116, (2006) 3 CHANDCRIC 205, 2006 CRILR(SC MAH GUJ) 719, MANU/SC/3471/2006, (2007) 1 ANDHLT(CRI) 174, 2006 (3) SCC (CRI) 300, 2006 (6) AIR KAR R 428

Author: G. P. Mathur

Bench: G.P. Mathur, A.K. Mathur

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           CASE NO.:
Appeal (crl.)  834 of 2006

PETITIONER:
U.T. of Dadra & Haveli & Anr

RESPONDENT:
Fatehsinh Mohansinh Chauhan

DATE OF JUDGMENT: 14/08/2006

BENCH:
G.P. Mathur & A.K. Mathur

JUDGMENT:
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J U D G M E N T (Arising out of S.L.P.(Crl.) No.5459 of 2004) G. P. MATHUR, J.

1. Leave granted.

2. This appeal, by special leave, has been preferred against the judgment and order dated 8.10.2004 of Bombay High Court by which the revision preferred by the respondent was allowed and the order dated 12.8.2004 passed by the learned Sessions Judge, Dadra & Nagar Haveli, Silvassa, summoning Shri S.P. Marwah, the then Collector, Dadra & Nagar Haveli, Silvassa under Section 311 Cr. P.C. was

set aside.

3. One Damabhai Lasyabhai Choudhary lodged an FIR at 8.30 p.m. on 29.4.1996 at P.S. Khanvel alleging that on the instigation of accused A-7, A-8 and A-9 accused A-1 to A-6 had assaulted the deceased Bapjibhai Bhoya and caused injuries to some others. The respondent herein Fatehsinh Mohansinh Chauhan is A-7 and he was assigned the role of instigation 'Maro Maro, Pakdo Pakdo'. After usual investigation charge sheet was submitted against all the nine accused and the case was committed to the Court of Sessions. In his statement under Section 313 Cr.P.C. which was recorded after close of the prosecution evidence, the respondent took a plea of alibi and submitted that he is a prominent member of a political party and at the time of the incident, he was present in the chamber of Shri S.P. Marwah, Collector, Dadra & Nagar Haveli, Silvassa, as a meeting had been called there. The respondent examined two witnesses, viz., DW.1 O.P. Misra, Deputy Collector and DW.2 R.N. Parmar, Executive and Sector Magistrate, Dadra, in support of his plea of alibi that he was present in the chamber of Shri S.P. Marwah. The Special Public Prosecutor, thereafter, moved an application, purporting to be one under Section 311 Cr.P.C., praying that Shri S.P. Marwah, the then Collector of Dadra & Nagar Haveli, Silvassa and currently posted as Director, Jal Nigam Board, New Delhi, may be summoned and examined as a witness. The application was opposed by respondent no.7 by filing a written reply on the ground, inter alia, that he had raised a plea of alibi at the very beginning, which was very well known to the investigating agency, but no investigation in that direction had been made and the defence taken by him in his statement under Section 313 Cr.P.C. was not a sudden or unexpected one. It was also submitted that the prosecution was not entitled to fill in a lacuna by moving an application under Section 311 Cr.P.C for the purpose of summoning a witness. The learned Sessions Judge, after referring to the authorities cited by the counsel for the parties, allowed the application moved by the Special Public Prosecutor by the order dated 12.8.2004 and the relevant part of the order which has a bearing on controversy in dispute is being reproduced below :-

> "The gist of all these authorities is that the best available evidence should be brought before the Court to prove point in issue. However, it is left either to the prosecution or to the defence to establish its respective case by adducing the best available evidence. Under Section 311 of the Code of Criminal Procedure it is the duty of the 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, provisions of Section 311 of the Code can be invoked by exercising judicial discretion at any stage of enquiry, trial or other proceeding.
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> This Court is conscious of the fact that matter is very old and is lingering on some or the other ground since long. But this alone will not be sufficient to reject an opportunity to the prosecution particularly when the defence has kept behind the best available evidence of the then Collector who had convened the meeting according to accused No.7 in which he was present. Moreover, it will not cause any prejudice to accused no.7 as alibi is his own defence. He will have an opportunity to cross-examine the witness. Thus in order to find out the truth, evidence of the then Collector is necessary.

In the interest of just and fair decision application is to be allowed."

4. Feeling aggrieved, the respondent filed an application under Section 397/401/482 Cr.P.C. and Article 227 of the Constitution of India before the Bombay High Court for setting aside the order dated 12.8.2004 passed by the learned Sessions Judge. The High Court held that the respondent had taken a plea of alibi as far back as in the year 1996 when he had moved an application for anticipatory bail and also when he opposed the application moved by the prosecution for giving him on police remand. In the order dated 6.5.1996 passed by the learned Sessions Judge granting bail to the respondent, it was observed that the investigating agency had not considered it appropriate to place the relevant material or to rebut the plea of alibi taken by the respondent. The High Court accordingly held that the grant of the application moved by the Public Prosecutor for summoning the Collector, Dadra & Nagar Haveli, Silvassa, under Section 311 Cr.P.C. would inevitably result in permitting the prosecution to fill in the lacuna in the prosecution case. It has been further observed that the respondent had already examined two witnesses and if the trial Court was of the opinion that the said evidence was insufficient, a logical conclusion could be drawn for accepting or not accepting the defence version and merely because the defence has chosen not to examine one more witness, who should also have been examined by the defence, that by itself may not be sufficient reason for invoking the powers under Section 311 Cr.P.C. The application filed by the respondent was accordingly allowed by the order under challenge and the order dated 12.8.2004 of the learned Sessions Judge was set aside.

5. Shri Ranjit Kumar, learned senior counsel for the appellant has submitted that Section 311 Cr.P.C. confers a very wide power on the Court to summon any person as a witness or to recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding and further the Section casts a duty upon the Court to summon and examine or recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case. Learned counsel has further submitted that the specific defence of the respondent is that at the relevant time he was present in the chamber of Shri S.P. Marwah, the then Collector, Dadra & Nagar Haveli, Silvassa, where a meeting had been called and, therefore, Shri S.P. Marwah was the best person to give evidence regarding the said fact. The learned Sessions Judge had also recorded a finding that in order to find out the truth, the evidence of the then Collector Shri S.P. Marwah is necessary. In such circumstances, the order passed by the learned Sessions Judge was eminently just and proper and the High Court has erred in interfering with the said order and setting aside the same.

6. Shri Arun Jaitley, learned senior counsel for the respondent, has on the other hand submitted that the incident took place on 29.4.1996 and in the application for anticipatory bail moved shortly thereafter, a specific plea was raised by the respondent that at the alleged time of the incident, he was present in the meeting which had been convened by the Collector, Dadra & Nagar Haveli, Silvassa. The respondent was arrested on 2.5.1996 and he was remanded to police custody for three days and after expiry of the said period, an application was moved for extending the police custody, which was opposed by the respondent on the ground that he was not present at the scene of commission of crime and was actually present in the meeting in the chamber of the Collector, Dadra & Nagar Haveli. The learned Chief Judicial Magistrate rejected the prayer of the investigating agency for extending the police remand by passing a detailed order on 6.5.1996, wherein it was

observed that "the investigating officer should have thwarted out the alibi taken by the accused at this preliminary stage by recording the statements of concerning officers" and "it is the inaction or the casual approach of the police which has disentitled the police to further custody". Shri Jaitley has also submitted that in the order dated 7.5.1996 passed by the incharge Sessions Judge granting bail to the respondent, it was specifically observed that the investigating officer had not even bothered to record the statement of those high ranking officers to show that the contention of the accused was palpably false though the accused even prior to his arrest or at the time of filing the application for anticipatory bail had made a clear assertion about his being present with those officers at the time of the incident and the police had not bothered to verify this vital fact by recording the statement of the concerned officers. Learned counsel has also submitted that the entire cross-examination of the prosecution witnesses had been directed on said line and a categorical suggestion had been given to the witnesses that at the time of alleged incident the respondent was present in the meeting which had been called by the Collector. It has thus been submitted that the prosecuting agency having slept over the matter for such a long time it was not entitled to move an application under Section 311 Cr.P.C. at such a belated stage i.e. on 19.7.2004 to summon the Collector of the Dadra & Nagar Haveli, Silvassa as a witness. Learned counsel has also submitted that the course adopted by the prosecution clearly amounts to filling in the lacuna in the prosecution evidence and the High Court was, therefore, perfectly justified in setting aside the order passed by the learned Sessions Judge.

7. We have given our anxious consideration to the submissions made by the learned counsel for the parties. The order passed by the learned Sessions Judge shows that while moving the application for summoning the Collector of Dadra & Nagar Haveli, Silvassa under Section 311 Cr.P.C. it was submitted on behalf of the prosecution that as the meeting had been called in his chamber, he was the best person to depose about the presence of the respondent, but the respondent had not chosen to examine him as a witness in his defence and, therefore, to find out the truth, the evidence of Collector was necessary. This prayer was opposed on behalf of the respondent principally on the ground that right from the beginning the plea of the respondent was that at the time of the incident he was present in the chamber of the Collector where a meeting had been called but the investigating agency did not make any investigation in that regard, nor made any attempt to collect the relevant evidence and at such a belated stage when the entire evidence had been recorded and the trial was almost over, the prosecution could not be permitted to fill in the lacuna. The learned Sessions Judge was of the opinion that the accused had kept behind the best available evidence of the Collector who had convened the meeting where he claimed to be present and, therefore, in the interest of justice and fair decision, the application deserved to be allowed.

8. What requires consideration, therefore, is whether the order passed by the learned Sessions Judge comes within the parameters of Section 311 Cr.P.C., which confers power on the Court to summon a material witness or examine a person present in Court. Section 311 of Code of Criminal Procedure, 1973 is a verbatim reproduction of Section 540 of Code of Criminal Procedure, 1898 (for short 'old Code'). Section 311 Cr.P.C. 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."

The scope and content of Section 540 of the old Code was considered in several decisions rendered by the High Courts. A Division Bench of Allahabad High Court in Ram Jeet & Ors. v. The State AIR 1958 All 439 examined the provisions of the section in considerable detail. In this case after the entire evidence had been recorded and the arguments had been heard and a date for pronouncement of judgment had been fixed, the learned Sessions Judge felt that for the just decision of the case the evidence of certain persons who had not been examined hitherto was essential. Therefore, on the date originally fixed for delivery of judgment, he passed an order for summoning and examining some persons as witness under Section 540 of the old Code. The order passed by the learned Sessions Judge was challenged in revision before the High Court and one of the grounds raised was that the examination of fresh evidence was tantamount to making good lacunae in the prosecution case and was, therefore, not justified under Section 540 of the old Code. It was held that the Section is manifestly in two parts; the first part gives purely discretionary authority to the criminal Court; on the other hand, the second part is mandatory. 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 for 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. Dealing with the argument that examination of fresh evidence amounted to filling in lacuna in the prosecution case, in para 4 of the reports, it was held :-

> "The misconception instinct in the applicant's argument is made evident by this analysis of the terms of Section 540 and springs from a disregard of the second part of the section. This part, as should be plain, casts on the Court the duty of calling fresh evidence whenever such evidence "appears to it essential to the just decision of the case". That is to say, the paramount consideration should be the doing of justice in the case, and whenever the Court finds that any evidence which is essential for this has not been examined, the law enjoins it to call and examine it. If this results in what is sometimes thought to be the "filling of loopholes", that is a purely subsidiary factor and cannot be taken into account."

The Bench also took note of illustration (g) of Section 114 of the Evidence Act which says that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. It was observed that in the trial of criminal cases the Court should not rely on mere presumptions when the second part of Section 540 obliges them to summon the witness in question, and at least criminal Courts unlike civil Courts (the analogous provision of Order XVI Rule 14 of the Code of Civil Procedure gives the civil Court merely discretionary authority) are not entitled to level the type of criticism just referred to.

9. In State of West Bengal v. Tulsidas Mundhra 1964 (1) Crl. L.J. 443, this Court considered the amplitude of Section 540 of the old Code. The question which arose for consideration in this case

was whether in proceedings under Section 207A of the old Code (commitment proceedings before a Magistrate in a case instituted on a police report and which was exclusively triable by the Court of Sessions) the provision of Section 540 would be applicable. It was held :-

> "Section 540 confers on criminal Courts very wide powers. It is no doubt for the court to consider whether the power under this section should be exercised or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person already examined is essential to the just decision of the case, it is its duty to take such evidence. The exercise of the power conferred by S. 540 is conditioned by the requirement that such exercise would be essential to the just decision of the case."

10. In Jamatraj Kewalji Govani v. State of Maharashtra AIR 1968 SC 178 after analysis of the provision of Section it was held as under

> in para 10 of the reports :
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> "Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways : (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to some thing in the interest of the accused only. The action may equally benefit the prosecution. ....."

11. In Mohanlal Shamji Soni v. Union of India & Anr. AIR 1991 SC 1346 it was observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. It was further held that 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. It was emphasized that power is circumscribed by the principle that underlines Section 311 Cr.P.C., namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Further, that the power must be used judicially and not capriciously or arbitrarily. It was further observed that evidence should not be received as a

disguise for a retrial or to change the nature of the case against either of the parties and the discretion of the Court must obviously be dictated by exigency of the situation and fair play and good sense appear to be the safe guides and that only the requirement of justice command the examination of any person which would depend on the facts and circumstances of each case. Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110 is a decision where the contention that the prosecution should not be permitted to fill in lacuna was examined having regard to the peculiar facts where the exercise of power under Section 311 Cr.P.C. second time was challenged and, therefore, it is necessary to notice the facts of the case in brief. The accused along with some other persons was facing trial for offences under Sections 21, 25 and 29 of the NDPS Act. The prosecution and the defence closed their evidence on 19.9.1997 and the case was posted for further steps and on 7.3.1998, after few more dates, at the instance of the prosecution two witnesses who had already been examined were reexamined for the purpose of proving certain documents for prosecution. After they had been examined and the evidence had been closed, the case was posted for hearing arguments, which was heard in piecemeal on different dates. Subsequently on 7.6.1998, the Public Prosecutor moved an application seeking permission to examine Dalip Singh, S.I. and two other persons. Though the application was strongly opposed by the counsel for the accused, the trial Court allowed the same in exercise of its power under Section 311 Cr.P.C. and summons were issued to the witnesses. The challenge raised to the order of the learned Sessions Judge by filing a revision was dismissed by the High Court. In appeal before this Court it was contended that in the garb of exercise of power under Section 311 Cr.P.C., a Court cannot allow the prosecution to reexamine prosecution witnesses in order to fill up lacana in the case specially having regard to the fact that Dalip Singh witness was never tendered by the prosecution for cross-examination and PW.4 Suresh Chand Sharma had also not been cross-examined by the State. Repelling the contention raised on behalf of the accused it was held :

> "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 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 prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

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."

Finally, it was held that the proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, cannot be accepted nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during arguments. Similar view has been taken in P. Chhaganlal Daga v. M. Sanjay Shaw (2003) 11 SCC 486 where permission granted by the Court to a complainant to produce additional material after evidence had been closed and case was posted for judgment was upheld repelling the contention that production of the document at that belated stage would amount to filling in a lacuna.

12. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in 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.

13. The charge-sheet submitted by the police under Section 173 Cr.P.C. after completion of investigation contains the statements of the witnesses as recorded under Section 161 Cr.P.C. and in a case exclusively triable by court of Sessions there is a duty enjoined on a magistrate to furnish to the accused, free of cost, a copy of the police report including a copy of the FIR, statement of the witnesses under Section 161 Cr.P.C. and other documents as mentioned in Section 207 Cr.P.C. It is on the basis of the charge-sheet that the magistrate takes cognizance of the offence under Section 190(1)(b) Cr.P.C. Normally, the investigating agency cannot visualize at that stage what will be the nature of defence which an accused will take in his statement under Section 313 Cr.P.C. as the said stage comes after the entire prosecution evidence has been recorded. The prosecution is only required to establish its case by leading oral and documentary evidence in support thereof. While leading evidence the prosecution may not be in a position to anticipate or foresee the nature of defence which may be taken by the accused and evidence which he may lead to substantiate the same. Therefore, it is neither expected to lead negative evidence nor it is possible for it to lead such evidence so as to demolish the plea which may possibly be taken by the accused in his defence. This being the normal situation, an application moved by the prosecution for summoning a witness under Section 311 Cr.P.C., after the defence evidence has been recorded, should not be branded as "an attempt by the prosecution to fill in a lacuna".

14. In the case in hand the respondent has raised a plea of alibi that at the time of the alleged incident he was present in the chamber of the Collector, Dadra & Nagar Haveli, Silvassa, who had called a meeting. In fact, the respondent has led evidence on the said point by examining DW.1 and DW.2. The evidence of the then Collector, Dadra and Nagar Haveli might as well support the defence taken by the respondent. In such circumstances if the learned Sessions Judge was of the opinion that in order to find out the truth, the evidence of the Collector was necessary, no exception can be taken to the course adopted by him. It was for the learned Sessions Judge to decide whether for just and fair decision of the case, the evidence of the Collector is necessary or not and he having

come to a conclusion that evidence of the Collector was necessary for just and fair decision of the case, the order passed by him could not have been set aside by the High Court on the ground that it would amount to filling in lacuna in the prosecution case. We are clearly of the opinion that in the facts and circumstances of the case, the examination of the then Collector, Dadra and Nagar Haveli cannot be termed as filling in lacuna in the prosecution case. The learned Sessions Judge rightly observed that the evidence of the Collector will not cause any prejudice to the respondent as he had himself pleaded alibi and had led evidence to substantiate the same. We are, therefore, of the opinion that the High Court clearly erred in setting aside the order passed by the learned Sessions Judge.

15. In the result, the appeal is allowed and the judgment and order dated 8.10.2004 passed by the High Court is set aside and the order dated 12.8.2004 of the learned Sessions Judge is restored. 27929