Rajaram Prasad Yadav vs State Of Bihar & Anr on 4 July, 2013

Equivalent citations: 2013 AIR SCW 4179, 2013 (14) SCC 461, 2013 CRI. L. J. 3777, AIR 2013 SC (CRIMINAL) 1746, (2013) 3 RECCRIR 726, (2013) 128 ALLINDCAS 29 (SC), (2013) 3 DLT(CRL) 710, (2014) 1 ALLCRILR 155, (2013) 3 CURCRIR 298, (2013) 3 UC 1631, 2013 (3) KLT SN 47 (SC), AIR 2013 SUPREME COURT 3081, (2013) 8 SCALE 316

Bench: Fakkir Mohamed Ibrahim Kalifulla, T.S. Thakur

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2013
(@ SLP (CRL.) No.2400 of 2011)

Rajaram Prasad Yadav ….Appellant

VERSUS

State of Bihar & Anr. ….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 Judicature at Patna, in Criminal Miscellaneous Petition No. 12454 of 2010, dated 9.12.2010.

3. By a short order dated 18.11.09, passed in Sessions Trial No. 425 of 2009, the trial Court disallowed the applications of the Respondents filed under Section 311 of the Code of Criminal Procedure (Cr.P.C.), to re- examine PW-9, the informant. The High Court directed the trial Court to allow the 2nd Respondent to examine himself as a witness on a specified date by its order dated 9.12.2010.

4. To narrate the brief facts, the 2nd Respondent (PW-9), herein filed a written complaint, alleging that on 07.07.1999, at about 5 p.m. in the evening, as regards the construction of a latrine in his land in front of his house, a dispute arose as between him and his brother Bindeshwar Yadav and that at

the instance of his brother Bindeshwar Yadav, his son Rajaram Yadav, brought a country made pistol and fired at the 2nd respondent (PW-9) on the left side of the back, whereafter he was taken to the hospital for treatment.

5. At the instance of the second respondent, based on a complaint dated 8.7.1999, a case in Crime No. 71 of 1999 was registered in Khizersarai Police Station for the offences punishable under Sections 324, 307 read with Section 34 Indian Penal Code, 1860 and also under Section 27 of the Arms Act, 1959. Investigation was held and an injury report was brought on record, in which the doctor opined that the injury was caused by a hard blunt substance and was single in nature. It was stated that the second Respondent (PW-9) was able to secure another report later on.

6. The appellant was enlarged on bail on 13.10.1999. A charge sheet bearing No. 127 of 1999, dated 31.10.1999 was filed against the appellant and the other accused for the offences under Sections 324, 307 read with 34 of IPC. Significantly, there was no charge framed under Section 27 of the Arms Act. Cognizance was taken and the case was committed and after framing of the charges, the trial commenced. After the examination of the other witnesses, the 2nd Respondent was examined as PW-9 on 16.3.2007.

7. In his evidence, the 2nd Respondent (PW9), categorically stated that he never gave any statement to the police; that nobody beat him on the date of occurrence and that he was not hit by any bullet. He further stated in his evidence that he accidently fell into the hole of the latrine, while looking into it and that some instrument, which was lying inside the hole, caused the injury on his body. As far as the evidence of PW-4 and PW-5, namely, his sons, Babloo and Munna Kumar was concerned, the 2nd Respondent (PW9) stated that they were not present at the place of occurrence, since Babloo was staying in a hospital at Hulasganj and Munna Kumar was at Ranchi. The evidence of the prosecution was closed on 4.4.2007 and thereafter, the evidence of the defense side stated to have commenced.

8. In the meantime, it is stated that yet another altercation took place as between, the 2nd Respondent (PW9), his son Babloo on the one side and the appellant and his father on the other side, regarding the flowing of water from the latrine, constructed by the 2nd Respondent into the field of the father of the appellant.

9. Pursuant to the said issue, it is stated that the father of the appellant was beaten with bamboo sticks, injuring him seriously. In connection with the said incident, Bindeshwar Yadav filed a complaint before the police on 7.6.2007, leading to the registration of the FIR on the same date in Khizersarai Police Station in case No.78 of 2007. Subsequently, the second respondent came forward with a petition dated 24.8.2007, under Section 311 Cr.P.C. and sought for permission for his re- examination. For the same purpose, the Additional Public Prosecutor also filed a petition on 5.12.2007, in the above applications. The trial Court passed a common order on 18.11.2009, dismissing both the applications and posted the case for evidence of investigation officers and the doctors on 18.12.2009. The second respondent approached the High Court by filing the present Criminal Misc. Case No.12454/2010, in which the impugned order was passed by the High Court on 9.12.2010.

10. We heard Mr. Mohit Kumar Shah, learned counsel for the appellant and Mr. Gopal Singh, learned counsel for the first respondent and Mr. Amlan Kumar Ghosh, learned counsel for the second respondent. We also perused the order impugned, as well as the order of the trial Court and other material papers placed on record.

11. Mr. Mohit Kumar Shah, learned counsel for the appellant in his submission contended that while the trial Court passed a reasoned order after hearing both parties extensively, the Hon'ble High Court passed the impugned order in the absence of the appellant. According to the learned counsel, the second respondent even without impleading the appellant, persuaded the High Court to pass the impugned order, which according to the learned counsel is on the face of it, not sustainable under Section 311 Cr.P.C. Learned counsel further contended that by permitting the second respondent to get himself re-examined, every attempt has been made to fill up the lacunae in the case of the prosecution, which the High Court ought not to have permitted. According to the learned counsel, when the trial Court had examined the pros and cons, while dealing with the prayer of the second respondent, as well as the first respondent for re-examination of the second respondent and gave well-founded reasons for rejecting the applications, the High Court ought not to have interfered with the same by passing a cryptic order. Learned counsel further contended that the application, which came to be allowed by the High Court was vexatious and would only encourage the malicious designs of the second respondent to get over his own earlier version deposed before the Court, which fully supported the case of the appellant.

12. As against the above submissions, learned counsel for the respondents contended that as enormous powers are vested in the Court under Section 311 Cr.P.C., in the matter of examination or re-examination of a witness in order to arrive at a just conclusion and the High Court having exercised its powers in pursuance of the said power, the order of the High Court does not call for interference.

13. Having heard the learned counsel for the respective parties and having bestowed our serious consideration to the issue involved, we find force in the submission of the counsel for the appellant, as the same merits acceptance. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 Cr.P.C., as well as Section 138 of the Evidence Act. The same are extracted hereunder:

> Section 311, Code of Criminal Procedure
>
> 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.

Section 138, Evidence Act

138. Order of examinations- witnesses shall be first examined-in- chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

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. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. 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.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C. In the decision reported in Jamatraj Kewalji Govani vs. State of Maharashtra - AIR 1968 SC 178, this Court held as under in paragraph 14:-

> "14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction." (Emphasis added)

16. In the decision reported in Mohanlal Shamji Soni vs. Union of India and another - 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under

> in paragraph 10:-
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> "10....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."

17. In the decision in Raj Deo Sharma (II) vs. State of Bihar - 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:-

> "9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)

18. In U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan - 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:-

> "15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC 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 the 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." (Emphasis added)

19. In Iddar & Ors. vs. Aabida & Anr. - AIR 2007 SC 3029, the object underlying under Section 311 Cr.P.C., has been stated as under in paragraph 11:-

> "11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (Emphasis added)

20. In P. Sanjeeva Rao vs. State of A.P.- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 13 and 16, which are as under:-

> "13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:
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> "In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of

justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself." (Emphasis added)

21. In a recent decision of this Court in Sheikh Jumman vs. State of Maharashtra - (2012) 9 SCALE 80, the above referred to decisions were followed.

22. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) – Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 14 and 15:

"14. 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 Cr.P.C. 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 Cr.P.C. 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.
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> 15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v.

State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

> a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?
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> b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.
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> c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.
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> d) 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 for such facts, which will

lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. 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 care, caution and circumspection. The Court should bear in mind that

> fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

24. Keeping the above principles in mind, when we examine the case on hand, at the very outset, it will have to be stated that the High Court, while passing the impugned order has completely ignored the principal objectives with which the provision under Section 311 Cr.P.C. has been brought into the statute book. As rightly argued by the learned counsel for the appellant, at the foremost when the trial was very much in the grip of the trial Court, which had every opportunity to hear the appellant, the State, as well as the second respondent, had not even bothered to verify whether the appellant, who was facing criminal trial was impleaded as a party to the proceedings in the High Court. A perusal of the order discloses that the High Court appears to have passed orders on the very first hearing date, unmindful of the consequences involved. The order does not reflect any of the issues dealt with by the Learned Sessions Judge, while rejecting the application of the respondents in seeking to re-examine PW-9, the second respondent herein. Though orders could have been passed in this appeal by remitting the matter back to the High Court, having regard to the time factor and since the entire material for passing final orders, are available on record and since all parties were before us, the correctness of the order of the Sessions Judge dated 18.11.2009, can be examined and final orders can be passed one way or the other in the present criminal appeal itself.

25. With that view, when we examine the basic facts, we find them as noted by the learned trial Judge being indisputably contrary to the complaint preferred by the second respondent on 8.7.1999, in the police station in case No. 71/1999, wherein offences under Section 324/307/34 IPC were reported alongwith Section 27 of the Arms Act. Based on the report of the doctor, the chargesheet came to be filed bearing No.127/99, dated 31.10.1999, under Sections 324/307/34 IPC and no charge under Section 27 of the Arms Ac was laid. The said case was put to trial and parties were participating. In the course of the trial, the turn of examination of PW- 9, the second respondent came on 16.3.2007, nearly after eight years from the date of occurrence. Second respondent made a categorical statement in his evidence that he never made any statement to the police nor was he beaten on the date of occurrence, nor was he hit by any bullet shot. Further he made a clear statement that the injury sustained by him was due to the fall into the hole dug for constructing a latrine, where some instruments caused the injury sustained by him. He also made a categorical statement that his sons PWs-4 and 5, Babloo and Munna Kumar, were not present at the place of occurrence since one was staying in a hostel in Hulasganj and the other was at Ranchi on the date and time of occurrence, namely, on 07.07.1999, at about 5 p.m. While the said version of the second respondent was stated to have been recorded by the Court below on 16.3.2007, and the evidence of the prosecution was stated to have been closed on 4.4.2007, the defence evidence seem to have also commenced.

26. In that scenario, the second respondent filed the present application under Section 311 Cr.P.C. on 24.8.2007, i.e., nearly after five months after his examination by the trial Court. While filing the said application, the second respondent claimed that his evidence tendered on 16.3.2007, was not out of his own free will and volition, but due to threat and coercion at the instance of the accused persons, including the appellant. It was contended on behalf of the second respondent that the

accused persons posed a threat by going to the extent of eliminating him and that such threat was meted out to him on 15.3.2007, when he was kidnapped from his wheat field by the accused, along with two unknown persons.

27. The trial Court having examined all the above factors in its order dated 18.11.2009, has held as under:

> "....Either at the time of his evidence in Court or subsequent to his evidence he never made any complaint to the court or any other officer viz. the C.J.M. or any police officer that accused persons had yielded any pressure upon him to turn hostile to the prosecution and to give a go by to the prosecution case. He has also argued that he did not also file any affidavit or case in this regard. Rather when on the basis of the information dated 30.5.2007 given by the accused Bindeshwar Yadav Khizersarai Police Station case No.78/2007 dated 7.6.2008 was registered by the police the informant Suresh Prasad has filed this petition and has also got the similar petition filed through the Additional Public Prosecutor which has got no legs to stand and the same is fit to be rejected. He also filed a photocopy of the FIR to Khizersarai Police Station case No.78/2007 in support of his argument."

28. After noting the above submissions made on behalf of the accused, the trial Court held as under:

> "....After the evidence of the informant, Suresh Prasad (PW-9) on 16.03.2007 the Court of Addl. Sessions Judge, F.T.C.-5 closed the evidence of prosecution on 04.04.2007 after giving opportunity to the learned Addl. P.P. to produce the remaining witness on 26.03.2007 and 04.04.2007 which he could not do on the ground that the time limited by the Hon'ble Court has expired. The Lordships of Supreme Court have held in Dohiyabhai Vs. State, AIR 1964 SC 1563 that "Right to re-

examine a witness arises only after the conclusion of cross examination and S.C. 138 says it shall be directed to the explanation of any part of his evidence given during cross examination which is capable of being construed unfavourably too his own side. The object is to give an opportunity to reconcile the discrepancies if any between the statements in examination in chief and cross examination or to explain any statement inadvertently made in cross examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross examination. Where there is no ambiguity or where there is nothing to explain, question put in re-examination with the sole object of giving a change to the witness to unto the effect of the previous statement should not be asked during re-examination (S.142). Section 154 is wide in its scope and court can permit a person calling a witness to but question in the nature of cross examination at the stage of re-examination provided it take care to give opportunity to the adverse party to cross examine the witness in the such case". It is clear from the afore quoted principles decided by the Hon'ble Apex Court and from the evidence of PW-9 as well as from the instant two aforesaid petitions filed on behalf of the PW-9 and the Additional P.P. that the cross examination of PW-9 does not contain any evidence against his evidence in chief which could be explained or made clear by re-examination of PW-9 through his

re- examination vide Section 138 Evidence Act or Section 311 of the Criminal Procedure Code. It is also clear that PW-9 had filed petition after filing of the case against him by the accused. As such the two instant petitions are not maintainable. However, whether the hostility of PW-9 would have been tested on the touch stone of Section 145 Evidence Act by examining the I.O. as some other prosecution witness have supported the prosecution case. The evidence of the I.O. of the case is taken would have sufficed the end of justice."

29. We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused, as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under Section 311 Cr.P.C. In our considered opinion, the trial Court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court.

30. In the light of the above conclusion, applying the various principles set out above, we are convinced that the order of the trial Court impugned before the High Court did not call for any interference in any event behind the back of the appellant herein. The appeal, therefore, succeeds. The order impugned dated 9.12.2010, passed in Crl. M.P. 12454/2010 of the High Court is set aside. The order of the trial Court stands restored. The trial Court shall proceed with the trial. The stay granted by this Court in the order dated 7.3.2011, stands vacated. The trial Court shall proceed with the trial from the stage it was left and conclude the same expeditiously, preferably within three months from the date of receipt of the copy of this order.

.....J. [T.S. Thakur] .....J. [Fakkir Mohamed Ibrahim Kalifulla] New Delhi;

July 04, 2013