

(2011) 03 CAL CK 0008

Calcutta High Court

Case No: C.R.R. No. 3531 of 2010

Rajesh Agarwal

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** March 3, 2011**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 311
- Evidence Act, 1872 - Section 161, 165
- Penal Code, 1860 (IPC) - Section 489, 489

**Citation:** (2011) 4 CHN 777**Hon'ble Judges:** Kanchan Chakraborty, J**Bench:** Single Bench**Advocate:** Manas Kumar Barman, for the Appellant; Biplab Mitra and Amajit Dey, for the Respondent

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**Judgement**

Kanchan Chakraborty, J.

This revisional application is taken out by one Rajesh Agarwal, the accused, in Sessions Trial No. 2(6) of 2009 pending in the Court of learned Additional Sessions Judge, Fast Track, 2nd Court, at Sealdah, challenging the legality, validity and propriety of the order passed by the learned Judge on 22nd December, 2010 whereby and whereunder the prayer of the petitioner for re-cross-examination of some of the witnesses examined on behalf of the prosecution, was refused.

2. The Sessions Trial No. 2(6) of 2009 arose out of Maniktala Police Station (D.D.) Case No. 13 dated 13.01.2009 u/s 489B and 489C of the Indian Penal Code, wherein this petitioner is the sole accused, The trial of the case is going on in the Court of learned Additional Sessions Judge, Fast Track, 2nd Court, Sealdah. On 13.8.2010, the petitioner filed an application u/s 311 of the Code of Criminal Procedure (hereinafter referred to as "the Code") praying for issuing summons upon the prosecution witness Nos, 2, 3 and 4 for the purpose of further cross-examination on the grounds



stated in the petition. That prayer of the petitioner-accused was objected to by the learned Public Prosecutor, in-charge, who was conducting the case on behalf of the State of West Bengal. Upon hearing of the learned Advocates of the parties, the learned Judge passed the order on 22.9.2010 rejecting the prayer of the petitioner which is impugned in this revisional application.

3. Mr. Manas Kumar Barman, learned Advocate appearing on behalf of the petitioner, submits that provisions of section 311 of the Code empowers a Court to 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. He submits that in the application filed by the petitioner in the Trial Court, the grounds for re-cross-examination of the prosecution witnesses No. 2, 3 and 4 have been mentioned clearly. It was his specific plea that inadvertently his Counsel did not take contradiction of the statements made by those witnesses in Court u/s 161 of the Code. If that contradiction is not taken in course of trial, the presumption arising therefrom would obviously go against him and that will cause, no doubt, prejudice to him.

4. Mr. Biplab Mitra, learned Advocate" appearing on behalf of the O.P. State of West Bengal, submit that the petitioner filed that application only to filling in the lacunae, which could not detected earlier, but found in course of trial and by way of further cross-examination he wanted to remove the defects, which is not permitted u/s 311 of the Code.

5. I have carefully gone through the application dated 13.8.2010 tiled by the petitioner in the learned Trial Court and the prayer made therein. The petitioner, in fact, has given the questions to be put to the witnesses in case he is allowed to re-cross-examination the said witnesses. The purpose of recalling those witnesses for re-cross-examination has clearly been mentioned therein. The only intention, as it appears from that application, is to the contradiction of the statements of those particular witnesses made in Court in course of their Examination-in-Chief and made by them to the Investigating Officer, who was recorded that statement u/s 161 of the Code. There cannot be any debate on the point that if a particular fact, which has been stated by a witness relating to a relevant issue in a criminal trial, has not been controverted, that will be amounting to an admission on the part of the defence. Therefore, in a criminal justice dispensation system, an accused should get every opportunity to cross-examine the prosecution witnesses to the full extent according to requirements barring in some specific cases. Section 311 of the Code and section 165 of the Evidence Act confer to wide discretionary power on the Court to act as the exigencies of justice require. This discretion can be exercised by the Trial Court at any state right from the stage of enquiry till the judgment is signed. Once Court, finds that a particular person is to be summoned for the purpose of



examination, or re-examination or further examination or cross-examination, it can call on that person. It should summon and examine or recall or re-examine that person for the Just decision of the case. The second part of section 311 of the Code appears to be mandatory while the discretion is to be exercised under first part of the Code, which appears to be very important in a sense that the said discretion is to be exercised judiciously and in a proper case.

6. In the instant case, the application has not been filed by the prosecution in order to rebut the defence evidence/specific case. It has been filed by the defence in the trial for the purpose of further cross-examination by way of putting some questions in the form of suggestion and, thereby to take contradictions of statements made by the witnesses in Court and before the Investigating Officer u/s 161 of the "Code. Although it is not necessary for such an applicant to mention the question to be put to the witnesses in course of cross-examination, it has been mentioned in the petition in order to remove any doubt from the mind of Court that defence had no intention at all to fill the loopholes.

7. I reiterate that getting full opportunity to cross-examine the prosecution witnesses is a Constitutional right of an accused in a criminal trial. Where the defence has, inadvertently, failed to ask some questions on relevant issues in course of cross-examination and, subsequently, prays before the Court for recalling those witnesses for that purpose, I think that they should be given that opportunity so that they can exercise their right properly and in a satisfactory way.

8. The view taken by the learned Court does not appear to be justified and reasonable rather against the settled principle of law.

9. Accordingly, I allow the revisional application. Order impugned be set aside. The learned Trial Court is directed to recall the P.W. Nos. 2, 3 and 4 for the purpose of re-cross-examination by the petitioner for the purpose of taking contradictions of their statements made in Court in course of their examination with their statements made before the Investigating Officer, which was recorded u/s 161 of the Code. The learned Trial Court is further directed to conclude the entire process within a month from the date of communication of this order.

10. The learned Advocate appearing on behalf of the petitioner is given liberty to communicate this order to the learned Trial Court, and the learned Trial Court is directed to act on that.

11. With the following observations, this revisional application is disposed of.

12. Interim order, if any, stands vacated.

13. Let urgent photostat certified copy of this order, if applied for, be given to the learned Advocates of the parties upon compliance of necessary formalities.