

**Pradeep Kumar Agarwal Vs. State**

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**Court :** Orissa

**Decided On :** Jul-14-1994

**Reported in :** 78(1994)CLT962; 1995CriLJ76; 1994(II)OLR313

**Judge :** A. Pasayat, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 311; Evidence Act

**Appeal No. :** Criminal Misc. Case No. 1443 of 1994

**Appellant :** Pradeep Kumar Agarwal

**Respondent :** State

**Advocate for Def. :** B. Das, Addl. Standing Counsel

**Advocate for Pet/Ap. :** D.P. Dhal and A.K. Acharya

**Judgement :**

**A. Pasayat, J.**

1. Petitioner challenges order passed by learned Special Judge, Dnenkanal rejecting his prayer to issue summons to six persons, who, according to him, are material witnesses. Prayer was made in terms of Section 311 of the Coda of Criminal Procedure, 1973 (in short, the 'Cr PC'). Prayer appears to have been rejected on the ground that sufficient opportunity was granted to the petitioner. It is

petitioner's case that adjournments were not earlier granted for the purpose of securing presence of the witnesses named in the petition dated 30-6-1994.

2. Section 311, Cr PC reads as follows :

'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 Section is manifestly in two parts whereas the word used in the first part is 'may', the second part uses 'shall'. In consequences, the first part gives purely discretionary authority to the Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before the Court. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it consider absolutely necessary for giving justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak to important relevant facts.

The object underlying Section 311 Cr PC 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 Cr PC and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. Sections 233, 185 and 311, Cr PC co-exist supplementing one another. In Sec, 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.

3. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation; it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the Law of evidence that the best available evidence should be brought before the Court. Secs. 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Cr PC to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on interested allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be the 'filling of loopholes'. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the

Presiding Judge.

4. The objection of the Section 311 is to put discretion not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted by the apex Court in *Jamat Raj v. State of Maharashtra*, AIR 1968 SC 178 and by this Court in *Nitamani Das v. Bhikari Nayak and Ors.* (1982) 5 OCR 268 and *Sk. Siraj v. State of Orissa and Ors.* (1994) 7 OCR 229.

5. Keeping in view the principles as laid down in the aforesaid decisions, I feel interest of justice would be best served if the learned Special Judge accepts prayer to issue summons to six persons named by the petitioner in his application dated 30-6-1994. I fully appreciate the concern of the learned Special Judge for early disposal of the matter. At the same time, keeping the circumstances of the case in view, a short date may be fixed for appearance of the persons named as witnesses and the matter thereafter proceed. It shall be open to the learned Special Judge to pass such orders in case persons named do not respond to the summons issued. It is stated that the case is posted to 22-7-1994. If a motion is made the matter may be adjourned for a short period for the purpose of issuance of summons and appearance of the concerned persons.

The Criminal Misc. Case is disposed of.

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