

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

Case Number	M.Cr.C. No.50458/2021
Parties Name	Arun Kumar Dey v/s The State of Madhya Pradesh through Special Police Establishment
Date of Order	21.10.2021
Bench	<u>Division Bench:</u> Justice Sujoy Paul Justice Pranay Verma
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	Yes
Name of counsel for parties	Shri Arvind Gokhale, learned counsel for the petitioner. Shri Vaibhav Jain, learned counsel for the respondent.
Law laid down	1. Section 311 of the Cr.P.C – The Section is in two parts. In the first part, the word “may” is employed whereas second part uses “shall”. Thus, first part gives pure discretion to the criminal court whereas second part makes it mandatory to summon the witness. Second part of Section 311 of the Cr.P.C - The <i>litmus test</i> to exercise power under the second part aforesaid is whether it is essential to the just decision of a case to summon the witnesses. Whether new evidence is essential or not depends on the facts and circumstances of each case which needs to be determined by the presiding Judge. 2. The Prevention of Corruption Act, 1988

	and Sec.293 of Cr.P.C - As per the prosecution story, petitioner was trapped and his hands and pocket were washed in Sodium Carbonate solution which turned pink. Indisputably, the scientific expert as per Sec.293 Cr.P.C is not required to prove his scientific report by entering the witness box and marking the said report as an exhibit. However, petitioner's prayer to summon him was rejected because in the application filed u/S.311, the petitioner has not given adequate reasons with accuracy and precision which necessitated summoning the expert witness. 3. Section 482 of the Cr.P.C - The power should be exercised very sparingly to prevent the abuse of process of any Court or otherwise to secure the ends of justice. This power cannot be exercised on mere asking or based on bald averments like "for lawful adjudication of the matter". The Court below has taken a plausible view which is not shown to be illegal or suffering from any material irregularity. Interference is declined.
Significant paragraph numbers	11 to 16

ORDER
21.10.2021

Sujoy Paul,J.

This petition filed under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) takes exception to the order dated 24.08.2021 passed by the Special Judge (PC Act), Ujjain in Special Case No.4/2018 whereby the application preferred by the petitioner under Section 311 of the Cr.P.C. is rejected by the Court below.

02. In nutshell, the case of the is that he is facing prosecution under Section 7, 13(1) and 13(2) of the Prevention of Corruption

Act, 1988 (PC Act). The case of the prosecution is that petitioner has received an illegal gratification for executing lease deed in favour of the complainant. The petitioner at the relevant time was working as Manager of District Industries Centre at Ujjain where he was contacted by the complainant for execution of lease deed in his favour. During this process, the petitioner allegedly demanded an illegal gratification which resulted into a trap in which petitioner's hands, pocket and pant were washed in Sodium Carbonate solution which turned pink. Bottles in which washings were kept, were sent to the Forensic Science Laboratory, Rau, District – Indore for analysis.

03. In turn, Scientific Officer submitted the report which was filed before the Court below. During the trial, the defence counsel cross-examined the prosecution witnesses who entered the witness box. On the basis of deposition of prosecution witnesses, the petitioner noticed certain discrepancies and thought it proper to file an application under Section 311 of the Cr.P.C. for calling the scientific expert for cross-examination. The said application dated 17.08.2021 was resisted by the prosecution. The Court below by impugned order dated 24.08.2021 disallowed the said application.

04. Shri Arvind Gokhale, learned counsel for the petitioner submitted that Section 311 of the Cr.P.C. is in two parts, first part gives discretion to the Court to requisition / summon the witness for cross-examination or not whereas second part is couched in a mandatory language. To elaborate, it is submitted that a plain reading of second part of Section 311 of the Cr.P.C. shows that when an application is filed with a submission that to meet the ends

of justice, it is necessary to summon the witness, the Court has no option but to summon the relevant witness.

05. During the Course of hearing, Shri Gokhale fairly submitted that as per Section 293 of the Cr.P.C., the report of scientific expert is not required to be proved by bringing him in the witness box. However, in a case of this nature where the cross-examination of expert witness is necessary to put forth proper defence of the petitioner, the Court below should have summoned the said expert witness. In support of this submission, reliance is placed on the judgments delivered in the cases of *Shri Navin Laxman Tamboli v/s The State of Maharashtra (Writ Petition No.4326/2021)*, *Jaipaldas v/s The State of Madhya Pradesh reported in 2006 (1) M.P.L.J. 506*, *C.P. Sahu v/s The State of Madhya Pradesh reported in 2005 (3) M.P.L.J. 401*, *Natashi Singh v/s CBI (State) (Criminal Appeal No.709/2013)*, *Rameshwar Dayal & Others v/s State of UP reported in AIR 1978 SC 1558*, *P Sanjeeva Rao v/s The State of AP (Criminal Appeal No.874-875 of 2012)* and *Jamatraj v/s The State of Maharashtra reported in AIR 1968 SC 178*.

06. The averments of application filed under section 311 of the Cr.P.C were relied upon to bolster the submission that the Court below has not taken into account the averments of para no.2,3,6 and 7 of the said application. Unless expert/scientific expert is put to cross-examination by summoning him in exercise of power under section 311 of the Cr.P.C, the applicant will not be able to demolish the case of prosecution and put forth his defense in an effective manner.

07. *Per contra*, Shri Vaibhav Jain, learned counsel for the respondent opposed the prayer and contended that the Court below has rightly rejected the said application. The petitioner's application was in fact a dilatory tactics to delay the trial, which is at the stage of final hearing. The application aforesaid does not contain justifiable reasons on the strength of which expert witness could have been requisitioned.

08. Parties confined their arguments to the extent indicated above.

09. Shri Vaibhav Jain further contended that argument relating to different PH value in different samples of liquid is without any basis. The expert/scientific report shows that all the relevant samples were found to be of pink colour. The report nowhere shows that colour of said liquid in different bottles was different. The liquid was not classified as pink or light/dark pink. The liquid was simultaneously kept in different bottles. Scientific expert's presence as a witness is not at all required.

10. We have heard learned counsel for the parties at length and perused the record.

11. Section 311 of the Cr.P.C reads as under:-

“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 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.”

(emphasis supplied)

12. In view of judgment of the Apex Court in *Zahira Habibullah Sheikh and Anr Vs. State of Gujarat and Ors reported in (2006) 3 SCC 374*, there is no difficulty to hold that the aforesaid

section is in two parts. In the first part, the word employed is “may”, whereas second part uses “shall”. Consequently, the first part gives a discretion to the Court whereas the second part is worded in a mandatory language, which compels the Court to take steps if new evidence appears to it essential for the just decision of the case.

13. The purpose behind insertion of section 311 of the Cr.P.C in the statute book is that there may not be any failure of justice on account of mistake of either parties in bringing the valuable evidence on record or leaving ambiguity on the statement of witness examined from either side. The *litmus test* as laid down in ***Zahira Habibullah Sheikh*** (supra) is that *whether it is essential to the just decision of a case to summon a witness*. In no necessary terms, it was made clear by the Apex Court that in the facts of each case it has to be determined by the Presiding Judge whether new evidence is essential.

14. In our considered view, the power flowing from second part of section 311 of the Cr.P.C cannot be exercised on mere asking. Merely because it is pleaded that '*in the interest of justice*' and '*for lawful adjudication of matter,*' scientific expert should be summoned, it was not obligatory on the part of Special Judge to summon the said witness unless it is established with accuracy and precision that the new evidence is essential in the peculiar facts and circumstances of the case.

15. If the application of the petitioner dated 17.08.2021 is examined, it will be clear that the averments of para 2 are relating to non-production of *Mudda Maal Register*. It has nothing to do with

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the expert/scientific evidence. Para 3 is related to evidence of *Panch* witness Pradeep Shrivastava and has no thread relation with the scientific evidence. Para 5 and 7 of the application contains vague and ambiguous averments. The petitioner could not establish by necessary pleadings as to why the scientific officer needs to be summoned.

16. The Court below in the impugned order relied upon the judgment of Allahabad High Court in *Jose Quintanilla Sascristan Vs State of UP passed in Cri. Appeal No.757/2018* and the judgment of the Apex Court in *Rajesh Kumar and Ors Vs. State of NCT of Delhi(2008) 4 SCC 493*, in which it was ruled that in view of section 293 of the Cr.P.C it is not obligatory that an expert who furnished his opinion on scientific issue should be necessarily made party to depose in proceedings before the Court. Pertinently, on this aspect, learned counsel for the petitioner has also not raised any objection.

17. The singular point needs determination is whether the petitioner could make out a case in his application under section 311 of the Cr.P.C to summon the scientific expert. Our answer is in negative because the application does not contain sufficient pleadings and reasons on the strength of which the power under section 311 of the Cr.P.C could have been exercised by the Court below.

18. The Apex Court way back in *Madhu Limaye Vs. State of Maharashtra reported in (1977) 4 SCC 551* cautioned that power under section 482 of the Code should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the

ends of justice. In the application under section 311 of the Cr.P.C the party seeking attendance of new witness needs to plead with accuracy and precision why the expert witness must be summoned. As noticed, in the instant case, the averments of application filed by the petitioner under section 311 of the Cr.P.C do not inspire confidence.

19. Learned Special Judge in our opinion, has taken a plausible view. Another view is possible, cannot be a ground to interfere under section 482 of the Cr.P.C. So far judgments cited by learned counsel for the petitioner are concerned, all the said judgments are founded upon different facts and circumstances. At the cost of repetition, as held in *Zahira Habibullah Sheikh* (supra) whether new evidence is essential or not depends on the facts of each case. In the peculiar factual backdrop of certain cases, the Courts have entertained the application under section 311 of the Cr.P.C. In the instant case, since the petitioner has miserably failed to establish necessary ingredients for invoking power under section 311 of the Cr.P.C, we are unable to hold that the Court below has passed the order either with material irregularity or illegality. Hence, no case is made out for interference.

Resultantly, the interference is declined.

The petition is dismissed.

(SUJOY PAUL)
J U D G E

(PRANAY VERMA)
J U D G E

Ravi / Sourabh