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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
DR. DHANANJAYA Y. CHANDRACHUD; J., A.S. BOPANNA; J.
August 08, 2022
Varsha Garg *versus* **The State of Madhya Pradesh & Ors.**

Criminal Appeal No. 1021 of 2022 with MA 1144 of 2022 in SLP (Crl) No. 2239 of 2022

Code of Criminal Procedure, 1973; Section 311 - Application cannot be dismissed merely on the ground that it will lead to filling in the lacunae of the prosecution's case - Even the said reason cannot be an absolute bar to allowing an application under Section 311 - The resultant filling of loopholes on account of allowing the application is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence - It is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. *(Para 38 - 40)*

Code of Criminal Procedure, 1973; Section 311 - The Court is vested with a broad and wholesome power to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. *(Para 42)*

Code of Criminal Procedure, 1973; Section 311 - Scope - Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court - The broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest. *(Para 28 - 32)*

For Appellant(s) Mr. Ramakrishnan Viraraghvan, Sr. Adv. Mr. Preetam Shah, Adv. Mr. K. Krishna Kumar, AOR Ms. Shashi Kiran, AOR.

For Respondent(s) Mr. Shreeyash U. Lalit, Adv. Mr. Pashupathi Nath Razdan, AOR Mirza Kayesh Begg, Adv. Mr. Shaddab Anwar, Adv. Mr. Prakhar Srivastav, Adv. Ms. Ayushi Mittal, Adv. Mr. Astik Gupta, Adv. Mr. S.K. Gangele, Sr. Adv. Ms. Priya Sharma, Adv. Mr. Prathui Raj Chauhan, Adv. Ms. Ritu Gangele, Adv. Mr. Arup Banerjee, AOR Ms. Bansuri Swaraj, Adv. Mr. Siddhesh Kotwal, Adv. Ms. Manya Hasija, Adv. Ms. Ana Upadhyay, Adv. Mr. Akash Singh, Adv. Mr. Nihar Dharamadhikari, Adv. Mr. Nirnimesh Dube, AOR

J U D G M E N T

Dr. Dhananjaya Y. Chandrachud, J.

1 A Single Judge of the Indore Bench of the High Court of Madhya Pradesh rejected, by a judgment dated 8 April 2022, a petition instituted by the appellant under Section 482 of the Code of Criminal Procedure 1973[1] registered as Misc. Criminal Case No. 57152 of 2021.

[1] "**CrPC**"

2 The petition addressed a challenge to the correctness of an order dated 13 November 2021 of the Second Additional Sessions Judge, Dr. Ambedkar Nagar, District Indore rejecting an application under Section 311 CrPC seeking to summon the nodal officers of certain cellular entities along with the decoding register to trace the mobile location of accused Vikas, Mangilal and Suresh.

3 The appellant is the spouse of an advocate who was brutally murdered outside his office at about 2330 hrs on 18 November 2015. Following the homicide, a First Information Report bearing Criminal Complaint No. 734 of 2015 was registered with Police Station[2] Mhow, District Indore on 19 November 2015 for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code 1860[3]. The investigation was initiated. The post mortem report indicated that the homicide was caused due to a firearm injury. The second, third, fourth, fifth and sixth respondents (i.e., Vikas, Sawan, Mangilal, Suresh and Raju) were arrested during the course of the investigation.

4 A charge-sheet was submitted after investigation on 15 February 2016. A supplementary charge-sheet was submitted on 20 November 2016. The case has been committed to the Court of the Second Additional Sessions Judge, Dr. Ambedkar Nagar, District Indore and was registered as Sessions Trial 227 of 2016.

5 Among the enclosures to the supplementary charge-sheet were certificates dated 11 January 2016 of the nodal officers of certain cellular companies, namely:

(i) a certificate dated 11 January 2016 of Airtel;
(ii) a certificate dated 18 January 2016 of Reliance;
(iii) a certificate dated 30 March 2016 of Idea;
(iv) a certificate dated 6 June 2016 of Vodafone.

Upon the commencement of the recording of evidence at the trial, the nodal officers of Idea (PW33), Airtel (PW41), Reliance (PW43) and Vodafone (PW48) were examined on 17 November 2017, 7 May 2018, 17 July 2018 and 31 October 2018. The Station House Officer[4], P.S. Mhow between February 2016 and April 2017, was examined by the prosecution as PW47 on 31 October 2018. PW47 had filed the supplementary charge-sheet and had prepared a compact disc[5] with call details of the co-accused. He also admitted that he had not filed a certificate as required under Section 65B of the Indian Evidence Act 1872[6] in relation to the CD.

6 The statements of accused – Suresh (the fifth respondent) and Mangilal (the fourth respondent) – under Section 313 CrPC were recorded on 25 January 2020 and 12 February 2020 respectively. During the course of the trial, the CD had been produced but since it was found to be ‗corrupted', an application was made to the trial court to requisition the copy of the CD which was available at the police station. The application was allowed on 15 November 2019. On the subsequent date, PW47 marked his appearance. On the next date of hearing, when PW47 was required to produce the CD which was kept at the police station, he failed to do so. In those circumstances, an application ("**first application**") was preferred to requisition the said CD but this

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[2] **"P.S."**
[3] "**IPC**"
[4] "**SHO**"
[5] "**CD**"
[6] "**IEA**"

application was rejected by the trial court on the ground that the evidence of PW47 had been recorded and a last opportunity had already been given to him to produce the CD. A Single Judge of the High Court on 2 March 2020 allowed the petition instituted by the appellant to challenge the order of the trial court, noting that the CD was a vital piece of evidence and had been provided to all the accused along with the charge-sheet. Resultantly, the trial court was directed to take necessary steps for requisitioning the CD through the police station and for taking it on record from PW47.

7 On 15 March 2021, another application ("**second application**") was moved under Section 311 on behalf of the prosecution for summoning the decoding register.

8 On 5 July 2021, the prosecution filed an application ("**third application**") under Section 311 CrPC stating that the court had taken on record the CD and a certificate under Section 65B of the Evidence Act, in pursuance of the order of the High Court admitting its previous application. By filing the third application, the prosecution sought permission to summon the certificate issuer and examine said witness in order to prove the certificate.

9 On 16 July 2021, an application was filed by the prosecution (**"fourth application"**) under Section 311 to summon the nodal officer of Idea and under Section 91 to produce the call data records of two mobile numbers.

10 On 22 September 2021, the trial court allowed the third application but dismissed the fourth application. This order of the trial court was challenged before the High Court.

11 In the meantime, the trial court by an order dated 13 November 2021 dismissed the second application as well. The trial court in its order dated 13 November 2021 rejected the application for the production of the decoding register on the ground that:

(i) The document which the prosecution desired to summon does not form a part of the investigation; and

(ii) The document has not been obtained during the course of the investigation.

Consequently, on the same date, the trial court also recorded that the evidence of the prosecution stood closed. The appellant challenged this order of the trial court before the High Court invoking its jurisdiction under Section 482 CrPC. While rejecting this petition on 8 April 2022 in Misc. Criminal Case No. 57152 of 2021, the Single Judge of the High Court held that

A. The decoding registers are not part of the case diary or the charge-sheet;

B. The prosecution has closed its evidence; and

C. The application has been filed at a belated stage without collecting all the relevant information (for instance, whether the decoding register is available with the service provider or not).

12 Separately, on the same date i.e. 8 April 2022, the High Court also disposed of two proceedings under Section 482 instituted by the State of Madhya Pradesh[7] and by the appellant[8] challenging the order of the trial court dated 22 September 2021 dismissing the fourth application under Section 91 CrPC for summoning of documents. The Single Judge noted that the application under Section 91 had been filed by the prosecution for

[7] MCrC No. 61600 of 2021
[8] MCrC No. 51642 of 2021

summoning the CDR and CAF of two mobile numbers on the ground that they were crucial for establishing the guilt of accused Sawan. It was urged before the High Court that PW41, the nodal officer of Airtel, had specifically deposed that he had forwarded the call details of the mobile numbers to the SDOP along with a letter dated 11 January 2016 (Exhibit P/103) but these were not filed along with the charge-sheet. However, the High Court held that since these documents were available in the case diary, they could be exhibited under Section 91 CrPC. Accepting the plea of the prosecution and the appellant, the Single Judge set aside the trial court's order which had dismissed the application seeking the summoning of the documents and the trial court was directed to pass a consequential order on the application.

13 It is however the other judgment of the High Court dated 8 April 2022 in Misc. Criminal Case No. 57152 of 2021 mentioned earlier which rejected the petition instituted by the appellant under Section 482 challenging the order of the trial judge dated 13 November 2021 dismissing the second application which has been called into question in these proceedings.

14 We have heard Mr Ramakrishnan Viraraghavan, senior counsel appearing on behalf of the appellant. Mr Shreeyash U Lalit, counsel for the State of MP has supported the submissions in the appeal.

15 Mr SK Gangele, senior counsel appears on behalf of the second, third and sixth respondents while Ms Bansuri Swaraj, appears on behalf of the fourth and fifth respondents.

16 The submission which has been urged by Mr Ramakrishnan Viraraghavan, senior counsel on behalf of the appellant and by Mr Shreeyash U Lalit , counsel for the State of MP are set out below:

(i) The production of the decoding register is crucial to establish the corelationship between the location of the accused and the cell phone tower;

(ii) The application was filed by the prosecution before the closure of evidence and it was only after the rejection of the application that the order dated 30 November 2022 of the Second Additional Sessions Judge recorded that the evidence of the prosecution stood closed;

(iii) In any event, there was no bar in law to the filing of an application under Section 311 even after the closure of evidence;

(iv) The production of the decoding register was sought under the provisions of Section 91 CrPC which exists independent of Section 207 CrPC; and

(v) There is no element of prejudice to the accused since the enclosures to the supplementary charge-sheet specifically refer to the certificates of the nodal officers of the cellular companies.

17 Mr SK Gangele, senior counsel appearing on behalf of the second, third and sixth respondents has urged that:

(i) In view of the bar contained in Section 301 CrPC, it is not open to the appellant who is the spouse of the deceased to pursue these proceedings;
(ii) The nodal officers have already been examined on 7 May 2018, 17 July 2018 and 31 October 2019;
(iii) The locations have been mentioned by the witnesses; and

(iv) All relevant documents are already on record.

18 Ms Bansuri Swaraj, counsel appearing on behalf of the respondents four and five submitted that:

(i) Four applications were submitted by the prosecution under Section 311 CrPC;

(ii) 53 witnesses have been examined;

(iii) Final arguments at the trial are to be addressed on 25 July 2022;

(iv) In view of the decision of this Court in **Swapan Kumar Chatterjee** v. **Central Bureau of Investigation**[9], an application under Section 311 CrPC ought not be allowed where:

a. It is an abuse of the process of the Court; or
b. The prosecution's evidence was closed long back.

(v) The prosecution's evidence was closed long back;

(vi) The reasons for non-examination of the witnesses earlier are not satisfactory;

(vii) The accused had been denied bail and are in custody as under trials for over 6.5 years; and

(viii) The right to a speedy trial is an integral component of Article 21 of the Constitution which mandates fairness to the accused.

19 Accordingly, it was urged that the nodal officers were examined in 2017-2018, the CD has already been brought on record and the two Courts having concurrently rejected the application under Section 311, the balance of justice must weigh in favour of the accused.

20 *First,* we deal with the objection of the respondents regarding the bar in Section 301 of the CrPC on the basis of which it has been argued that it is not open to the Appellant who is the spouse of the deceased to pursue these proceedings.

21 The respondents have relied upon the decisions in **Shiv Kumar** v. **Hukam Chand** [10] and **Dhariwal Industries Ltd.** v. **Kishore Wadhwani** [11] to further their contention. However, both these cases deal with this Court having declined private counsel to conduct a prosecution instead of a Public Prosecutor in a sessions trial by relying upon the specific bar in Section 225 CrPC. Accordingly, these cases can be clearly distinguished from the facts of the present case. In the present case, even the application under Section 311 in the sessions trial was moved by the State and there is no question of the appellant wanting to replace the public prosecutor in the trial.

22 On the other hand, in **Mina Lalita Baruwa** v. **State of Orissa**[12], the appellant was alleged to have been gang raped by the assailants who were arrayed as accused at the sessions trial. PW 18 was a Sub Divisional Judicial Magistrate before whom the Test Identification Parade[13] was held. PW 18 had recorded the proceedings in the prescribed format and certain documents were marked as Ext. The grievance of the appellant was that during the course of the examination in chief, an incorrect version was spoken to by

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[9] (2019) 14 SCC 328
[10] (1999) 7 SCC 467
[11] (2016) 10 SCC 378
[12] (2013) 16 SCC 173
[13] "**TIP**"

PW18 as an authorized officer who conducted the TIP. However, the prosecution failed to confront him with the aforementioned Ext. 8 or to controvert the incorrect statement in order to remove any source of ambiguity which would otherwise prejudice the case of the prosecution. The appellant approached the Special Public Prosecutor to set right the error of PW18 in his evidence and to confront him *inter alia* with a document marked as Ext. 8.The public prosecutor not having taken any steps, the appellant moved the trial judge with an application for recalling PW18. The trial judge rejected the application on the ground of maintainability, holding that such an application could not have been filed at the instance of the victim. The High Court, placing reliance on the provisions of Section 301 CrPC observed that the informant had a limited role to play and it was not open to her to file an application for recalling witnesses.

In this backdrop, this Court examined the provisions of Section 301. Section 301 is extracted below:

"301. Appearance by Public Prosecutors.—(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

23 The Court observed:

"19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, duty and responsibility of the court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect upon every bit of vital information placed before it. It can also be said that in that process the court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution failed to note the situation at that moment or later when it was brought to light and whereafter also the prosecution remained silent, the court should have acted promptly and taken necessary steps to rectify the situation appropriately. **The whole scheme of the Code of Criminal Procedure envisages fool proof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and the innocent is not punished.** It is with the above background, we feel that the present issue involved in the case on hand should be dealt with."

(emphasis supplied)

24 The Court noted that while it is true that Section 301 places limitations on the right of the private person to participate in criminal proceedings, nonetheless Section 311 empowers the trial court to summon witnesses in order to arrive at a just decision. The court held in that context:

"21 …Therefore, a reading of Sections 301 and 311 together keeping in mind a situation like the one on hand, it will have to be stated that the trial Court should have examined whether invocation of Section 311 was required to arrive at a just decision. In other words even if in the consideration of the trial Court invocation of Section 301(2) was not permissible, the anomalous evidence deposed

by PW-18 having been brought to its knowledge should have examined the scope for invoking Section 311 and set right the position. Unfortunately, as stated earlier, the trial Court was in a great hurry in rejecting the appellant's application without actually relying on the wide powers conferred on it under Section 311 CrPC for recalling PW-18 and ensuring in what other manner, the grievance expressed by the victim of a serious crime could be remedied. In this context, a reference to some of the decisions relied upon by the counsel for the appellant can be usefully made."

25 Further, the Court while relying upon the earlier decisions in **J.K. International** v. **State (Govt. of NCT of Delhi)**[14], **Zahira Habibulla H. Sheikh** v. **State of Gujarat**[15], **Manu Sharma** v. **State (NCT of Delhi)**[16], **Mohanlal Shamji Soni** v. **Union of India**[17], **Rajendra Prasad** v. **Narcotic Cell**[18], noted:

"31 …a criminal court cannot remain a silent spectator. It has got a participatory role to play and having been invested with enormous powers under Section 311 CrPC, as well as Section 165 of the Evidence Act, a trial court in a situation like the present one where it was brought to the notice of the court that a flagrant contradiction in the evidence of PW 18 who was a statutory authority and in whose presence the test identification parade was held, who is also a Judicial Magistrate, ought to have risen to the occasion in public interest and remedied the situation by invoking Section 311 CrPC, by recalling the said witness with further direction to the Public Prosecutor for putting across the appropriate question or court question to the said witness and thereby set right the glaring error accordingly. It is unfortunate to state that the trial court miserably failed to come alive to the realities as to the nature of evidence that was being recorded and miserably failed in its duty to note the serious flaw and error in the recording of evidence of PW 18."

26 The objection which has been raised by the second, third and sixth respondents on the basis of the provisions of Section 301 CrPC lacks substance. Sub-section (1) of Section 301 stipulates that the Public Prosecutor or the Assistant Public Prosecutor in charge of a case may appear without written authority before any court in which the case is under inquiry, trial or appeal. Sub-section (2) of Section 301 postulates that if any such case, any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

27 In the present case, the application for the summoning of witness and for production of the decoding register was submitted by the State. Hence, the bar contained in Section 301 does not stand in the way.

28 Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court "may":

(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and
(ii) Recall and re-examine any person who has already been examined.

This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court

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[14] (2001) 3 SCC 462
[15] (2004) 4 SCC 158
[16] (2010) 6 SCC 1
[17] (1991) Supp (1) SCC 271
[18] (1999) 6 SCC 110

to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

29 The first part of the statutory provision which uses the expression "may" postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

30 A two judge Bench of this Court in **Mohanlal Shamji Soni** (supra) while dealing with *pari materia* provisions of Section 540 of the Criminal Code of Procedure 1898 observed:

"16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice."

Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the "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." In that context the Court observed:

"18 …Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by 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 rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."

31 Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal** v. **State of U.P.**[19], **State of W.B.** v. **Tulsidas Mundhra**[20], **Jamatraj Kewalji Govani** v. **State of Maharashtra**[21], **Masalti** v. **State of U.P.**[22], **Rajeswar Prosad Misra** v. **State of W.B.**[23] and **R.B. Mithani** v. **State of Maharashtra**[24], the Court held:

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[19] (1978) 2 SCC 518
[20] (1963) Supp 1 SCR 1
[21] (1967) 3 SCR 415
[22] (1964) 8 SCR 133
[23] (1966) 1 SCR 178
[24] (1971) 1 SCC 523

"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

32 The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

33 Section 91 CrPC empowers *inter alia* any Court to issue summons to a person in whose possession or power a document or thing is believed to be, where it considers the production of the said document or thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the CrPC.

34 Section 91 forms part of Chapter VII of CrPC which is titled "Processes to Compel the Production of Things". Chapter XVI of the CrPC titled "Commencement of Proceedings before Magistrates" includes Section 207 which provides for the supply to the accused of a copy of the police report and other documents in any case where the proceeding has been instituted on a police report.[25] Both operate in distinct spheres.

35 In the present case, the application of the prosecution for the production of the decoding registers is relatable to the provisions of Section 91 CrPC. The decoding registers are sought to be produced through the representatives of the cellular companies in whose custody or possession they are found. The decoding registers are a relevant piece of evidence to establish the co-relationship between the location of the accused and the cell phone tower. The reasons which weighed with the High Court and the Trial Court in dismissing the application are extraneous to the power which is conferred under Section 91 on the one hand and Section 311 on the other. The summons to produce a document or other thing under Section 91 can be issued where the Court finds that the production of the document or thing "is necessary or desirable for the purpose of any investigation, trial or other proceeding" under the CrPC. As already noted earlier, the power under Section 311 to summon a witness is conditioned by the

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[25] **Section 207 in The Code Of Criminal Procedure, 1973**
207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-
(i) the police report;
(ii) the first information report recorded under section 154;
(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;
(iv) the confessions and statements, if any, recorded under section 164;
(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173: Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

requirement that the evidence of the person who is sought to be summoned appears to the Court to be essential to the just decision of the case.

36 PWs 33, 41, 43 and 48, who were the nodal officers of Idea, Airtel, Reliance and Vodafone have already been examined. During the examination of PW-41, the nodal officer of Airtel, the witness specifically deposed during the course of examination that:

"2. Call detail of mobile number XXXXXXXXXX, which has 134 pages is Exhibit P-104, I sent the same detail of the call to the police. Each page of the same has seal of Bharti Airtel on the same. Call detail contains date and time wise detail of call and short message services made/sent and received by the customer. **Additionally, location of the mobile number is available in code number along with the time of the call or message for which call detail is provided. Location of the call made by the mobile number in certain time has been shown with codes, I cannot state name of the location today by seeing the code. Location can be stated after decoding the same. We have coding chart for location, by seeing the same location can be started. I don't have aforesaid chart along with me.** Aforesaid chart is available in the office."

(emphasis supplied)

37 The relevance of the decoding register clearly emerges from the above statement of PW-41. Hence, the effort of the prosecution to produce the decoding register which is a crucial and vital piece of evidence ought not to have been obstructed. In terms of the provisions of Section 311, the summoning of the witness for the purpose of producing the decoding register was essential for the just decision of the case.

38 Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.

39 In the decision in **Zahira Habibullah Sheikh (5)** v. **State of Gujarat**[26], which was more recently reiterated in **Godrej Pacific Tech. Ltd.** v. **Computer Joint India Ltd.**[27], the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:

"28. 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 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 intercepted 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 "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.

(emphasis supplied)

40 The right of the accused to a fair trial is constitutionally protected under Article 21. However, in **Mina Lalita Baruwa** (supra), while reiterating **Rajendra Prasad** (supra), the

[26] (2006) 3 SCC 374
[27] (2008) 11 SCC 108

Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In **Rajendra Prasad** (supra), the Court had held that:

"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."

(emphasis supplied)

In the present case, the importance of the decoding registers was raised in the examination of PW-41. Accordingly, the decoding registers merely being additional documents required to be able to appreciate the existing evidence in form of the call details which are already on record but use codes to signify the location of accused, a crucial detail, which can be decoded only through the decoding registers, the right of the accused to a fair trial is not prejudiced. The production of the decoding registers fits into the requirement of being relevant material which was not brought on record due to inadvertence.

41 *Finally*, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on **Swapan Kumar** (supra), a two judge Bench decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in **Swapan Kumar** (supra) observed:

"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

In the present appeal, the argument that the application was filed after the closure of the evidence of the prosecution is manifestly erroneous. As already noted above, the closure of the evidence of the prosecution took place after the application for the production of the decoding register and for summoning of the witness under Section 311 was dismissed. Though the dismissal of the application and the closure of the prosecution evidence both took place on 13 November 2021, the application by the prosecution had been filed on 15 March 2021 nearly eight months earlier. As a matter of fact, another witness for the prosecution, Rajesh Kumar Singh, was also released after examination and cross-examination on the same day as recorded in the order dated 13 November 2021 of the trial court.

42 The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at

any stage and the closing of prosecution evidence is not an absolute bar. This Court in **Zahira Habibulla H. Sheikh** (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:

"43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidencecollecting process. **They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency.** The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

(emphasis supplied)

Further, in **Zahira Habibullah Sheikh (5)** (supra), the Court reiterated the extent of powers under Section 311 and held that:

"27. 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 of 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 the 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 any 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 supplied)

43 The Court while reiterating the principle enunciated in **Mohanlal Shamji Soni** (supra) stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:

"44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (*i*) giving a discretion to the court to examine the witness at any stage, and (*ii*) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal* v. *Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widestpossible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially

with circumspection and consistently with the provisions of the Code. **The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is** necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

(emphasis supplied)

While reiterating the decisions of this Court in **Karnel Singh** v. **State of M.P.**[28], **Paras Yadav** v. **State of Bihar**[29], **Ram Bihari Yadav** v. **State of Bihar**[30] and **Amar Singh** v. **Balwinder Singh**[31] this Court held that the court may interfere even at the stage of appeal:

"64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the socalled findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals."

44 For the above reasons, we have come to the conclusion that the decision of the High Court which is impugned in the appeal is unsustainable. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 8 April 2022 in Misc. Criminal Case No. 57152 of 2021 as well as the order of the Second Additional Session Judge, Dr. Ambedkar Nagar, District Indore dated 13 November 2021 in Sessions Trial 227 of 2016 dismissing the application filed by the prosecution. The application filed by the prosecution for the production of the decoding registers and for the summoning of the witnesses of the cellular companies for that purpose is allowed. The Second Additional Sessions Judge, Dr. Ambedkar Nagar, District Indore is directed to conclude Sessions Trial No. 227 of 2016 by 31 October 2022.

MA No. 1144 of 2022 in SLP (Crl.) No. 2239 of 2022

45 The application has been filed on behalf of one of the accused – Mangilal Thakur - who was granted interim bail on medical grounds on 6 May 2022 in SLP (Crl.) No. 2239 of 2022 for a period of thirty days from the date of his release. In view of the continuing medical condition of the accused, we deem it appropriate and proper to extend the interim bail which was granted by order of this Court up to 31 October 2022 subject to the same terms and conditions.

46 Pending application(s), if any, stand disposed of.

[28] (1995) 5 SCC 518
[29] (1999) 2 SCC 126
[30] (1998) 4 SCC 517
[31] (2003) 2 SCC 518