

CASE NO.:
Appeal (crl.) 544 of 2007

PETITIONER:
Rama Paswan & Ors.

RESPONDENT:
State of Jharkhand

DATE OF JUDGMENT: 13/04/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 544 2007
(Arising out of SLP (Crl) No.912 of 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Appellants call in question legality of the order passed by a learned Single Judge of the Jharkhand High Court dismissing the petition filed by the appellants.

Background facts in a nutshell are as follows:
Alleging that PW4 (hereinafter referred to as the victim) was subjected to rape, attracting punishment under Section 376 of the Indian Penal Code, 1860 (in short the 'IPC') First Information Report (in short the 'FIR') was lodged by the informant. The date of occurrence was stated to be 30.5.1992. The charge sheet was filed on 29.9.1994. The examination of witnesses after framing of charges continued from 1994 to 2004. After examination of several witnesses on 18.5.2004 the trial court directed the production of further witnesses, if any. Since no prosecution witness was present on 18.5.2004, 28.5.2004 and 10.6.2004, evidence of prosecution was closed. On 16.6.2004 the statement of accused persons was recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The evidence of the defence witnesses was recorded between 25.6.2004 and 13.12.2004. Thereafter the matter was placed for argument. At this stage an application purported to be under Section 311 of the Code was filed for recalling of the victim for further cross examination on the ground that the parties have settled the dispute outside the Court at the intervention of the well-wishers and also the informant could not identify the persons who allegedly committed the offence due to darkness. The trial court rejected the application by order dated 1.4.2005. The trial court was of the view that in view of the circumstances indicated it would not be proper to allow the application of the accused for recalling the victim. The same was accordingly dismissed. It was noted that the case was pending for trial for more than ten years. Application in terms of Section 482 of the Code was filed before the High Court which was dismissed by the impugned order. The High Court was of the view that the compromise petition which was annexed to the petition under Section 482 of the Code referred to purported compromise between the parties. The High Court noted that Section 376 of

IPC is not compoundable and when the victim was examined and cross examined during trial, the prayer to recall the victim is not acceptable. Accordingly the petition was rejected.

In support of the appeal, learned counsel for the appellants submitted that when parties have settled the disputes continuance of the proceeding would not be in the interest of the justice and the High Court should have exercised jurisdiction under Section 482 of the Code.

Learned counsel for the State on the other hand supported the orders passed by the trial court and the High Court.

The scope and ambit of Section 311 of the Code, which reads as follows, needs to be noted:

"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 a 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 consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the 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 enabling provision, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. 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 it 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 considers absolutely necessary for doing 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 means 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 important relevant facts.

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.

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. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. 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.

The object of Section 311 is to bring on record evidence 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 the 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 provisions 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 in *Jamatraj Kewalji Govani v. State of Maharashtra* (AIR 1968 SC 178).

Considering the ambit of Section 311 of the Code, it does not appear to be a case where any interference is called for. What is the effect of evidence already recorded shall be considered by the trial court. Since Section 376 IPC is not compoundable in terms of Section 320 of the Code, the trial court and the High Court rightly rejected the prayer. We find no scope for interference in the appeal. Our non-interference shall not be construed as we have expressed any opinion on the merits of the case.

The appeal is dismissed.