Citation: 2013 (82) ACC 303
Dr. Rajesh Talwar And Another V. Central Bureau Of Investigation,

Production of prosecution witnesses is the sole and absolute discretion of the public prosecution. It is for him to state before the Court at the very outset of the trial as to by what evidences he is going to establish the charge against the accused. Who is to be examined and the sequence and manner of examination of its witnesses are all matters which lies in exclusive domain of the prosecutor with no fetters. No body, nor even the Court can interfere with such an exercise of power by him. Public Prosecutor in his responsibility is guided only by ethics of fair play and should execute his solemn duty faithfully as an officer of the Court. ....VARIOUS CASE LAWS DISCUSSED, (Para 9)

Where there are several investigating officers,it was not essential to examine all the I.Os. (Para-15)

Case :- APPLICATION U/S 482 No. - 16946 of 2013

Petitioner :- Dr. Rajesh Talwar And Another
Respondent :- Central Bureau Of Investigation, Thru' Director, And Another
Petitioner Counsel :- Vikram D. Chauhan
Respondent Counsel :- Govt. Advocate,Aunrag Khanna

Hon'ble Rajesh Dayal Khare,J.

Heard Ms. Rebecca M. John, learned Senior Counsel assisted by Vikram D. Chauhan, learned counsel for the applicants, Sri Anurag Khanna, learned counsel for the C.B.I. and learned Government Advocate for the State.

Present application under Section 482 Cr.P.C., has been filed for quashing of the order dated 04.05.2013 passed by Additional Sessions Judge/Special Judge (Anti-Corruption) CBI, Ghaziabad in Sessions Trial No.477 of 2012 in the matter of C.B.I. Vs. Dr. Rajesh Talwar & another, whereby application of the accused-applicants herein, under Section 311 Cr.P.C., read with Section 165 Evidence Act has been rejected by the learned trial Judge.

The applicants herein are facing trial for the charges of committing murders of their own daughter Arushi and of their domestic help Hemraj, in their house. The crime was investigated both by local police as well as C.B.I. Initially a closure report was submitted before the Magistrate, who after perusing the entire material contained in the case diary submitted along with the closure report disagreed with the closure report and has summoned the applicants to face trial for the double murder. After committal of the case, presently the trial is pending before Additional Sessions Judge/ Special Judge (Anti Corruption) C.B.I. Ghaziabad as Sessions Trial No. 477 of 2012 C.B.I. Vs. Dr. Rajesh Talwar and another.

Currently the stage of the trial is that the prosecution has closed it's evidence under Section 230/231 Cr.P.C., and now accused statements is being recorded under Section 313 Cr.P.C. It is at this stage that the accused applicants moved to the trial court for summoning and examining seven other left over witnesses and also other seven left over investigating officers, who had participated in the investigation along with the main investigating officer, by moving an application under Section 311 Cr.P.C., for that purpose. Learned trial has rejected the said application by passing the impugned order dated 04.05.2013 which order is now under challenge in this application by the applicants-accused by invoking inherent power of this Court under Section 482 Cr.P.C.

Ms. Rebecca M. John, learned Senior Counsel assailed the impugned order by contending that seven left over important witnesses and seven other investigating officers, who had also participated in investigating the case and unearthing the crime has been intentionally and deliberately left out by the prosecutor from being examined as a prosecution witness in the trial to misguide the court, although they were named as witnesses in the charge sheet and their evidences were essential unfold the prosecution case. Seven investigating officers of the C.B.I., who are desired to be summoned and examined had participated in the investigation process and they are and will never be under the control of the accused-applicants and hence trial court committed a manifest error in passing the impugned order and refusing to exercise power vested in him under Section 311 Cr.P.C. It was incumbent upon the trial court to have examined all the witnesses named in the charge sheet, since it was the Court who had summoned the accused-applicants to face the trial. She further argued that to bring out the contradictions in the statements/depositions of witnesses it was but essential for the trial court to have afforded an opportunity

to the accused by accepting their prayer to summon the left over witnesses as court witnesses and examined them before proceeding to record accused statement. It is submitted that to bring contradictions in the statement of the witnesses is essential to challenge the veracity of depositions of prosecution witnesses and their truthfulness. Referring to Section 162 Cr.P.C., and 145 Evidence Act, learned senior counsel had tried to buttress her submissions. Citing the decision of Harnam Singh and others Vs. State 1982 Cr.L.J. 1818 it was urged that unless left over witnesses are examined in the trial it will cause irreparable injury and prejudice to the accused applicants and will make their trial farce and unfair. Denial of opportunity to the accused to bring forth contradictions in the statements of witnesses and thereby challenge entire spectrum of prosecution allegations will only be negation of fair trial to the applicants, contended learned Senior Counsel. Relying upon another decision in Heera Lal alias Nimma Vs. State of M.P. 1998 Cr.L.J. 2585, it was urged that while deciding the prayer for summoning of a witness for examination under Section 311 Cr.P.C. a duty has been casted upon the trial court to arrive at a conclusion in a fair and just manner and it is expected to be guided by a sense of fair play and justice as the primary object to be achieved is to bring out the truth. Learned counsel further relied upon Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others 2004, Cr.L.J. 2050 to submit that trial courts are not expected to be silent spectator or recipient of evidences but it should be lively participant in the trial procedure to do complete and substantial justice. Power under Section 311 of Cr.P.C., read with section 165 of Evidence Act has been conferred for such a purposes and both the powers are vast and wide enough to embrace in it's fold fact situation like the present one and to get elicited all the necessary material from the witnesses to foster cause of justice which is the ultimate goal to be achieved. In a serious charge like the murder, trial court should afford fullest opportunity to the accused in a fair and just manner to defend themselves and whenever necessary to wield both the powers under Section 311 Cr.P.C., and 165 Evidence Act.

While arguing as aforesaid it was acceded by the learned Senior Counsel that prosecution has an unfettered power to examine it's witnesses and decide their number, serial and manner in which they are to be examined and it cannot be compelled to produce any witness. It is the wisdom of the prosecutor which is the guiding factor in such matters but he should be guided by justice and fair play. Since just decision of the case is the responsibility of the trial Court therefore it should not have left entire prosecution case at the mercy of the prosecutor but should have intervened at the appropriate time and manner by resorting to it's power under Section 311 Cr.P.C., and 165 Evidence Act.

For the aforementioned reasons it was urged that trial court should have accepted applicants' application and should have summoned the witnesses and examined them before proceeding to record accused statements and hence impugned order is unsustainable and be set aside with direction to the trial court to summon and examine all fourteen witnesses prior to recording accused statements.

Counsel for the C.B.I. conversely contended that the discretion vested in the prosecutor to decide who is to be examined at it's witness to establish the charge is unfettered and it is his absolute discretion. Accused can't force or compel the prosecutor to toe their line of examination of witnesses. It is not essential for the prosecutor to examine each and every witness cited in the charge sheet irrespective of the fact that his evidence is not essential to unfold the prosecution case. Multiplicity of witnesses who are to narrate the same evidences is not required to sacrifice precious time of the court. It is the quality of evidence that is essential and not the quantity of witnesses to do complete and fair justice. It was further submitted that when investigating officer witness A.G.L. Paul was examined in the trial it was made clear to the Court and the accused that prosecution will not examine any other investigating officer and hence if the accused desired they should have cross examined Paul to their satisfaction but for the reasons best known to them they did not do so. Consequently subsequent application for examining other investigating officers is nothing but is tainted with ulterior motives to delay and linger on the trial, which has been mandated by the Apex Court to be decided expeditiously. It was pointed out that the witnesses who were interrogated by those seven officers were already examined in the trial and they all were cross examined at length by the defence counsel but the accused had failed to get elicited from them any contradiction of significance requiring examination of those investigating officers and consequently the submission that contradictions and omissions are to be put to them is an afterthought development without any real substance in it. Question of prejudice in such a situation does not arise nor it can be said that trial was being conducted in an unfair manner. It was next urged that it is always open to the accused to get summoned those witnesses in their defence and get favourable evidences from them but it cannot compel the prosecution to examine them. Thus it was submitted that present 482 Cr.P.C. is bereft of merits and be dismissed.

I have carefully considered rival submissions and have perused the decisions cited at the Bar. There is no gainsaying of the fact that production of prosecution witnesses is the sole and absolute discretion of the public prosecution. It is for him to state before the Court at the very outset of the trial as to by what evidences he is going to establish the charge against the accused. Who is to be examined and the sequence and manner of examination of it's witnesses are all matters which lies in exclusive domain of the prosecutor with no fetters. No body nor even the court can interfere with such an exercise of power by him. Public Prosecutor in his responsibility is guided only by ethics of fair play and should execute his solemn duty faithfully as an officer of the court, who is also expected to act as a prosecutor and not as a persecutor. Prosecution should make all endeavour to unfold it's case in the chronological order in which incident had occurred and should examine all those witnesses justly and fairly who are essential to unfold it's story. Prosecutor is expected to act in a manner which serves best course in achieving justice without being guided by the ultimate result. Since decades this aspect has been too well settled to be dislodged at this late hours. To have some recollections of the past decisions under the old Cr.P.C., which has not changed the law in the present time, on can have a look into Sukhia Versus Emperor AIR 1992 ALL 266 at page 267; Emperor Vs. Ahirannessa: AIR; 1923 Cal 579 at page 581; Malak Khan Vs. Emperior: AIR 1946 PC 16 at pages 19/20. In Adel Muhammad El Dabbah Vs. Attorney General of Pelestine: AIR 1945 PC 42 at page 45, it has been held by the Court-

"It is not necessary legally for the prosecution to call or tender all the witnesses in the list furnished. The prosecutor has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive."

Recently in Banti alias Guddu Vs. State of M.P. AIR 2004 SC 261, it has been observed by the Apex Court as under:-

"14. The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutor's duty to the Court may require him to produce witnesses from the latter category, also subject to his discretion to limit to one or two among them. But is the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in court about that fact and skip the witness from being examined as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner"

In Darya Singh and others Vs. State of Punjab AIR 1965 SC328 a Full Bench of the Apex Court has held as under:-

"In our opinion, this argument is entirely misconceived. It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion have not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case if the ends of justice require, the Court may even examine such witnesses by exercising its power under S. 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under S. 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require, but that does not justify Mr. Bhasin's contention that the failure of the Court to have exercised its power under S. 540 has introduced a serious infirmity in the trial itself."

In Moirangthem Tomba Singh Vs. State of Manipur 1984 Cr.L.J. 536 it has been observed as under:-

"That apart as submitted by the learned public prosecutor, reviewing on the decision Darya Singh v. State of Punjab (AIR 1965 SC 328) : (1965(1) Cri LJ 350). the duty of the prosecution is normally to examine all

the eye-witnesses but if the selection was made fairly and honestly and not with a view to suppress inconvenient witness from the witness box no adverse inference could be drawn against the prosecution."
Thus so far as the question of compelling the prosecution to examine left over witnesses are concerned it seems to be wholly unmerited contention and is hereby rejected.

Now turning to the power of the court under Section 311 Cr.P.C., it is to be noted that the said power is vested in the Court. It is for the trial court to decide and determine when that power has to be exercised and when not. What will constitute an unfair trial causing prejudice to the accused has to be left to the trial court and High Court should be slow and circumspect in overturning trial court's discretion unless it is shown on the face of the record that non exercise of jurisdiction vested in the trial court has in fact resulted in miscarriage of justice and accused has been denied just and fair trial. Exercise of power under Section 311 Cr.P.C., has also been subjected to many a judicial decisions and it will be worthwhile to have a note of some of those decisions as that will be authentic guiding factor. In Hanuman Ram v. State of Rajasthan and Ors. AIR 2009 SC 69 it has been held by the Hon'ble Supreme Court as under:-

"7. 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 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 Code and empowers 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 enquiry or trial or other proceeding 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 wide the power the greater is the necessity for application of judicial mind."

In Zahira Habibullah Sheikh and Anr. Vs. State of Gujarat and Ors. AIR 2006 SC 1367, it has been laid down by the Hon'ble Supreme Court as under:-

"24. In this context, reference may be made to Section 311 of the Code which 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 a 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 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 witness who are known to be in a position to speak important relevant facts.

25. 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 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 Code and empowers 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 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.
26. 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. Section 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 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.
27. The object of the 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 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 211, 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 Jagat Rai v. State of Maharashtra, (AIR 1968 SC 178)."
In State of Karnataka, Appellant v. Bhaskar Kushali Kotharkar and others: AIR 2004 SC 4333 Hon'ble Supreme Court has held as under:-
"6. In the instant case, the Sessions Judge issued summons to these two witnesses but these police officers did not turn up for giving evidence and Sessions Judge closed the prosecution case as one of the accused had been in prison as an under trial for fairly long period. The counsel for the respondents 1 to 4 though contended that they were serious prejudiced by the non-examination of the investigation officer; this plea could not be substantiated by cogent facts and circumstances. It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161, Cr.P.C. or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr.P.C. In the present case, no such serious contradiction is pointed out in respect of the evidence of the important, eye witnesses PW-1, PW-2 and PW-10. So also the non-examination of head constables who recorded F1 statement is not of serious consequence as PW-1 was examined to prove the fact that she had given the statement before the police. The learned Single Judge was not justified in reversing the order of the Sessions Court by holding that the non-examination of investigating officer and the constable who recorded the FI statement had caused prejudice to the accused."
In the backdrop of such and expounded law, when the contention of applicants' counsel is analysed it becomes evident that no material has been brought forth to come to an opinion that the case of the applicants are being prejudiced. Additional Session's Judge/Special Judge (Anti-Corruption) CBI, Ghaziabad has considered the question of relevance in examining the witnesses at great length and has passed the impugned order. It has rightly come to the conclusion after looking into the facts and circumstances of the case and relevant decisions that there is no reason to allow the application by the applicants accused under Section 311 Cr.P.C./165 Evidence Act. There seems to be no reason to interfere with it's discretion as during the course of the argument learned counsel for the applicants also failed to dislodge the factual findings recorded by the learned trial court at internal pages 4/5 of the impugned judgment. It has rightly been observed that Sri Arun Kumar is not the I.O. of the case and was only an observer of investigation and rest of the police officers S.I. Yatish Chandra Sharma, Pramod Kumar Tanwar, H.S. Sachan, Pankaj Bansal, Mukesh Sharma, Naresh Indora, Dy. S.P. R.S. Kureel all

had conducted partial investigation and it was not essential to examine all the I.Os. For this opinion trial judge has relied upon various decisions mentioned by it in the impugned order. Regarding none police witnesses it has reserved the right to decide that question after hearing both the sides and present is not the appropriate stage to summon them. Learned counsel for the accused applicants also failed to snip these opinions by the learned trial court. Accused has been afforded fullest opportunity to cross examine all the prosecution witnesses at great length (whose statements were recorded by the seven part investigating officers who were sought to be summoned) and no grievance was raised before me on that count and hence it cannot be said that they are facing an unfair trial.

Moreover, I am of the view that the learned trial judge will afford fullest and fair opportunity to the accused to defend themselves in a fair and just manner and their apprehension of having an unfair trial is wholly unfounded. Learned trial Judge is reminded of the law laid down by the Apex Court that he is not to be a tape recorder and a silent recipient of evidences. It is his responsibility to conduct a free and fair trial and I hope and trust that learned trial judge will not abjure his responsibility.

In the end I don't find any legal infirmity in the impugned order requiring any interference by this Court in exercise of inherent power under Section 482 Cr.P.C. and consequently the prayer by both the applicants to quash the impugned order dated 4.5.2013 passed by Additional Sessions Judge/Special Judge (Anti-Corruption) CBI Ghaziabad in Sessions Trial No. 477 of 2012 in the matter of CBI versus Dr. Rajesh Talwar & another, is refused.

I find no merit in this application under Section 482 Cr.P.C. moved by the two accused applicants and the same is dismissed.

Order Date :- 21.5.2013