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A Paper Presentation On

POWER OF COURT UNDER SECTION 311 CODE OF CRIMINAL
PROCEDURE 1973 AND SECTION 165 INDIAN EVIDENCE ACT
1872 WITH LATEST CASE LAWS ON THE SUBJECT

Submitted To

CHHATTISGARH STATE JUDICIAL ACADEMY BILASPUR



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DISTRICT COURT, MUNGELI,

DIVISION BILASPUR (C.G.)

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1. INTRODUCTION

“EXERCISE OF POWERS u/s 311 Cr. P. C AND u/s 165 OF INDIAN EVIDENCE ACT BY THE COURTS TO SECURE THE BEST EVIDENCE RULE AND FOR THE JUST DECISION OF A CASE.”

Amongst the various rules of evidence that have developed over the course of time, the Rule of Best Evidence is one of the foundation stones on which our criminal justice system rests. This rule gains immense prominence in criminal trials, as under the Indian Criminal Justice System, an accused is considered to be innocent until proven guilty and the guilt of the accused has to be proved beyond reasonable doubt and not on a mere preponderance of probabilities, thus imposing upon the prosecution the obligation to adduce the best possible evidence to prove the guilt of the accused.

The rule has been defined to mean - so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it.

In the case of **Mohanlal Shamji Soni vs. Union of India & Anr.**,¹ it has been held by the Supreme Court that -

“...it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue.”

Genesis of this Provision is found in article 21 of the Constitution. Hon“ble Apex Court in many cases has held that fair trial is the main

1. 1991 Supp. (1) SCC 271:1991 SCC (Cri) 595

object of criminal procedure and such fairness should not be hampered or threatened in any manner. A trial primarily aimed at ascertaining truth has to be fair to all concerned and includes the accused, the victims and society at large. Each person has a right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and society. Under our Constitution, as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Accused has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India.

Recently, in the case of **Digamber Vaishnav vs. State of Chhattisgarh**², a three-judge bench of the Hon'ble Supreme Court observed that no attempt had been made by the prosecution to examine the witnesses who were present at the scene of the incident at the relevant time and who had first seen the deceased persons and thus held that the best evidence had been withheld.

Keeping in view of the role of prosecution in any trial in any criminal case and the possibility of miscarriage of justice in cases of lack of duties performed on the part of the prosecution the criminal law specifically the Code of Criminal Procedure and the Evidence Act has empowered the criminal courts to exercise their inherent powers in order to secure the justice to the parties. Amongst numerous provisions of such a kind section 311 and 91 of Cr.P.C and section 165 of the Indian Evidence Act finds its place at a different footing. The conjoint reading of these sections reflects that the criminal courts are not at the mercy of the evidences produced by the prosecution or the defence and empowers them to ensure that justice is rendered by an active role played by the criminal courts.

2. Criminal Appeal Nos. 428-430 of 2019.

2. CONCEPT OF FAIR TRIAL vis-à-vis POWERS OF COURT UNDER SECTION 311 OF Cr.PC & SECTION 165 OF INDIAN EVIDENCE ACT

Before we advert to the ambit and scope of Section 311Cr.P.C, it is imperative to dwell upon the concept of “fair trial”. There is no denial of the fact that fair trial is an insegregable facet of **Article 21** of the Constitution. Hon’ble Supreme Court on numerous occasions has emphasized on the fundamental conception of fair trial as the majesty of law so commands.

A three-Judge Bench speaking through Krishna Iyer, J. in **Maneka Sanjay Gandhi and another v. Rani Jethmalani** (1979)4 SSC 167 , though in a different context, observed:-

“Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hyper sensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner’s grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate when the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.”

The aforesaid principle has been stated in the context of transfer of a case but the Court has laid emphasis on assurance of fair trial. It is worthy to note that in

the said case, the Court declined to transfer the case and directed the Magistrate to take measures to enforce conditions where the Court functions free and fair and agitational or muscle tactics yield no dividends. However, liberty was granted to the appellant therein to renew prayer under Section 406 Cr.P.C. Stress was laid on tranquil court justice. It was also observed that when the said concept becomes a casualty there is collapse of our Constitutional order.

In **Rattiram and others v. State of Madhya Pradesh**³ speaking on fair trial the Court opined that:-

“... Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.”

The purpose of citing above judgements is just to highlight that the powers vested in criminal Courts under sections 311 of Cr.PC or under section 165 of Indian Evidence Act are not arbitrary powers of the Courts rather it is coupled with the corresponding duties towards the litigant and the society at large to use such discretionary powers in order to ensure fair trial and justice by obtaining the best evidence in any criminal trial.

3. (2012) 4 SCC 516

3. POWER OF COURT TO SUMMON MATERIAL WITNESS or EXAMINE PERSON PRESENT

Before entering into the intricacies of law involved in section 311 of Cr.P.C i.e. power to summon material witness or examine person present by the competent Court, let us briefly see what it states. Section 311 states –

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.

Section 311 is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, that first part gives purely discretionary authority to the criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case “**Jamatraj Kewalji Govani v. State of Maharashtra**”⁴ . Where in a trial of dowry case, the Public Prosecutor fails to produce material witnesses, it is the bounden duty of

4. AIR 1968 SC 178; Avtar Singh Bhasin v. Hari Pal Singh, 1995 (1) Crimes 841 (HP) ; Pradeep Kumar Agarwal v. State, 1995 (1) Crimes 390 (Ori).

court to summon them on its own. “**Govind Ram v. State of U.P.**”,⁵.

When the legislature has used the words “may” and “shall” in the same provision, it means the legislature did not leave it to the discretion of the Court to interpret both the expressions. It is clear that the word ‘shall’ in the second clause is mandatory and imperative in nature and character while the word ‘may’ in the first clause is directory.

In order to enable the Court to find out the truth and render a just decision the salutary provisions of section 311 are enacted where any Court by exercising its discretionary authority at any stage of the enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute **Mohanlal Shamji Soni vs. Union of India**,⁶. The aid of this section should be invoked only with the object of discovering relevant fact or obtaining proper proof of such facts for a just decision of a 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. It should not be used for filling up the lacuna 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 parties⁷. It is the cardinal rule in

5. 1999 Cr LJ 1955 (All): 1999 (1) Crimes 101.

6. AIR 1991 SC 1346.

7. Supra.

the law of evidence that the best available evidence should be brought before the court. Section and 60, 64, and 91 of the evidence act are based on this rule.

- **Power of Court Whether Unfettered:**

Under the section, a court has unrestricted powers of summoning a witness. The only restriction is that this power should not be exercised to save parties from trouble and expense. Subject to this, 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. The very usage of the words such as “any Court”, “at any stage” or “any inquiry, trial or proceedings” and “any such person” clearly spells out that this section is expressed in its widest possible terms and do not limit the discretion of the Court in any way ⁸.

There is no limitation as to the power of the Court arising from the stage to which the trial may have reached, provided the Court is bonafide of the opinion that for the just decision of the case, the steps must be taken. This section confers a wide discretion on the Court to act as the exigencies of justice require “**Zahira Habibullah H. Sheikh vs. State of Gujrat**”⁹.

- **Courts Discretion How To Be Exercised:**

It only needs a discretion in the court to summon any person as a witness, a discretion which should, as a matter of course, be exercised judicially and for the proper decision of the case. Rules which the court must bear in mind when examining court witnesses are-

8. Mohan Lal v. Union of India (1991 Supp (1) SCC 271).

9. (2004) 4 SCC 158

- a. That the prosecution and the accused or both equally entitled to cross examine a court witness, and

That if the evidence of the Court witness is prejudicial to the accused, opportunity to rebut the evidence should be given to the accused.

This section confers very wide powers upon a court. But the wider the powers, the greater the exercise of jurisdiction is required of the magistrate; If section 311 is read with section 244 of the Cr.P.C, it is apparent that by this section, it was not intended that the magistrate should exercise his powers at the bidding of any person, but that the powers are given to prevent any danger or miscarriage of justice, just because some particular witness has not been called. Under the section the magistrate may summon any person as a court witness at any stage of proceedings, but in fairness to the parties and with a view to afford them an opportunity of proper cross examination, he should generally inform them beforehand of the names etc. of those witnesses.

- **Witness Whose Evidence is Essential to Just and Proper Decision of the Case or Ends of Justice:**

In such case Once the Court reaches a conclusion that the evidence of any particular witness neither examined by the prosecution nor by the defence, appears to the Court essential to the just decision of the case, the Court in order to perform the paramount duty cast upon it, namely to do justice between the parties, must examine such a witness untrammelled and unfettered by any other provision of the Code. The determinative factor under section 311 is whether the summoning/ecalling of the witness is

essential to the just decision of the case. The test of “just decision” is not only limited 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 this section merely because the evidence supports the case of the prosecution and not that of the accused.

- **Meaning of ‘At Any Stage of Inquiry, Trial’:**

The section gives the Court ample powers to summon any material witness at any stage of any inquiry, trial or other proceeding. When the trial Court is of the opinion that summoning a witness is essential to the just decision in the case, the objection that the application to summon the witness under this section moved by the complainant, is belated by more than nine months, cannot prevail. ¹⁰

Even after both parties have closed their cases it is open to the Magistrate to summon any person as a witness if his evidence appears to him to be essential to the just decision of the case. ¹¹

The Court can summon the witness under section 311 at any stage of the trial. Such a witness has to be called as a prosecution witness, if summoned on behalf of the prosecution and likewise defence witness if summoned on behalf of defence and not Court witness. ¹² However, it is improper to recall witness after the final arguments were heard. The power should be exercised

10. Hukum Chand Kaushal vs. Subash Sikri; 1975 CLR 360.

11. Manoj Jha vs. State of Jharkhand, AIR 2003 Jhar HCR 1025.

12. Vijay Kumar vs. State of UP, 2012 CrLJ 1696.

only in suitable cases when the exigencies of the situation impel the Court to proceed under this section. Similarly, when the case is posted for judgement it is not illegal for the Magistrate to order issuance of summons to a person to be examined as a Court witness, though it has been held that where a case is posted for judgment, the trial of the case stands terminated within the meaning of section 353 of Cr.P.C and the witness cannot be examined under section 311.¹³ On the other hand, when the case is posted for arguments and for judgement the trial of the case is not terminated and the witness can be examined under section 311.¹⁴

It is important to note that the Court has power to summon witnesses under section 311 even at the stage of taking cognizance of the offence for the just decision of the case. Where the Court summons a witness under section 311 at the time of taking cognizance of the offence, the accused has no right to cross-examine such witness.¹⁵

Ordinarily the Court may intervene under this section after the closure of evidence, and not before that, for it may not be possible for the Court to form a bona fide opinion as to the necessity of calling a witness before evidence is closed on the side of the prosecution. There is nothing, however, in the language, of the section to say, that the Court cannot make an order under it even before the prosecution evidence is closed.

13. K.Sanjeedram vs. Secretary, Thalakulathur Gram Panchayat, 2004 CrLJ 555 (Ker).

14. P.T.Josep vs. K.K.Rajappan, 2004 CrLJ 727.

15. Sk. Siraj vs. State of Orissa, 1994CrLJ 2410.

- **Examination of Essential, Material Witness:**

The court should exercise its inherent power under the section in the interest of justice and to serve the cause of justice to examine the essential witnesses, ¹⁶ for ex. doctor or a investigation officer in a murder case. The section gives a power to the Court to summon a material witness or to examine a person present in Court or to recall a witness already examined. It

is not only the power rather the duty of the Court to examine all material witnesses for the just decision of the case. ¹⁷ Where a witness is a material witness, where adjournments were not granted earlier for producing the witness, rejection of prosecution prayer for summoning the witness is not proper. ¹⁸

- **Court Not to Fill up Omission by the Prosecution:**

Section 311 should not be invoked by the Court to fill the lacuna in the prosecution case. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case, but an oversight in the management of the prosecution cannot be healed as irreparable lacuna. ¹⁹ Where the prosecution did not examine a single witness during a period of five years and as such the prosecution evidence was closed and the statements of the accused persons were recorded, the Magistrate was fully justified in rejecting the informant's application under

16. Nagina vs. State of Bihar ; 1991 Cr LJ 1195 (Pat-DB)

17. State of Gujrat vs. Senma Savabhai Bhikhabhai; 1995 CrLJ 3061 (Guj-DB)

18. Pradeep Kumar vs. State; 1995 CrLJ 76.

19. Rajendra Prasad vs. Narcotic Cell, Delhi: AIR 1999 SC 2292.

section 311 for summoning the prosecution witness. ²⁰ However where a witness has done mistake in giving evidence, he can be summoned under section 311 of Cr.P.C, for rectifying it's mistake and it does not amount to filling up gap in prosecution case. ²¹ But on the other hand, the prayer at defence stage to examine a witness to prove a document shall be refused.

- Hon'ble The Supreme Court observed that an application under Section 311 Cr.P.C cannot be dismissed merely on the ground that it will lead to filling in the loop holes of the prosecution's case. The power must be exercised where the court finds that any evidence is essential for the just decision of the case and is not constrained by the closer of evidence. **“Versha Garg v/s State of M.P. 2022 LiveLaw (SC) 622”**
- **Whether Application u/s 311 Can Be Permitted in the Appellate Court :**

Power to summon material witnesses or recall or re-examine any person already examined, as contemplated under section 311 of Cr.P.C can be exercised by the trial court as well as by the appellate court. Wordings of section 311 indicate that such power could be exercised by any court at any stage of any enquiry, trial or other proceedings under this code. This is for all intents and purposes would also include hearing of the appeal by the Court of Session. Mere fact that section 311 is incorporated under chapter XXIV which deals with general provisions applicable to enquiries and trial

20. Saraswati Devi vs. State of Jharkhand; 2004 Cr LJ 1512.

21. Valsamma vs. Satheesh Kumar, Cr LJ 1574.)

would not be sufficient to hold that such power can only be exercised at the stage of any enquiry or trial and not at appellate stage.

- **Other Proceedings:**

The power under the section may be exercised in any enquiry, trial or other proceedings under the Code. The section is quite general and applies to all proceeding and is not limited in its operation by any other provision in the court. The words other proceeding includes proceedings under section 145.²² A witness may be examined under the section in such proceedings, even though his affidavit may not have been filed by either side; ²³ but this power should not be so used as to enable a party to circumvent The provisions of subsection (4) of section 145. It is a special power that should be used sparingly on appropriate occasions.²⁴

- **Any Person as a Witness:**

There is no restriction as to the person who may be examined as a witness under this section. The Court is competent to summon any person as a court witness at any stage of the proceedings but he should inform the parties before hand of the names of such witnesses, so as to afford them an opportunity of proper cross-examination. The expression any person includes:

- a. Witness present in the court: When witnesses are present in court and the party wants to examine them and there is not even a

22. Bishedhar Prasad vs. Mahadeo, 1961 All LJ 611.

23. supra

24. 4Harihar Pati vs. BodaPitel Naik, (1962) 1 CrLJ 60.

suggestion that the party wants to delay the proceedings then the court should not refuse to examine them.²⁵

A party to the case: A party to the case may be examined as a court witness, if his evidence is considered essential to the just decision for the case not of course including an accused person.

Police officials: If it becomes necessary to examine a police official in respect of the statement of the witnesses recorded by him, then even though the defence may not have named them, the court should not refuse to summon them as court witnesses.

Discharge persons: There is no law or principle which prevents a person who has been suspected and charged with an offence but discharged by the magistrate for want of evidence, being afterwards admitted as a witness for the prosecution.²⁶

Medical Witness: When the defence is based on section 84 of the Indian Penal Code the sessions judge may acting under the section 84 and section 165 of the Evidence Act, ascertain the behaviour exhibited by the prisoner during the years of his life previous to the homicide and if the accused has been kept in a lunatic asylum, record material evidence of the facts observed there.

25. Harblas vs. Krishan Devi, 1982 CrLT 453 (P & H).

26. Queen vs. Behary Lall Dose, 7WR 44.

Accused or Accomplice: This section does not seem to authorise the examination of the accused as a witness, not even at the stage of an appeal, as the appeal is nothing but the continuation of the original case. However, an accomplice if not accused in the same case is a competent witness and can be examined under this section. ²⁷

Witness Previously Given Up: Court cannot refuse request - The prosecution by merely making an endorsement that a particular witness is given up is not stopped from examining that witness later on before it closes its case. Therefore, upon a request made by the prosecution, to examine such witness the court will not be justified in refusing the request unless it gives reason as to why the examination of such witness, who were given up, is not necessary for a just decision of the case. Even otherwise the court can examine these witnesses as Court witnesses under this section. ²⁸

- **Court may Suo Moto Summon :**

If the conditions of section 311 satisfied, the court can call the witness not only on the application of either party, but on its own motion. The court may suo moto to summon on a public analyst where examination is necessary to rectify mistake and if no prejudice is being caused to the accused. Where the prosecution has not examined the informant and investigating officer who were material witnesses, the Court should of its

27. Re B.K.Narayan Reddy, AIR 1941 Mad. 324.

28. Syed Mohammad vs.K.C. Raman, (1964)1 CrLJ 100 at 101 (Ker.).

own motion summon such material witnesses for the just decision of the case ²⁹.

- **Court Has No Power to Discover Witnesses by Personal Inquiry:**

Section 311 simply provides that a Magistrate may summon any witness whose evidence appears to be necessary but the power to summon a witness does not by any means imply a power to discover such witness by personal inquiry out of court. Where the Magistrate makes a personal inquiry out of court without notice to the parties and as a result summons certain witnesses, his action is improper and not in accordance with law and disqualifies him from conducting the trial.

4. Guidelines for exercising powers u/s 311 CrPC

In the case noted below, the Hon'ble Supreme Court has laid down following guidelines and governing principles for exercising powers u/s 311 CrPC to summon, recall or re-examine any person as witness :

1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?
2. The exercise of the widest discretionary power under Section 311, CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

29. Palacharla Rama Rao vs. State of A.P , 2002 CrLJ 4189 (AP).

3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.
4. The exercise of power under Section 311, CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
6. The wide discretionary power should be exercised judiciously and not arbitrarily.
7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him further examination in order to arrive at a just decision of the case.
8. The object of Section 311, CrPC simultaneously imposes a duty on the Court to determine the truth and to render a just decision.
9. The Court arrive at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.
10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.
12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
14. The power under Section 311, CrPC must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. See: **Rajaram Prasad Yadav Vs. State of Bihar, AIR 2013 SC 3081 (para 23)**

5. When should an application u/s 311 CrPC be not allowed?

An application moved under Section 311 CrPC for summoning a witness ought not be allowed where:

1. It is an abuse of the process of the Court; or
2. The prosecution's evidence was closed long back.
3. The reasons for non-examination of the witnesses earlier are not satisfactory;
4. Where the application is produced only to cause ordinary delay.
5. On the ground of incompetence or change of counsel : See : **State NCT of Delhi Vs. Shiv Kumar Yadav, (2016) 2 SCC 402.**
6. On the ground of illness of counsel of accused or change of counsel : See : **State of Haryana Vs. Ram Mehar & Others, AIR 2016 SC 3942.**

6. SECTION 165 OF THE INDIAN EVIDENCE ACT, 1872

Section 165 of the Indian Evidence Act, 1872 (in short 'IEA') reads:

“The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this Section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.”

Whenever an examination-in-chief of a witness is done by a party, the opposite party will always have a right to cross examination. However when the court puts the question under section 165 Evidence Act that cannot be termed as Examination in chief and therefor the opposite party per section will not have a right to cross examination. Nevertheless the court has the discretion to allow such cross examination.

Connection with sec 162 Criminal Procedure Code 1973:

-Does sec162 Cr. P.C. prohibits the court also from asking question to the witnesses on the basis of previous police statements recorded under section 161(3) Cr.P.C. or any such statement made otherwise to the investigating officer in the course of investigation?

- No, the limitaion provided u/s 162 Cr.P.C is applicable only to the parties.

Raghunandan v/s State of UP (1974 SC).

This Section invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to

get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.

The Judge contemplated by Section 165 is not a mere umpire at a combat between the lawyers for the parties, whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses so that every point is brought out, is not fulfilling his duty. The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.

“The power of asking questions is of obvious utility in a country like India, where in the vast majority of cases, no advocate is employed, but the Judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious witnesses.”

Under Section 165, the Court has ample power and discretion to interfere and control conduct of trial properly, effectively and in a manner as prescribed by law. While conducting trial, Court is not required to sit as a silent spectator or

umpire but to take active part within the boundaries of law. The Supreme Court in **Ramchander v. State of Haryana**³⁰ held:- “the court cannot play the role of the prosecution or the defense counsel rather it shall let them do their job and it is only when it itself has some questions to ask, it shall take recourse to Sec 165.”

“ presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may 'ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant.

The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial. (Session Judge, Nellore v. Intha Ramana Reddy, ILR 1972 AP 683: 1972 Cri LJ 1485).

With such wide powers, the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not' assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be

30. (1981) 3 SCC 191.

usurped by the Judge, by descending into the arena, as it were. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a Judge adopting a much too stern an attitude towards witnesses has been explained by Lord Justice Birkett:

People accustomed to the procedure of the Court are likely to be over-awed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding Judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence they may wish, but the parties may begin to think, quite wrongly it may be, that the Judge is not holding the scales of justice quite eventually"

In **Ritesh Tewari v. State of Uttar Pradesh**,³¹ the Supreme Court held that every trial is a voyage of discovery in which truth is the quest. The power under Section 165 of the Indian Evidence Act is to be exercised with the object of subserving the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The relevant portion of the judgment is reproduced hereunder: -

"Section 165 of the Evidence Act, 1872 empowers the Court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not

31. (2010) 10 SCC 677.

permitted to tell the Court that the question put to him is irrelevant or the facts the Court wants to ascertain are not in issue. Exercise of such a power is necessary for the reason that the judgment of the Court is to be based on relevant facts which have been duly proved. A Court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an power conferred upon the Court to elicit the truth and to act in the interest of justice.

*A wide discretion has been conferred on the Court to act as the exigencies of justice require. Thus, in order to discover or obtain properproof of the relevant facts, the Court can ask the question to the parties concerned at any time and in any form. "Every trial is voyage of discovery in which truth is the quest". Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the Court can put questions to the parties, except those which fall within exceptions contained in the said provision itself. (Vide: Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178; 1968 Cri LJ 231 and Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors. 2004 (4) SCC 158; 2004 SCC Cri 999)". In case of State of **Rajasthan v/s ANI (1997 SC): "court expected to be pro-active but should exercise self restraint."** In the case of **Besahulal Yadav v/s State of C.G. CRMP no. 574/2022 Hon'ble High Couert of CG.** Held "The courts are required to take a participatory role during trial but can not loose it's balance. It is also not expected that until and unless the statement in*

support of the prosecution is made, the question can be put to the witness in exercise of power under Section 165 of the Evidence Act. When the courts have exercised such power and when the leave of the court was asked for to cross-examine to eliminate the further truth, having denied, it would result into trial not eclipsed by any ambiguity.”

7. INTER SE RELATION BETWEEN SECTION 311 Cr.P.C & SECTION 165 OF THE INDIAN EVIDENCE ACT

Section 311 of Cr.PC and section 165 of the Indian Evidence Act, 1872 are intended to arm the Court with extensive powers required for the purpose of getting at the truth. The effect is that in order to get the bottom of the matter the Court will be able to look and inquire into every fact whatsoever. It should, however, be borne in mind that Courts must act within the limits which the law places upon their powers in dealing with cases before them. Just as it is not open to a Court in civil litigation to compel a party to make a particular kind of pleading or to amend its pleading, so also it is beyond its competence to virtually oblige a party to produce and examine any particular witness. It is no doubt the duty of the Court not only to do justice but to ensure that justice is done. It has to bear in mind that it must act only in accordance with the law and not otherwise.

In **Zahira Habibulla H. Sheikh v. State of Gujarat**,³² the Supreme Court held that Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The relevant portion of the judgment reads: -

32. (2004) 4 SCC 158.

“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 evidence collecting 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 ultimate objective i.e. truth is arrived at. This becomes more necessary when 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.”

8. CONCLUSION

Every criminal trial is a voyage of discovery in which truth is the quest. The power under Section 311 Cr.P.C. and Section 165 Indian Evidence Act 1872 has been conferred upon the Court to ensure justice, it is clear that it is obligatory on the part of the court to summon the witness in case his evidence appears to be essential for just decision of the case and such power may be exercised at any time. However, the power is circumscribed by the principal underlying the section, that is, the evidence to be obtained must be essential for just decision of the case.



*Thank
you*

