

Summoning of Witnesses u/s 311 CrPC

S.S. Upadhyay

Former District & Sessions Judge/

Former Addl. Director (Training)

Institute of Judicial Training & Research, UP, Lucknow.

Member, Governing Body,

Chandigarh Judicial Academy, Chandigarh.

Former Legal Advisor to Governor

Raj Bhawan, Uttar Pradesh, Lucknow

Mobile : 9453048988

E-mail : ssupadhyay28@gmail.com

Website: lawhelpline.in

1. **Object behind Section 311 CrPC:** The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthens the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested in court under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice. See: **V.N. Patil Vs K. Niranjan Kumar (2021) 3 SCC 661**
2. **Application for recall of witness for further cross examination when not to be allowed** : where application u/s 311 CrPC was moved by the accused on the ground that the PW has to be cross examined on some important points but the important points were not mentioned in the application, the revision against order rejecting the application by trial court u/s 311 CrPC was dismissed. See : **Anurag Srivastava Vs. State of U.P. 2010 (71) ACC 504 (All)**
3. **An application u/s 311 CrPC cannot be rejected merely on ground that it seeks to fulfill lacuna or loop-holes:** The Supreme Court observed that an application under Section 311 CrPC cannot be dismissed merely on the ground that it will lead to filling in the loopholes of the prosecution's case. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case and is not constrained by the closure of evidence. See:

- (i) Varsha Garg Vs State of Madhya Pradesh, Judgment dated 08.08.2022 of the Supreme Court in Criminal Appeal No. 1021 of 2022
- (ii) J.K. International Vs State (Govt. of NCT of Delhi) (2001) 3 SCC 462
- (iii) Zahira Habibulla H. Sheikh v. State of Gujarat (2004) 4 SCC 158
- (iv) Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1
- (v) Mohanlal Shamji Soni v. Union of India (1991) Supp (1) SCC 271
- (vi) Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110

4. Duty of court to procure evidence : It is the duty of court to procure all evidence relevant for case. See : **Santosh Pathak Vs. State of U.P., 2010 (70) ACC 548(All).**

3(B). Supreme Court 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 :

- (i) 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?
- (ii) 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.
- (iii) 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.
- (iv) 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.
- (v) 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.

- (vi) The wide discretionary power should be exercised judiciously and not arbitrarily.
- (vii) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
- (viii) The object of Section 311, CrPC simultaneously imposes a duty on the Court to determine the truth and to render a just decision.
- (ix) 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.
- (x) 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.
- (xi) 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.
- (xii) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
- (xiii) 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.
- (xiv) 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*)

3(C). 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:

- (i) It is an abuse of the process of the Court; or
- (ii) The prosecution's evidence was closed long back.
- (iii) The prosecution's evidence was closed long back;
- (iv) The reasons for non-examination of the witnesses earlier are not satisfactory;
- (v) The accused had been denied bail and are in custody as under trials for over 6.5 years; and
- (vi) The right to a speedy trial is an integral component of Article 21 of the Constitution which mandates fairness to the accused. See: **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation, (2019) 14 SCC 328.**

3(C). Duty of court while exercising power u/s 311 CrPC: The object underlying Section 311 CrPC is that there may not be a failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor for exercise of power u/s 311 CrPC is whether it is essential to the just decision of the case. It is however to be borne in mind that the discretionary power conferred u/s 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercising judicious discretion." See: **V. N. Patil Vs. K. Niranjan Kumar, (2021) 3 SCC 661**

3(D). Calling witness for cross examination after long gap deprecated by the Supreme Court : It is not justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time: and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that t civilized and orderly society thrives on the rule of law which includes "fair trial" for the accused as well as the prosecution.Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-9n-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of. In the instant case the cross-examination has taken place after a year and 8 months allowing

ample time to pressurize the witness and to gain over him by adopting all kinds of tactics. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. See : **Vinod Kumar Vs. State of Punjab, (2015) 3 SCC 220.**

4. **Court has power u/s 311 CrPC to summon more witnesses even after conclusion of prosecution case** : Court has power u/s 311 CrPC to summon more witnesses even after conclusion of prosecution case. See : **Amrinder Singh Vs. Prakash Singh Badal, (2009) 6 SCC 260 (Three-Judge Bench)(para 46).**
- 5(a). **A witness cannot be recalled u/s 311 CrPC merely because of incompetence or change of counsel** : A witness cannot be recalled u/s 311 CrPC merely because of incompetence or change of counsel. See : **State NCT of Delhi Vs. Shiv Kumar Yadav, (2016) 2 SCC 402.**
- 5(b). **A witness cannot be recalled u/s 311 CrPC on the ground of illness of counsel of accused or change of counsel** : Merely because the accused persons are imprisoned and they changed their counsel due to his illness and because of the failure of the counsel to put certain questions to the witnesses, a witness cannot be recalled u/s 311 CrPC on such grounds. Concept of fair trial cannot be limitlessly stretched. See : **State of Haryana Vs. Ram Mehar & Others, AIR 2016 SC 3942.**
6. **Re-examination of witness u/s 137 & 138 Evidence Act not limited to ambiguities in cross-examination** : Re-examination of witness u/s 137 & 138 Evidence Act is not limited to ambiguities in cross-examination. If Public prosecutor feels that certain answers require more elucidation from witness, he has the freedom and right to put such question as he deems necessary for that purpose, subject of course to control of court in accordance with other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination. See :
 - (i) **Vinod Kumar Vs. State of Punjab, (2015) 3 SCC 220**

(ii) Rammi Vs. State of MP, (1999) 8 SCC 649.
