the case. Had that been so the plaintiff would have been spared the tribulations of knocking at the doors of the highest court of the land. The courts below fell into error in going into the question of privity of contract and lost sight of the basic issue involved in the case.

11. It was a case where perhaps action could have been taken against the 1st defendant as he was apparently guilty of perjury in not only denying his signatures on Exh. P-1 and Exh. P-2 but also on the written statement and the vakalatnama filed by him.

12. We allow the appeal, set aside the judgments of the trial court as well as of the High Court and decree the suit of the plaintiff for Rs 1,36,167 against the 1st defendant with costs throughout. The plaintiff shall also be entitled to interest at the rate of 10% per annum on the principal amount of rupees one lakh from the date of institution of the suit till realisation.

(1999) 6 Supreme Court Cases 110

(BEFORE K.T. THOMAS AND M.B. SHAH, JJ.)

RAJENDRA PRASAD .. Appellant;

Versus

NARCOTIC CELL
THROUGH ITS OFFICER IN CHARGE, DELHI .. Respondent.

Criminal Appeal No. 621 of 1999†, decided on July 12, 1999

Criminal Procedure Code, 1973 — S. 311 — Witnesses can be recalled or resummoned though power under this section cannot be exercised to fill up lacuna in prosecution case — Bar against filling "lacuna in prosecution case" as laid down in 1991 Supp (1) SCC 271 — Meaning of — Oversight or mistakes during conducting of case cannot be understood as lacuna and so can be corrected — Lacuna is the inherent weakness or a latent wedge in the matrix of prosecution case — Criminal Procedure Code, 1898, S. 540 — Words and phrases — "Lacuna in prosecution case"

The appellant was facing trial along with certain other persons for offences under Narcotic Drugs and Psychotropic Substances Act, 1985. As the trial proceeded almost to the end when the prosecution and the defence closed their evidence on 19-9-1997, the case was posted for further steps. Nevertheless, subsequently, the case stood posted to some other days also. On 7-3-1998, at the instance of the prosecution two of the witnesses, who were already examined, were resummoned for the purpose of proving certain documents for prosecution. They were further examined and the evidence was once again closed and the case was posted for hearing arguments. On 7-6-1998, the Public Prosecutor moved an application seeking permission to examine PW 21 and two other persons. Though the application was stoutly opposed by the accused's counsel the trial court allowed it in exercise of its power under Section 311 of the Code.

† From the Judgment and Order dated 23-2-1999 of the Delhi High Court in Crl. R. No. 64 of 1999

The appellant challenged the said order in revision before the High Court which was dismissed. Dismissing the appeal by special leave, the Supreme Court

Held :

A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up. (Para 7)

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. (Para 8)

It cannot be said as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at. (Para 12)

Mohanlal Shamji Soni v. *Union of India*, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 : AIR 1991 SC 1346, *explained* and *followed*

Jamatraj Kewalji Govani v. *State of Maharashtra*, AIR 1968 SC 178 : (1967) 3 SCR 415; *Ram Chander* v. *State of Haryana*, (1981) 3 SCC 191 : 1981 SCC (Cri) 683 : AIR 1981 SC 1036, *followed*

S-M/TZ/21355/CR

Suggested Case Finder Search Text (*inter alia*) :

crpc (311 or 540)

search in catchwords only

Advocates who appeared in this case :

Manoj Swarup, Ms Lalita Kohli and Ms Maulini Swarup, Advocates, for Manoj Swarup & Co., Advocates, for the Appellant.

Chronological list of cases cited ***on page(s)***

1. 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 : AIR 1991 SC 1346, *Mohanlal Shamji Soni* v. *Union of India* 113*d*, 114*a*
2. (1981) 3 SCC 191 : 1981 SCC (Cri) 683 : AIR 1981 SC 1036, *Ram Chander* v. *State of Haryana* 114*d-e*
3. AIR 1968 SC 178 : (1967) 3 SCR 415, *Jamatraj Kewalji Govani* v. *State of Maharashtra* 114*c*

The Judgment of the Court was delivered by

THOMAS, J.— Leave granted.

2. Can a trial court permit lacuna in prosecution evidence filled up? The conventional concept is that the court should not do so. But then, what is meant by lacuna in a prosecution case, has to be understood before deciding the said question one way or the other.

3. The present case provides an occasion to decide the said question. The appellant is now facing trial along with certain other persons before a Court of Session for offences under Sections 21, 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellant is now on bail pursuant to an order granted by the High Court of Delhi. As the trial proceeded almost to the end when the prosecution and the defence closed their evidence on 19-9-1997, the case was posted for further steps. Nevertheless, subsequently, the case stood posted to some other days also. On 7-3-1998, at the instance of the prosecution two of the witnesses, who were already examined, were resummoned for the purpose of proving certain documents for prosecution. They were further examined and the evidence was once again closed and the case was posted for hearing arguments. It appears that arguments were heard in piecemeal on different days. On 7-6-1998, the Public Prosecutor moved an application seeking permission to examine PW 21 (Dalip Singh, SI) and two other persons. Though the application was stoutly opposed by the accused's counsel the trial court allowed it in exercise of its power under Section 311 of the Code of Criminal Procedure (for short "the Code") and summons were issued to the witnesses as per its order dated 8-1-1999.

4. The relevant portion of that order of the trial court is the following:

> "In order to find out whether the CFSL Form accompanied the sample packet or not, it has been repeatedly held by the Hon'ble High Court that the Road Certificate should be produced to make things clear in this respect. It cannot be denied that it is an old case and directions have been issued several times to expedite the trial but at the same time when the witnesses are available the prosecution cannot be debarred from examining them. In the present case, cross-examination of PW 4 was deferred by learned Additional Public Prosecutor. Cross-examination of PW 21 by the defence counsel was deferred but thereafter he was never summoned for cross-examination. There was negligence on the part of the Public Prosecutor as he closed evidence twice without verifying whether cross-examination of all the witnesses has been concluded or not. However, in the interest of justice, I allow the application to the extent that PW 21 Dalip Singh be recalled for cross-examination. The interest of justice demands that things should be clear before the Court to assist it to meet the ends of justice."

5. The appellant challenged the said order in revision before the High Court of Delhi. As it was an interlocutory order the question whether a revision was not maintainable as per Section 397(2) of the Code was not

considered by the High Court. Nevertheless, the High Court entertained the revision and dismissed it as per the impugned order. According to the learned Single Judge who dismissed the revision "there are certain circumstances which have been mentioned in the order of the Sessions Judge which forced him to pass the order".

6. Learned counsel for the appellants contended that the trial court failed to appreciate that in the garb of exercise of powers under Section 311 of the Code a court cannot allow the prosecution to re-examine prosecution witnesses in order to fill up lacuna in the case. Lacunae, as pointed out by the learned counsel, were the following:

(*a*) PW 21 Dalip Singh was never tendered by the prosecution for cross-examination.

(*b*) PW 4 Suresh Chand Sharma was also not cross-examined by the State.

(*c*) There was no link evidence to correct the testimony of PW 28 H/C Jai Prakash. That aspect was highlighted during arguments in the trial court, before the Court resorted to the impugned steps.

The above contention was based on the observation made by this Court in *Mohanlal Shamji Soni* v. *Union of India*[1] that the court while exercising its power under Section 311 of the Code shall not use such power "for filling up the lacuna left by the prosecution".

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

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.

1 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 : AIR 1991 SC 1346

9. The very same decision *Mohanlal Shamji Soni* v. *Union of India*[1] which cautioned against filling up lacuna has also laid down the ratio thus: (AIR Headnote)

> "It is therefore clear 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."

10. Dealing with the corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was) speaking for a three-Judge Bench of this Court had said in *Jamatraj Kewalji Govani* v. *State of Maharashtra*[2] as follows:

> "It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case."

11. Chinnappa Reddy, J. has also observed in the same tone in *Ram Chander* v. *State of Haryana*[3].

12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at.

13. The appeal is accordingly dismissed.

---

2 AIR 1968 SC 178 : (1967) 3 SCR 415

3 (1981) 3 SCC 191 : 1981 SCC (Cri) 683 : AIR 1981 SC 1036