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Vital v. Asehraj Chopra, 1978 Crl.L.J. 764 is also germane to decide this issue. That case also relates to a complaint filed under Sec.506, Penal Code for defamation. In that case also, according to the complainant, the offence under Sec.500, I.P.C. was committed on March 15, 1972, which was the date of the offence within the meaning of Sec.469(1)(a) of the Code and the period of three years limitation would be calculated with reference to that date for purposes of the bar provided by Sec.468. But the Apex Court has said that as has been stated, the complaint under Sec.500, I.P.C. was filed on February 11,1976, much after the expiry of that period. It was therefore not permissible for the Court of the Magistrate to take cognizance of the offence after the expiry of the period of limitation. Even in that case, the Court took into consideration only the date of filing of the complaint and not the date on which the Court took cognizance of the offence. The Apex Court in that case has held a complaint under Sec.500. Penal Code for defamation will be barred if filed after three years of the commission of the offence. The emphasis is on the term "filed" and not on the phrase "taking cognizance of the offence".

5. No doubt while taking cognizance of the offence, the learned Magistrate has to apply his mind and decide. But unfortunately, in most of the cases, where strict period of limitation is prescribed, the Magistrates do not take care to take cognizance of the offence within the period of limitation. It is unfortunate that such lethargic attitude on the part of the Magistrate concerned has to be condemned and a sense of duty is instilled to take cognizance of the offence if the complaint or police report is otherwise in order.

6. Insofar as Sec.468, Crl.P.C. is concerned, as discussed above, though the phrase used is "taking cognizance", according to the various rulings of the Apex Court, it virtually amounts to only making of the complaint. The law prescribes the period of limitation even in the general law of limitation only for filing suits and making of complaints, etc. and not for taking cognizance as such by the Courts concerned. In that view of the matter, since insofar as this case is concerned, the complaint was filed well within the expiry period of limitation, this Court is unable to set aside the order of the learned Magistrate who rejected the request of the accused petitioners. Therefore, the petition stands dismissed. Consequently connected Crl.M.Ps. are closed.

Narendra Kumar Mohnot v. State by Deputy Superintendent of Police, Central Bureau of Investigation, Special Crime Branch, Chennai

Crl.O.P. No.21914 of 1998 In the High Court of Madras,
Crl.M.P. No.10620 of 1998
Nov. 21, 2000 2001 (2) MWN (Cr.) 178 M. Karpagavinayagam, J.

Criminal Procedure Code, S. 311 — Application under — Filed by Prosecution for permission to examine additional witnesses — Objected by petitioner on the ground that names of additional 5 witnesses were not mentioned in the charge sheet and out of them 4 persons were treated as accused during investigation, therefore they cannot be treated as witnesses and their statements cannot be construed as statements recorded u/S.161 — Petition against the order allowing the application — Petitioner and other accused, in pursuance of conspiracy, cheated Income Tax Department by collecting various amounts from the assessees and without making payments producing forged pay-in-slips showing that payments were made into the bank — Four assessees though arrayed as accused when the FIR was registered, but during investigation when examined u/S. 161, it was

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revealed that they were not the party to the conspiracy, therefore, not prosecuted and charge sheet filed only against the petitioner and two others — Investigating officers obtained statements from these assessees under S. 161 and filed along with the charge sheet, however omitted to cite them as witnesses in the list of witnesses — Prosecution case that these 4 persons/assessees are important witnesses to prove that they had already handed over the monies to the petitioner for paying Income Tax — Therefore, they filed application u/S.311 to summon those 4 assessees and also to summon handwriting expert who gave opinion about the forgery in the disputed document — It cannot be contended that the statements of the accused during the course of investigation cannot be construed to be statement u/S. 161 since S. 161 refers to "any person" which means it relates not only to witnesses but also to accused — In fact statements would disclose that they did not commit any offence but were the victims at the hands of the petitioner — Omission to cite them in the list of witnesses should not be taken as a ground to curtail liberty of the prosecution to place the best evidence before the Court — Filing of an application u/S. 311 in the present case cannot be considered to be the process to fill up the lacuna — S. 311 imposes upon the Court an obligation of summoning any witness and the only condition is that the evidence sought to be obtained is essential for the just decision of the Court — Therefore, summoning of witnesses by the trial Court is quite essential for taking just decision of the case in exercise of the power conferred u/S.311.

Criminal Procedure Code, S. 161 — Words "any person" — Relates not only to witnesses but also to accused — Therefore, *held*, it cannot be contended that the statements of the accused during investigation cannot be construed to be statement u/S.161.

Law of Evidence — Cardinal rule — It is cardinal rule in the law of evidence that the best evidence should be brought before the Court to prove a fact or the points in issue.

Finding — Petition dismissed.

C.P. Palanichamy, Advocate for the Petitioner; A. Packiaraj, Special Public Prosecutor for the Respondent.

ORDER:

The Central Bureau of Investigation filed a charge sheet against the petitioner and two others for the offences under Sec. 120-B read with Secs.420, 468, 471 read with Sec.468, I.P.C. in the year 1995. The prosecution has examined 14 witnesses, out of 24 witnesses cited in the charge sheet. At that point of time, the prosecution filed an application under Sec.311, Crl.P.C. praying for permission to examine 5 more persons as additional witnesses.

2. The petitioner/ accused objected to the said application on the ground that the names of additional 5 witnesses were not mentioned in the charge sheet and out of the 5 persons, 4 persons were treated as accused during investigation. Therefore, they cannot be treated as witnesses and their statements cannot be construed as statements recorded under Sec.161, Crl.P.C.

3. The trial Court, while rejecting the objection of the petitioner/accused, upheld the contention of the prosecution and allowed the application. This petition under Sec.482, Crl.P.C. is against the said order.

4. I heard Mr.C.P.Palanichamy, the counsel appearing for the petitioner and Mr.A.Packiaraj, the learned counsel appearing for the C.B.I.

5. The case of the prosecution is this:

"In pursuance of the conspiracy, the petitioner and two others cheated the Income Tax Department by collecting various amounts from the assessees and without making payments, by producing forged pay-in-slips showing that payments were made into the bank. A-1 to A-3 collected various amounts towards payment of income tax from Ashok Kumar,

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Neelakandan, Sukidevi and Mithalal and without remitting the monies so collected, they submitted Income Tax Returns on behalf of the said four assessees enclosing 4 forged pay-in-slips, as if the amounts collected were paid into the bank and thereby, cheated the Income Tax Department".

6. While the F.I.R. was registered, it is true that these 4 assessees were arrayed as accused, as the prosecution felt that they were also party to the production of the said forged pay-in-slips to the Income Tax Department. But, during the course of investigation, while they were examined by the Investigating Officer under Sec. 161, Crl.P.C., it was revealed that they were not party to the criminal conspiracy, but they handed over the amounts to the petitioner for getting the pay-in-slips from the bank. However, the petitioner and other two accused prepared forged pay-in-slips without payment of monies into the bank and produced the same to the Income Tax Department. Therefore, on completion of investigation, the above said 4 accused were not prosecuted and the charge sheet was filed only against the petitioner and two others.

7. Though the Investigating Officer obtained statements from the assessees under Sec.161, Crl.P.C., they were not cited as witnesses in the list of witnesses. On the other hand, it is submitted that at the time of filing of charge sheet, the statements obtained from the said 4 assessees were filed along with the charge sheet.

8. According to the prosecution, these 4 persons, namely, assessees are important witnesses to prove that they had already handed over the monies to the petitioner for paying income-tax. It is submitted by the prosecution that the omission of their names in the list of witnesses is only due to oversight. Under those circumstances, they filed an application under Sec.311, Crl.P.C. to summon those 4 assessees and also to summon the handwriting expert, who has given opinion about the forgery in the disputed documents, which have already been filed along with the charge sheet.

9. The only contention urged by the counsel for the petitioner is that the statement obtained from these 4 assessees cannot be construed to be the statement of witnesses under Sec.161, Crl.P.C., as they were accused during the course of investigation and that the prosecution cannot be allowed to fill up the lacuna.

10. In the facts and circumstances of the case, I am not able to countenance the point urged by the counsel for the petitioner.

11. Though the names of 4 assessees were mentioned as accused in the F.I.R., on perusal of their statements, it is clear that they were not party to the conspiracy and other allied offences committed by the petitioner and two other accused. It is their categorical statement that they handed over the monies to the petitioner for paying income-tax. So, the nature of the statements itself would show that they were not accused and they can be the best witnesses to prove the offences against A-1 to A-3.

12. There is no dispute in the fact that the statements of these persons have been filed along with the charge sheet before the trial Court. Moreover, it is not correct to contend that the statements of the accused during the course of investigation cannot be construed to be statements under Sec.161, Crl.P.C., since Sec.161, Crl.P.C., refers to "any person" which means, it relates to not only witnesses but also accused. But, in this case, as noted above, the statements given by them would disclose that they did not commit any offence. On the other hand, they were the victims at the hands of the petitioner.

13. It is true that while filing the charge sheet, the Investigating Officer or the Public Prosecutor should have perused the charge sheet and other documents and verified as to whether the names of all the persons have

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been mentioned in the list of witnesses. This is really an omission. But, this should not be taken as a ground to curtail the liberty of the prosecution to place the best evidence before the Court.

14. In the same way, the name of the handwriting expert also was omitted to be mentioned in the list of witnesses, though his opinion and statement formed part of the report filed under Sec. 173, Crl.P.C.

15. Therefore, in my view, the prosecution, at least during the course of trial, has woken up from their slumber and performed their duty by filing the said application under Sec.311, Crl.P.C. for summoning these 5 witnesses.

16. In this context, it would be worthwhile to refer to the observation made by the Supreme Court in *Rajendra Prasad v. Narcotic Cell,* 1999 S.C.C. (Crl.) 1062, which is as follows:

"It is common experience in Criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Sec.311 of the Code or under Sec.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.

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 Court is administration of criminal justice and not to Court errors committed by the parties or to find out and declare who among the parties performed better."

17. In the above decision, the earlier decision of the Supreme Court in *Mohanlal Shamji Soni v. Union of India,* A.I.R. 1991 S.C. 1346, which has been cited by the petitioner, had also been referred.

18. In the light of the above observations, the filing of an application under Sec.311, Crl.P.C. in the present case cannot be considered to be the process to fill up the lacuna.

19. As held by the Apex Court in the above decision, the second part of Sec.311, Crl.P.C. imposes upon the Court an obligation of summoning any witness and the only condition prescribed is that the evidence sought to be obtained is essential for the just decision of the Court. It is 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.

20. In the light of the above settled law, in my view, the summoning of the 5 witnesses by the trial Court is quite essential for taking just decision of the case in exercise of the power conferred under Sec.311, Crl.P.C., as these persons would be the important witnesses to give the best evidence.

21. In view of the above, the petition is liable to be dismissed, as devoid of merits and accordingly, it is dismissed. Consequently, Crl.M.P.No. 10620 of 1998 stands dismissed. The trial Court is directed to go on with the trial and dispose of the same as expeditiously as possible. since the case relates to the year 1995.