

**IN THE COURT OF 2ND ADDL. DISTRICT JUDGE  
KHAMBHAT DIST. ANAND.**

**Atrocity Case No. 02 of 2020**

**PRESENT :-**

Mr. D.A. Shah, learned counsel for the Accused  
Mr. J.S. Gadhvi, learned APP for the State.

**ORDER BELOW EXH.179**

1. Learned counsel for accused has moved the instant application Under Section 348 BNSS for recalling complainant Devjibhai Mafatbhai who has already been examined vide Exh. 35. It is contended in the application that after deposing in the court, father of complainant Mafatbhai Danabhai has sold the land vide R.S. No. 92 situated in village Metpur, Tal. Khambhat to Chhotabhai Motibahi and cross examination of the complainant is necessitated regarding the pedigree prepared in the year 2005 as well as revenue entry. It has been further contended that certain important questions are to be asked regarding the said documents.
2. Learned APP for the State has contended that complainant was examined in the court on 13/2/2017, hence, long time has elapsed, so the application apparently appears to be vague one. He has prayed to reject this application because the case is pending in the court since long.
3. Heard both the parties and perused the record.

4. Section 348 of the BNSS (Previously Section 311 of the CrPC) reads as under :-

**348. 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.

5. Honourable Apex Court, in the case of **Rajaram Prasad Yadav vs State Of Bihar & Anr on 4 July, 2013, CRIMINAL APPEAL NO. OF 2013 (@ SLP (CRL.) No.2400 of 2011)** has observed that from a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:-

a) 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?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. 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.

c) 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.

d) The exercise of power under Section 311 Cr.P.C. 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) 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.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, 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.

k) 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.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) 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.

n) The power under Section 311 Cr.P.C. 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.

6. Record indicates that, complainant was examined as PW1 vide Exh. 35 on dated 17/12/2016 and his cross examination was finally concluded by defence counsel on dated 13/02/2017. After examination of complainant 21 more witnesses have also been examined. In the application Exh. 179 moved by Id. counsel for accused neither date nor purpose of cross examination has been clarified. It is stated nowhere as to how the further examination of the witness is required for just decision of the case. Moreover, defence has still opportunity to lead defence evidence. The matter pertains to incident happened in the year 2014. In the aforesaid view of the matter, in view of the ratio of the case law as discussed above, no merits are found to be in the present application, following order is passed :

**ORDER**

The Present application is dismissed.

Pronounced in the open Court today on this 7th day of October, 2024.

**Date : 07/10/2024.**  
**Place: Khambhat**

rrp

**(PARVEEN KUMAR)**  
**2nd Addl. Sesions Judge,**  
**Khambhat, Dist. Anand.**  
**(Unique ID Code: GJ01511)**