

G.R. 4189 of 2009

Order dated: 21.04.2026

Today is fixed for argument.

Defacto complainant had appeared before the Court by filing fresh Vokatnama.

All 6 accused persons are present by filing hajira.

Ld. App is also present.

Today Ld. Advocate on behalf of the complainant had filed one petition u/s 311 Cr.P.C.

Ld. APP had seen the said petition.

Ld. Advocate on behalf of the accused persons had raised vehement objection against the said petition.

Now the record is taken up for hearing of petition u/s 311 Cr.P.C filed by the Ld. Advocate on behalf of the defacto complainant.

By filing the instant petition, the complainant had submitted before the Court that during Course of trial the first investigating officer, i.e M J Beg had not been examined as prosecution witness whereas he was cited as charge sheet witness, CSW5. The complainant further stated that the examination of said CSW5 is very much important to decide the nationality of the accused as he had mentioned the nationality of accused no. 1 to 3 as Indian whereas in respect of accused to 4 to 6 the said details had been deliberately omitted as most of them are believed to be Bangladeshi National. In this instant petition the complainant had also prayed for recalling the evidence of the complainant as at the time of his earlier examination he could not fully and clearly depose before the Court regarding the complete description, number and particulars of stolen articles. Moreover, by filing the petition the complainant had intended to bring the record related as to whether the accused persons are holder of passports and whether the accused are being convicted by any competent Court or not.

Ld. Advocate on behalf of the complainant had cited case references in support of his contention by the way of firisti.

Ld. Advocate on behalf of the accused had strongly opposed such petition and stated that the complainant is trying to drag the case by filing the self-same petition again and again.

Heard both sides in full.

Perused the materials available in the record.

Considered.

After perusal of the materials available in the record it appears before the Court that trial of this case has commenced since 03.06.2017 after charge has been framed against the accused persons vide order dated 25.07.2016 u/s 448/147/148/323/427/506/120B of IPC. Since the day of commencement of trial till today the complainant had not filed any petition for recalling of evidence of complainant whereas on 21.02.2026 the then Ld. Advocate on behalf of the accused had prayed for time to file written argument.

Now, as per provision of sec. 311 Cr.P.C., court has a discretionary power to call or examine any person already examined at any stage of the proceeding. But such discretion has to be exercised judiciously.

It was held by the Hon'ble Apex Court in **Mohanlal Shamji Soni –Vs-UOI [1991 Cr.L.J 1521]** submitted that *power to recall witness u/s 311 Cr.P.C. can be exercise at any stage of the proceeding provided examination of such person is essential for the just decision of the case.*

Now, it is the duty of the court not only to do justice but also to ensure that justice is being done. In that case as referred by the Ld. Advocate for the complainant, it was held “ Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left 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 or a retrial or to change the nature of the case against either of the parties.”

Now after perusal of the materials available in the record as well as the evidence adduced by the prosecution it appears before the Court that the complainant had ample opportunity to file a petition for recall of his evidence since 15.01.2024 to 21.02.2026, i.e before proceeding with the argument. Moreover, this Court had already allowed one petition u/s 311 of IPC vide order dated 08.03.2024 which the son of the defacto Complainant namely Swadhin Chowdhury was permitted to depose before the Court as PW6 whereas his name was nowhere mentioned in the charge sheet as well as the complaint filed by the complainant. After perusal of deposition of PW6, it appears before the Court that during his evidence he had not made any whisper about

any details of complete description, number and particulars of stolen articles and neither made any whisper as to whether any such articles were stolen from the custody of his father on the date of the alleged incident. Neither in the instant petition the complainant had cited any cogent reason for his inability to narrate the alleged incident before the Court at the time of his evidence. Therefore, at this stage filing of petition u/s 311 by the complainant for his re-examination appears nothing but a dilatory tactics and attempt to fill up the lacuna of the prosecution took place during trial.

Now, regarding the examination of CSW5, i.e the first I/O of this case at this stage to ascertain the nationality of the accused persons does not appear to be necessary for deciding the fate of this case as in the complaint that was not the allegation made by the complainant and neither during trial the complainant had agitated the matter and also had failed to explain the relevancy of the said ascertainment of nationality of the accused with the subject matter of this case at the time of hearing of the instant petition.

In this context it is pertinent to be mentioned that on 21.02.2026 the then Ld. Advocate had preferred one petition for rectification of the deposition of the complainant which he lateron not pressed. From the said activity of the complainant it can be concluded that the complainant had filed the instant petition today as a part of dilatory tactics for the purpose of harassing the accused and for the purpose of wasting the judicial hour of the Court.

An application under section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of 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 opposite party.

In State (NCT of Delhi) vs. Shiv Kumar Yadav and another (2016) 2 SCC 402 the Hon'ble Supreme Court of India was pleased to hold that mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall.

In UT of Dadra and Nagar Haveli vs. Fatehsinh Monansinh Chauhan (2006) 7 SCC 529, the Hon'ble Supreme Court of India was pleased to hold that evidence should not be received as a disguise for retrial or to change the nature of the case against either of the parties and the discretion of the Court must obviously be dictated by the exigency of the situation and fair play and good sense appears to be the safe guides and that only the requirement of justice command the examination of any person which would depend on the facts and circumstances of each case.

In this instant case the accused was already examined u/s 313 CrPC on 02.02.2026 and till that date the complainant had not made any whisper about the re-opening of the evidence which he had filed lateron. In **Mir Mohd. Omar and others vs. State of West Bengal (1989) 4 SCC 436**, the Hon'ble Supreme Court was pleased to consider a case wherein, after the statement of the accused has been recorded under section 313 CrPC had been recorded, the prosecution had filed an application to further examined a witness and the Hon'ble High Court allowed the same. The Hon'ble Supreme Court held that granting of liberty to the prosecution to recall a witness after the accused has been examined under section 313 CrPC may amount to filling up a lacuna existing in the case of the prosecution and therefore, such an order was uncalled for."

Re – examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be construed as filling up the lucana in prosecution case.

Thus, after perusal of the petition filed by the complainant u/s 311 Cr.P.C for the purpose of re-examination of the complainant and re-opening of the evidence of CSW5 on the ground as mentioned in the said petition does not appears to be just for the purpose of ends of justice and proper adjudication of this case and for reaching just decision of this case.

Thus, the petition filed by the defacto complainant u/s 311 Cr.P.C is considered and rejected on contest.

Fix 24.04.2026 for further argument and pronouncement of judgment.

All the accused persons are directed to remain present on that day.

Typed and printed by me :

Judicial Magistrate 2nd Court,
Barrackpore , North 24 Parganas

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JO Code- WB01493

