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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of reserving order: 18th February, 2026

Date of decision: 16th July 2026

IN THE MATTER OF:

CRL.A. 17/2022

BIPIN BIHARI SINGH

.....Appellant

Through: Mr. Siddharth Luthra, Sr. Advocate
with Mr. Madhukar Pandey, Mr.
Saugat Pati, Ms. Shambhavi Sharma,
Ms. Rushika Patil, Mr. Samar Guraya,
Mr. Umesh Kumar Singh and Mr.
Kanishka Pandey, Advocates with
Appellant-in-person.

versus

STATE AND ANR.

.....Respondents

Through: Mr. Yudhvir Singh Chauhan, APP for
the State with SI Parveen, PS Subhash
Place.
Mr. C. Parkash, Mr. Arvind Gupta,
Mr. Shrey Tanwar, Mr. Bhagwan
Singh, Mr. Anushree Rawat, Mr.
Abhishek Rana, Mr. Ankit Verma,
Ms. Mansi Shukla and Mr. T. Parth,
Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE VIMAL KUMAR YADAV

ORDER

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16.07.2026

CRL.M.A. 25418/2023

1. While relying upon the Judgment in *Shazad Ahmed vs. State 2018 SCC Online Del 7029*, the learned Senior Counsel for the Applicant/Appellant has invoked Section 391 Cr.P.C. and sought that two



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witnesses i.e. PW-2 Udit Kathuria and PW-3 Sushant Rao be recalled for additional evidence i.e. for their cross-examination, which according to the Applicant/Appellant is essential for the disposal of not only the present appeal, in which this application CRL.M.A. 25419/2023 under disposal, has been moved but for the ends of justice too. The Judgment above referred has, after considering a host of other authorities, culled out the principles governing Section 391 and has been summarised as follows;

“34. The principles that can be summarised from the above decisions are as under:

- i. *The primary object of Section 391 Cr.P.C. is prevention of the consequences of “some careless or ignorant action on part of the prosecution before the Court or for vindication of an innocent person wrongfully accused, when the court omitted to record the circumstances essential to elucidation of truth.”*
- ii. *Section 391 Cr.P.C. is to prevent the ordering of a de novo trial. The doctrine of finality of judicial proceedings is not affected by the exercise of the power thereunder.*
- iii. *The power has to be exercised with caution and circumspection to meet the ends of justice.*
- iv. *Section 391 Cr.P.C. is not to fill up the lacuna in the prosecution evidence but to serve the ends of justice. Only in exceptional and suitable cases, where the Court is satisfied that directing additional evidence would serve the ends of justice, will the power under Section 391 Cr.P.C. be exercised.*
- v. ***If the Appellate Court finds that certain evidence is necessary in order to give a correct and proper finding, it would be justified in exercising the power under Section 391 Cr.P.C. The ends of justice have to address as much the interests of the accused as that of the community through the State and the public prosecutor.”***

2. For the purpose of reference, Section 391 Cr.P.C. is reproduced herein below:



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“Appellate Court may take further evidence or direct it to be taken.-

- i. *In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*
- ii. *When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*
- iii. *The accused of his pleader shall have the right to be present when the additional evidence is taken.*
- iv. *The taking of evidence under this section shall be subject to the provisions of Chapter XXII, as if it were an inquiry.”*

3. In addition to the aforesaid judgment, learned Senior Counsel for the Appellant / Applicant has further placed reliance on the judgment in ***Rekha Murarka vs State of West Bengal***, 2020 2 SCC 474 and has clarified about the victim’s right to participate in a session’s trial under Section 24(a), 225 and 301 Cr.P.C.

4. It was observed in the aforesaid judgment that the victim may even engage a counsel (to assist the prosecution) whereas the prosecutor is the commander under whose control the prosecution goes on. Learned Senior Counsel for the Appellant has further placed reliance on the following judgments in order to hammer his point with regard to the applicability of Section 391 Cr.P.C, i.e. ***Brigadier Sukhjeet Singh (Retired) MVC vs State of Uttar Pradesh & Ors*** 2019 16 SCC 712, ***Rajeswar Prasad Misra vs. State of West Bengal & Anr*** AIR 1965 SC 1887, ***Ajit Singh Chehuji Rathod vs. State of Gujrat***, 2024 (4) SCC 453.

5. Learned Senior Counsel for the Appellant has asserted about the



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independent right of a victim to file an appeal and stated that father of the deceased is a victim, as defined in Section 2 (wa) Cr.P.C. and proviso to Section 372 empowers a victim to prefer an appeal in its own independent right.

6. While relying upon the judgment in ***State of NCT of Delhi vs. Ashish Kumar***, 2018 SCC OnLine Del 11772, it was emphasized by the Court that the cause of justice or justice cannot be allowed to suffer on account of defective or incomplete investigation and therefore such an investigation by itself cannot result in acquittal, especially when corroborative evidence appears to be there but was not collected or produced due to defective investigation or other such reasons.

7. In such circumstances the Appellate Court, while invoking Section 391 Cr.P.C. may direct recording of additional evidence to prevent miscarriage of justice.

8. So to say that without additional evidence it would be impossible to render a judgment or on withholding such evidence would amount to failure of justice.

9. With the help of the aforesaid judgments, the learned Senior Counsel for the Appellant / Applicant stated that the Appellant, who unfortunately happens to be the father of the deceased boy, falls into the scope and ambit of victim as defined in Section 2(wa) and therefore has an independent right to file an appeal, which has been filed, in which the instant application has been moved. It is, thus, submitted that in view of the fact that learned APP ought to but did not cross-examine PW-2 Udit Kathuria and PW-3 Sushant Rao which has resulted into the acquittal of the Respondent No. 2, who was the one driving the vehicle at the time when the incident took place.

10. This according to the learned Senior Counsel for the



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Appellant/Applicant, amounts to miscarriage of justice and the reason is improper cross-examination of the witnesses turning hostile. It is submitted that four witnesses had turned hostile but these two i.e. PW-2 Udit Kathuria and PW-3 Sushant Rao were not cross-examined properly by the learned APP and that has resulted into the acquittal of Respondent No. 2. As such it is sought that PW-2 Udit Kathuria and PW-3 Sushant Rao may be permitted to be examined/cross-examined afresh by the learned APP / the counsel for the victim to meet the ends of justice.

11. The counsel for Respondent No. 2 while countering the arguments raised on behalf of the Appellant/Applicant submitted that Section 391 Cr.P.C. definitely empowers the Court to seek additional evidence wherever it is found indispensable. However, this power is to be used very sparingly in exceptional circumstances. It is submitted that no such circumstance is there in the instant case, inasmuch as the witnesses turning hostile were cross-examined including PW-2 Udit Kathuria and PW-3 Sushant Rao. However, the cross-examination may not be up to the expectations of the Applicant herein but then that in itself is not sufficient to invoke Section 391 Cr.P.C. With the change of counsel, perceptions change and when a new counsel takes over, he or she may have a different view and may not find that the cross-examination was conducted appropriately. Even assuming that the present application is allowed and further cross-examination is permitted by this Court under this application, a subsequently engaged counsel may again take a different view regarding the adequacy of such cross-examination. Therefore, the application is nothing but an attempt to start the *trial de novo* at least to the extent of the witnesses sought to be cross-examined.

12. Learned counsel for the Respondent has placed reliance on the following judgments in order to put across and strengthen his arguments,



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that is:

State of Rajasthan v. Asharam, 2023 SCC OnLine 423, wherein it was held that Section 391 confers a restricted power to admit additional evidence only where its absence would cause a failure of justice and it cannot be invoked to reopen concluded findings, conduct speculative inquiries, fill defence lacunae or delay disposal of an appeal.

In **Rambhau v. State of Maharashtra**, (2011) 4 SCC 759 the Hon'ble Supreme court held that Section 391 confers wide powers but cautious discretion to receive additional evidence to rectify procedural irregularities and prevent failure of justice, not to repair weaknesses in the prosecution case or alter its nature.

Another judgment relied upon by the learned counsel for the Respondent No. 2 is **State (NCT of Delhi) v. Pankaj Chaudhary** (2019) 11 SCC 575, when the Hon'ble Supreme Court emphasized that power under section 391 must be exercised cautiously and cannot be an excuse to rely on unproved material to overturn a trial court's findings. In **Rajvinder Singh v. State of Haryana** (2016) 14 SCC 671, The Apex court further emphasized that the power to adduce additional/expert evidence at the appellate stage under Section 391 CrPC cannot be exercised where the evidence could have been produced at trial.

In **Jagadeesh v. R. Rajeshwari** (2019) 16 SCC 730 it was held that additional evidence under Section 391 cannot be permitted at the appellate stage where it would amount to curing a fundamental deficiency in the complainant's case especially in quasi criminal proceedings. In **Sankay Kumar v. State of Jharkhand** (2022) 7 SCC 247, it was further held that the true test under Order 41 Rule 27 CPC, which is akin to Section 391 Cr.P.C., is not prior diligence or mere relevance, but whether the appellate court requires the additional evidence to pronounce judgment or for any other substantial cause.

Mohd Irshad v. State (NCT of Delhi) 2023 SCC Online Del 6750, has been referred and relied upon by the learned counsel for the Respondent No. 2 where it was held that power granted by Section 391 Cr.P.C. is to be exercised sparingly to prevent failure of justice and not to compensate for opportunities already granted and not availed.

Similarly, in **M Senthil Kumar v. K.M. Mohanasundaram**, Crl.R.C. No. 113 of 2018, it was held that that Section 391 confers discretionary power on the appellate court to receive additional evidence where it considers such evidence necessary for proper adjudication, provided reasons are recorded; the provision cannot be invoked to fill deliberate omissions or repair defects, yet where evidence had been led at trial



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and the appellate court found justification (including medical circumstances) for permitting further documents, such exercise of discretion does not warrant interference in revisional jurisdiction.

13. Section 391 Cr.P.C. is an exceptional provision and was brought into the statute books primarily for the purpose that there should not be any miscarriage of justice and if it is found that something of this sort has taken place and had come to the notice of the Court even at the appellate stage, still there should be a redressal mechanism. As such, this provision is to be used sparingly and in very exceptional circumstances where it is clear that the cause of justice would be at the receiving end. It has also been cautioned, as has been held in various pronouncements, discussed hereinbefore, that it should not be used to fill the lacuna in the prosecution's case. Another aspect which has been emphasized is that avoidance of a *de novo* trial where, by permitting some little / additional evidence, the miscarriage of justice can be prevented, provided such additional evidence is necessary for the correct finding on the issue. It is primarily meant for the prosecution as can be inferred from the bare reading of Section 391(iii). All this is to be done under the command, control and guidance of the prosecutor.

14. The proviso to Section 372 Cr.P.C. read with the definition of "victim" as provided in Section 2 (wa), indicates that the responsibility, which was hitherto confined to the prosecution alone, to challenge the acquittal, has devolved upon the victim also, as an independent entity. Thus, in a case where the prosecution does not come forward to assail any judgment, the statute has given an independent right to the victim to prefer an appeal.

15. Learned Senior Counsel for the Appellant/ Applicant has asserted



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that the Appellant / the applicant falls into the definition of victim, being father of the deceased (victim of accident) and has preferred the instant appeal, in his own independent right. There appears no reason to disagree with this proposition.

16. In this appeal, the application under disposal has been moved invoking section 391 Cr.P.C. which has come up for consideration. In view of what has been noted above, with the reference of the judgment relied upon by the parties, the parameters are settled under which such an application under section 391 Cr.P.C. is to be appreciated and decided. Without adverting into the rights of the Appellant as that of the victim, the contentions are being considered and appreciated, vis-a-vis an application under section 391 Cr.P.C. The grudge of the Appellant / applicant is that two of the vital witnesses, out of the four public witnesses examined, were not cross examined properly by learned APP and thus the cause of justice suffered. The applicant / Appellant through the instant application wants that these two witnesses i.e. Uday Kathuria and Sushant Rao should be permitted to be cross examined either by the prosecution or by the victim, by treating them as 'hostile witnesses'. Incidentally they have been treated so during the trial by the prosecution and were cross-examined by Ld.APP. However, the prime grudge of the applicant is that Ld.APP did not cross examine these two hostile witnesses in a manner befitting and appropriate to the circumstances and facts of the instant case.

17. In this context, Appellant has focussed on the statement of these two witnesses recorded under section 161 Cr.P.C. The purpose of statements recorded under section 161 Cr.P.C. is limited and that purpose has seemingly been fulfilled during the trial. Statement under section 161 Cr.P.C. and the one recorded in the Court are more or less on the same



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lines and no major deviation, warranting a full-fledged cross-examination is there. An issue with regard to the speed at which the vehicle was being driven at the relevant time has been highlighted and on that aspect, witness Sushant Rao has been cross examined by learned APP for the State. He has admitted that the speed of the offending vehicle, in which he alongwith his friends including the deceased (son of Appellant) and the accused were travelling was around 50-60 km/hr. Whereas, in his examination before the court, he had stated that the speed of car in question was about 30-40 km/hr. This admission or even if it is presumed that both the witnesses i.e. Udit Kathuria and Sushant Rao maintained that the speed of the offending vehicle was around 50-60 km/hr about which there was a variation in deposition. In the cross-examination conducted by learned APP for the State, that stands clarified. However speed alone is not a criteria to determine the rashness and negligence on the part of a driver. It is the control over the vehicle which is of utmost importance, irrespective of the speed. It has also come in the evidence that there was traffic on the flyover where a vehicle cannot otherwise be driven at an excessive high speed. These factors appeal to reason and, therefore, takes away the sheen out of the arguments on behalf of the Appellant warranting further re-examination / cross examination of Udit Kathuria and Sushant Rao.

18. Witness Udit Kathuria has further deposed that he was busy looking at his mobile and therefore could not notice the situation immediately before the accident. Given the mesmerizing effect a mobile has on a person especially youngsters, it is not unusual and what has been deposed by this witness seems correct. Therefore, an unsigned statement under section 161 Cr.P.C. having a limited purpose, cannot be made a basis to infer something which is not there, especially when the deposition before the



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court is more or less on the same lines, as has been recorded under statement under section 161 Cr.P.C. by the police. In respect of both Udit Kathuria and Sushant Rao, both of whom are consistent so far as the speed of the vehicle is concerned, to be in the range of 40-60 km/hr and that the driver of the vehicle took a sharp turn on right side, reason of which they could not notice.

19. It is pertinent to mention here that the witnesses/ accused and the deceased were all occupying and travelling in the same car. Thus, it cannot be presumed that there could be any design to cause such an accident where some of them may not be affected and others may receive injuries viz. simple, grievous and some of them may even lose their lives. It was an accident after all. It is worth noting that Udit Kathuria did not receive any injuries, so much so, that no MLC was prepared qua him as he himself deposed. Whereas, the son of Appellant/ Applicant, unfortunately, lost his life in that very accident and some other occupants had sustained injuries ranging from simple to greivous.

20. If the Appellant was so aggrieved by the inappropriate cross examination of these two witnesses then, he ought to have sought cross examination of these two witnesses at that time itself when they were examined and discharged, or anytime soon. Witness Udit Kathuria was examined on 22.01.2013 and so was witness Sushant Rao on that very day as PW-2 and PW-3 respectively. The record reflects that Appellant was participating in the proceedings in one way or the other, inasmuch-as he himself was examined as PW-6 and that he had moved an application under section 340 Cr.P.C. which was dismissed on 02.11.2020 and for that matter, appearance was there on his behalf through Counsels / Proxy Counsels.



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21. The impugned judgment was pronounced on 19.11.2019 and appeal was admitted on 20.02.2020, whereas the instant application came into being on 16.09.2023. This timeline shows not only the participation of the Appellant but the fact that he had no such grudge as has come up now through the application under section 391 Cr.P.C. It took about a decade for him from the date of examination of these two witnesses, to seek additional evidence through the instant application. What kept him quiet for such a long time remains a riddle. If he had the feeling that these two witnesses i.e. Udit Kathuria and Sushant Rao were not properly examined, then he must have had come to know this fact in 2013 itself and if not at that time, then at the time of filing of this appeal in 2020. Thus, in that eventuality, the application under section 391 Cr.P.C. should have been moved alongwith the appeal, if for some reason no such application was moved during the trial.

22. The plight of parents, who lost their young child, can be visualized. The pain, emptiness and sort of loss of purpose in life can be there haunting them round the clock, but then the circumstances reflect that there was no foul play and it was an accident and an accident alone.

23. In view of these facts and circumstances where the witnesses have deposed more or less on the same lines, as was their stand during the investigations, except for a few hiccups here and there, which are not vital enough to affect the core strength of the testimonies, therefore, when there appears no cogent reason to recall these two witnesses after more than 13 years. By this time, the limitations of human memory must have consumed away whatever was left with them out of this traumatic accident.

24. In any case, the Appellant/Applicant is unable to carve out a case, where it can be seen that any miscarriage of justice would be there if these



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two witnesses are not cross examined further, or that the truth is going to be a victim or is a victim. The Appellant, like the prosecution, cannot be permitted to fill any lacuna in the garb of such an application, inasmuch as the proposed additional evidence, is not necessary at all, which may warrant an opportunity to the Appellant to bring Udit Kathuria and Sushant Rao again in the witness box. As a result, the application is declined having no merit in it.

25. Application stands disposed off accordingly.

VIMAL KUMAR YADAV, J

JULY 16, 2026/ps/bj