

CRIMINAL LAW – PRACTICE AND PROCEDURE

d) Sections-311, 313 AND 319 OF Cr.P.C.- INTRICACIES AND CASE LAW

by

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LAW OF ADDITIONAL EVIDENCE UNDER SECTION 311 OF Cr.P.C (Corresponding Section in 348 of BNSS)

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1. Introduction :

Genesis of this Provision is found in Article 21 of the Constitution. Hon'ble Apex Court in many cases has held that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. A trial primarily aimed at ascertaining truth has to be fair to all concerned including the accused, the victims and society at large. Each person has a right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and society. Under our Constitution, as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Accused has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognized by the Parliament in terms of sub-sec (2) of Section 243 of the Code of Criminal Procedure, 1973.

"**Fair trial**" includes fair and proper opportunities allowed by Law to prove innocence. Adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial.

Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and to society.

In **Hoffman Andreas vs. Inspector of customs, Amritsar (2000) 10 SCC 430** the Hon'ble Apex court observed that "*grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial*".

2. Scope and Object of Section 311 of Cr.P.C :

The object underlying in Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. Power can be exercised even at the stage of defence evidence. It is also not necessary that in the prosecution evidence, only the witness whose statement under section 161 was recorded, may be summoned. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused (**Iddar and others Vs. Aabbida and anr. 2007 (11) SCC 211**).

In **Natasha Singh vs. CBI, 2013 SC** it was held that the object of this Section is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. The court examines evidence under this Section neither to help the accused nor to help the prosecution. The fundamental thing to be seen is whether the court thinks it necessary in facts and circumstances of the particular case before it.

Section 311 of Cr.P.C

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.

The reading of the section reveals that it manifestly consisting of two parts-

Part I - 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.

Part II - 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.

Whereas the word used in the first part is "**may**", which gives purely discretionary authority to a criminal court and enables it at any stage of an inquiry, trial or proceeding under the Code:

- (a) to summon anyone as a witness, or
- (b) to examine any person present in the court, or
- (c) to recall and re-examine any person whose evidence has already been recorded.

On the other hand the second part is mandatory and compels the court to take any of the steps if the new evidence appears to it essential to the just decision of the case. The steps in this case are :

- (a) to summon anyone as a witness, or
- (b) to examine any person present in the court, or
- (c) to recall and re-examine any person whose evidence has already been recorded (**Swapan Kumar Chatterjee vs. Central Bureau of Investigation,**

2019 (14) SCC 328).

The Hon'ble Supreme Court in **Zahira Habibullah Sheikh and Ors. vs. State of Gujarat and Ors., (2006) 3 SCC 374**, has observed the following -

"Section 311 of Cr.P.C is manifestly in two parts. The first part is discretionary as the presumption used is "may" whereas the second part is mandatory and the presumption used is "shall". Because of mandatory nature of the second part, it compels the court to take any steps provided in Section 311 of Cr.P.C if the new evidence appears to it is essential for the just decision of the case."

3. Duty of the court :

The Hon'ble Apex court observed in **Zahira (supra)** case that Section 311 of Cr.P.C is

"a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses, as it considers absolutely necessary, for doing justice between the state and the subject. The court is to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when, for certain obvious reasons, either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts".

It is also observed in the supra case that

*"It is a cardinal rule in the Law of evidence that, the best available evidence should be brought before the Court. **Sections 60, 64 and 91 of the Indian Evidence Act, 1872** are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties, but in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference".*

The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "**filling of loopholes**". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not, must of course depend

on the facts of each case, and has to be determined by the Court.

4. At what stage the provision under section 311 of Cr.P.C can be applied?

The section is a general section which applies to all proceedings, inquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or inquiry.

In Section 311 of Cr.P.C the significant expression occurs is "**at any stage of inquiry or trial or other proceedings under this court**". However, it is to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of Judicial mind.

It is observed by Hon'ble Allahabad High court in **para no.8 of Chootey Badri Prasad vs. State of UP 2006 Cri L J 711**

"if court finds any fact or evidence necessary for just decision of the case, the court can summon or re examine any witness at any stage of the case before the Judgment is reserved and while writing Judgment, the court finds that any material point is omitted, consideration of which is necessary or the paper is required to be proved, the court can pass order for examination or reexamination of witnesses. Thus, there is no restriction on the power of court. Section 311 of Cr.P.C cannot be curtailed at any stage as long as trial is under consideration before the court".

In **P.Chhaganlal Daga vs. M.Sanjay Shaw, 2004 SCC (Cri) 183** – the case is under section 138 of Negotiable Instruments Act, 1881 wherein the complainant completed the evidence including his own examination, cross-examination and re-examination. During such cross-examination the accused contested the question of service of notice envisaged under Section 138 of the Negotiable Instruments Act. The acknowledgment card produced by the complainant contained a signature which the accused disowned as his. After the arguments concluded and the case was posted for judgment the complainant moved the trial court for reception of additional material by producing a postal receipt in exercise of the powers under section 311 of Cr.P.C. The trial court felt that the said material was necessary for the just decision of the case and hence allowed the same to come on record. The said order was challenged by the accused before the High Court wherein it was held that production of postal receipt at the belated stage was only to **fill up the lacunae** and hence the same is impermissible in Law. The Hon'ble Apex court after discussing about **what is**

meant by lacunae in prosecution case, powers under section 311 of the code and section 165 of Evidence Act and by taking into consideration few earlier decisions of its own has upheld the order of trial court as the same would not cause any prejudice to the rights of the accused and the accused can cross examine the complainant on the basis of the new material adduced.

Hence, an application under section 311 of Cr.P.C can be permitted even at the stage of Judgment.

The same finding was arrived by **Hon'ble Apex court in S.R. Sinha vs. Mrinal Sengupta, 2001 SCC (Cri) 1581 and Manju Devi v. State of Rajasthan, (2019) 6 SCC 203.**

5. Whether examination / reexamination / summoning / recall of witnesses can be done Suo moto?

Chootey Badri Prasad vs. State of U.P. 2006 CrLJ 711 -

This is a case registered under section 302 r/w 34 of IPC. During the argument it was found by the Hon'ble Sessions Judge that the General dairy report about the death of deceased was not proved by the prosecution. The learned Judge has felt that examination of PW6 / Investigating Officer and one constable who has carried the death information is relevant for disposal of the trial. Therefore, the learned Judge has directed for reexamination of Investigating officer and also examination of the constable concerned on this point. Aggrieved by the same, the accused has moved an application to recall the said order but the same was dismissed and the matter came before Hon'ble High Court of Allahabad via application under section 482 of Cr.P.C. The Hon'ble High court has observed in Para No.8 that

"from the provisions of section 165 of Evidence Act and section 311 of Cr.P.C, it is clear that if court finds any fact or evidence necessary for just decision of the case, the court can summon or re examine any witness at any stage of the case before the Judgment is reserved and while writing Judgment, the court finds that any material point is omitted, consideration of which is necessary or the paper is required to be proved, the court can pass order for examination or reexamination of witnesses. Thus, there is no restriction on the power of court to summon and examine a witness. Section 311 of Cr.P.C cannot be curtailed at any stage as long as trial is under consideration before the court". The Hon'ble High court has dismissed the application under section 482 of Cr.P.C observing that the order of learned

Sessions Judge does not cause any prejudice to the accused as he would get an opportunity to cross examine the witness.

Hence, a witness can be called / recalled / reexamined by court even without a application by any party.

6. What should be the approach of the court while exercising the powers under section 311 of Cr.P.C?

In **Vijay Kumar vs. State of U.P. & Anr., 2011 (8) SCC 136**, the Hon'ble Apex court has held that though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously.

In **V.N.Patil vs. K.Niranjan Kumar and Ors., (2021) 3 SCC 661**, the aim of every court is to discover the truth. Section 311 Cr.P.C. is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under section 311 Cr.P.C has to be exercised judicially for strong and valid reasons and with caution and circumspection to meet the ends of justice.

The necessity and need for additional evidence has to be determined in the context of the need for a just decision and it cannot be used for filling up a lacunae. (**Jamatraj Kewalji Govani vs. State of Maharashtra 1967 (3) SCR 415**) and **Mohan Lal Shamji Soni vs. Union Of India and anr. 1991 Supp (1) SCC 271**

In **Mohan Lal vs. Union of India anr. 1991 Supp (1) SCC 271** the Hon'ble Apex court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, 'any Court' 'at any stage', or 'any inquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision

of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

Zahira Habibulla H. Sheikh Vs. State of Gujarat (2004) 4 SCC 158 well known as **Best Bakery case**. In this case it was observed by Hon'ble Apex Court that

"it is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in. Ultimately, the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining

proper proof of such facts as are necessary to arrive at a just decision in the case."

7. What is the extent and scope of power of the court?

In **Zahira Habibulla H. Sheikh Vs. State of Gujarat (2004) 4 SCC 158** it is observed that "the Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and section 165 of Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The power of the Court under section 165 of the Evidence Act is in a way complimentary to its power under Section 311 of the Code. The section consists of two parts i.e (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution.

(a) To bring best available evidence on record :

In **Mohanlal Shamji Soni vs. Union of India, AIR (1991) SC 1346** it was observed that it is a 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, but it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavorable to the party withholding such evidence, the court can draw a presumption under illustration (g) to section 114 of Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any

legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted where under any Court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate,, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

(b) Discovery of truth :

"Discovery of the truth is the essential purpose of any trial or inquiry" held by three Judges bench in **Maria Margarida Sequeria Fernandes vs. Erasmo Jack d Sequeria through Lrs. 2012 (3) SCALE.**

8. Whether an application under section 311 of Cr.P.C is permissible to cover up the lacunae?

Rajendra Prasad vs Narcotic Cell through Its Officer AIR 1999 SUPREME COURT 2292 -

This is a case registered under section 21, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 where the prosecutor has moved an application seeking permission to examine PW21 and other two persons at the stage when arguments were part heard and the said application was allowed by trial court. The said order was challenged before Hon'ble High Court of Delhi and the Revision was dismissed. Hence, the matter was placed before Hon'ble Apex Court wherein the Hon'ble Court based on the ratio laid its own observations in **Mohan Lal Shamji Sani (supra)** held that

"it cannot be said that court cannot exercise power of resummoning any witness if once the power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments".

By saying so the Hon'ble Apex court held the order of trial court in allowing the petition under section 311 of Cr.P.C.

The observations in **Mohan Lal Shamji Sani (supra)** are 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. '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 Evidence Act by saying that the Court could not fill the lacuna in the prosecution case'. A lacuna in 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 proved. A corollary of any such latches or mistakes during the conducting of a case cannot be understood as the 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 trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can before-close 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".

The nature and extent of power vested in the courts under section 311 Cr.P.C to recall witnesses is discussed by Hon'ble Apex court in **Hanuman Ram vs. State of Rajasthan and ors (2008) 15 SCC 652** as *"the object underlying section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses.*

Therefore, whether an application under 311 of Cr.P.C by prosecution is to fill up the lacunae is a matter that depends upon facts and circumstances of each and every case. The endeavor of the court is to grant fairest opportunity to he accused to prove his innocence - **Hoffman case (supra)**.

9. Who can be summoned under section 311 of Cr.P.C? Whether prosecution witness can be summoned as defence witness?

Any person whose evidence can be important for the just decision of the court can be examined as witness in the case, may be from prosecution side or from defence side. If both are not interested in examining any such person he can be examined by the court under the second part of the section 311. There is only one embargo that accused cannot be examined as a witness except when he so chooses under section 315 of Cr.P.C.

In State of **Madhya Pradesh vs. Badri Yadav and Anr. 2006 (2) RCR (Criminal) 468**, the matter of question before Hon'ble Court was that whether a prosecution witness can be summoned as a defence witness on request of accused. In this case a person appeared as prosecution witness and supported the prosecution. Later on, said prosecution witness appeared as defence witness and stated that his earlier deposition was false. The Hon'ble Court categorically held that a person already examined as prosecution witness cannot be allowed to become as defence witness. Subsequent statement was concocted and cannot be believed.

10. Whether witness cited by prosecution but not examined can be a defence witness?

The Hon'ble Apex Court further held that

"the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can also examine the cited, but not examined witnesses, if he so desires, in his defence. It is the discretion of the prosecutor to tender the witnesses to prove the case of the prosecution and "the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." In an extraordinary situation, if the court comes to the conclusion that a material witness has been withheld, it can draw an adverse inference against the prosecution, as has been provided under Section 114 of the Evidence Act. Undoubtedly, the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he must be fair to the court, and therefore, to the truth. In a given case, the Court can always examine a witness as a court witness, if it is so warranted in the interests of justice. In fact, the evidence of the witnesses, must be tested on the touchstone of reliability, credibility and trustworthiness. If the court finds the same to be untruthful, there is no

legal bar for it to discard the same" observed in **Rohtash Kumar vs. State of Haryana, 2013 (3) RCR (Criminal) 355.**

11. Difference between first part and second part of section 311 of Cr.P.C?

"The necessity of finding out a criteria for property exercising the discretion vested in first part of section 311 arises from the fact that the power conferred by the first part is discretionary and the discretion must be exercised along with well established judicial principles. Under the second part of section 311 there is no discretion to summon or not to summon a witness. If the court comes to the conclusion that it is necessary for the just decision of the case, the court is duty bound to summon and examine or recall or reexamine any person, if his evidence appears to be essential to the just decision of the case. It is necessary to keep in mind the distinction between the two parts of section 311 of Cr.P.C" held by **Hon'ble Rajasthan High court in Cheeku Sing vs. State of Rajasthan 1998 Cri L J 950.**

12. Whether change of defence counsel is a criteria for allowing application under 311 of Cr.P.C?

In **State of Haryana vs. Ram Mehar and others, 2016 (4) RCR (Criminal) 154**, the matter in question before the Hon'ble Supreme Court was that

"whether an application for recall of some prosecution witness for cross-examination moved by the accused on the grounds that counsel engaged earlier by defence had not put certain questions and had not given certain suggestion be allowed. The Hon'ble Supreme Court categorically held that such kind of application cannot be allowed because the accused persons had engaged counsel of their choice. In such a situation recalling of a witness indubitably cannot form the foundation. It was further held that it has normally to be presumed that counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant".

"The counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the

counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses” held in Hoffman (supra) case.

13. What must be the contents of application under section 311 of Cr.P.C?

“Application should not be in a vague language which precludes the trial court as to examine as to what is purpose of summoning the witness. The necessity to examine witness or appraisal of material called for is essential for just decision of the case must be included in the application”. Where this was not mentioned and the application was rejected by the trial court to summon a witness afresh **Hon’ble Punjab and Haryana High Court in case Narinder Kumar and Anr. Vs. State of Haryana and Anr. in CrI.Misc.No. M-16124 of 2011 (O&M) dt. 16.08.2011** has upheld the decision of trial court.

14. Whether an order under section 311 of Cr.P.C is revisable?

Hon’ble Allahabad High court in Sheeladevi and anr. vs. State of UP and 7 others AIRONLINE 2018 ALL 2677 has referred to cantena of decisions of Hon’ble Apex court more particularly the case in **S.Kuppuswami Rao vs. The King Manu/FE/0001/1947**. The conclusion arrived is no revision is maintainable against an interlocutory order passed in any appeal, inquiry, trial or other proceedings as provided under section 397(2) of Cr.P.C. However, it is not possible to make a catalog of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final and some may fall in the middle course. As no exhaustive test can be framed to cull out the difference, the meaning of the words final or interlocutory have to be understood in the light of facts of each particular case in relation to each particular purpose for which the word is required to be interpreted. The purpose of section 397(2) of Cr.P.C is to keep an intermediate order made during the preliminary stages of inquiry or trial outside the purview of the power of revision so that the inquiry or trial may proceed without any delay. This will not affect the aggrieved party as it is not a final order against him. But, if it is in the case of a person who is not a party to inquiry or trial, he will not have an opportunity to challenge it and in such case it amounts to final order and revisable.

By observing so the Hon’ble court has held that the revision is maintainable in the present case.

15. Whether an application under section 311 Cr.P.C by third party is maintainable?

From the discussion in **Sheeladevi (supra)** case referring to catena of decisions of Hon'ble Apex court and various High Courts wherein a reference was made with regard to maintainability of revision against an order in an application by a third party, the issue in Sheeladevi (supra) case is with regard to 311 of Cr.P.C, an inference can be drawn that even a third party is also entitled to file an application under section 311 of Cr.P.C.

16. What are the principles to be borne in mind by the courts while dealing 311 of Cr.P.C applications?

In **AG vs. Siva Kumar Yadav and anr 2015 AIR (SC) 3501** the Hon'ble Supreme Court has culled out principles:

1. Whether the court is right in thinking that the new evidence is needed by it?
2. Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?
3. The exercise of the widest discretionary power under section 311 Cr.P.C, 1973 should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.
4. 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.
5. The exercise of power under section 311 Cr.P.C 1973 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.
6. 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.
7. The wide discretionary power should be exercised judiciously and not arbitrarily.
8. 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.
9. The object of section 311 Cr.P.C, 1973 simultaneously imposes a duty on the court to determine the truth and to render a just decision.
10. 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.

11. Exigency of the situation, fair play and good sense should be the safeguard, 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.
12. 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.
13. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
14. 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.
15. The power under section 311 Cr.P.C, 1973 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.

The same ration has been followed by the **Hon'ble Apex court in State of Hariyana Vs. Ram Mehar and others 2016 (4) RCR (Criminal) 154**

17. What is the effect of section 311 of Cr.P.C and section 138 of Indian Evidence Act?

Like section 311 of Cr.P.C and section 165 of Indian Evidence Act, Section 311 of Cr.P.C and Section 138 of Indian Evidence Act are also not contradictory to each other but complementing the object of each other.

Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired-for such re- examination. Therefore, a reading of Section 311

Criminal Procedure Code and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Criminal Procedure Code. It is, therefore, imperative that the invocation of Section 311 Criminal Procedure Code and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purpose of the said provision, namely, for achieving a just decision of the case.

The above explained scope of Section 311 Cr.P.C. and Section 138 of the Indian Evidence Act makes it clear that there is absolutely no overlapping between the two sections. Merely because the case of a party is not covered under Section 138 of the Indian Evidence Act, would not be any ground to debar such a party or witness to move an application under Section 311 Cr.P.C. The provision of Section 311 Cr.P.C. is independent and irrespective of Section 138 of the Indian Evidence Act. While applying its mind on the aspect of permitting examination or re-examination of a witness under Section 311 Cr.P.C., the trial Court need not restrict itself to enquire into an aspect whether such re-examination has become necessary because of some facts coming in cross-examination or not, as is required under Section 138 of Indian Evidence Act.

The sole criteria for exercising power vested under Section 311 Cr.P.C. is the interest of justice and the necessity of such examination or re-examination for just decision of the case. If any other element is introduced while exercising power under Section 311 Cr.P.C., then it would not be unjustified to say that there is a material irregularity in exercise power by the trial Court.

The intention of the legislature to empower the Courts to permit production of additional evidence appears to be that cause of justice should not suffer and production of such evidence would enable the Court to come to a correct finding and for that reason it would be justified in permitting the additional evidence under the provisions of Law. Support can be taken from **Mohanlal Shamji Soni (supra) case.**

Section 165 of Indian Evidence Act has provided extensive power for the judges on interest stating administration of justice. It provides that the judge can question the witness or the party at any questionable if he thinks that this is necessary in order to know the truth about the case or to make the case clearer. This section provides the judge the following powers:

1. To ask any question to the witness or the party to the case in any form and about any fact whether they are relevant or not.

2. To able to order for production of document or thing which is related to the case.

The power provided under section 165 of Evidence Act compliments the power under section 311 of Cr.P.C (**Meeradevi and others vs. Jitender and others (2012) 5 SCC 777**)

18. What if an application under section 311 of Cr.P.C would cause prejudice to accused?

Hon'ble Rajasthan High court in Cheeku Singh vs. State of Rajasthan 1998 Cri L J 950 held that

"where summoning of witness would cause prejudice to the accused, the witness cannot be summoned under section 311 of Cr.P.C.

The **Hon'ble Supreme Court in P. Sanjeeva Rao versus State of A.P., AIR 2012 SC 2242** observed that

"refusal to recall the witness would cause prejudice to the accused and would amount to condemning the accused without giving sufficient opportunity to challenge the correctness of the prosecution version and the credibility of the witnesses".

**Scope and Significance of Examination U/S.313 of Cr.P.C
(Corresponding section 351 of BNSS)**

SYNOPSIS

1.	Introduction
2.	Scope and Object of Section 313 Cr.P.C
3.	Duty of the court
4.	At what stage the court can exercise the powers under section 313 Cr.P.C?
5.	What does the word "personally" in the section mean?
6.	What is the effect of non compliance of section 313 Cr.P.C?
7.	Whether circumstances not put to accused can be used against him?
8.	Whether an examination under section 313 Cr.P.C can be dispensed with?
9.	Whether accused can be confronted with any circumstance which is not in evidence?
10.	Whether examination under section 313 Cr.P.C can be used to cure lacunae in defence case?
11.	How to consider the failure of accused to explain circumstances?
12.	Whether statement of accused under section 313 Cr.P.C can be used as evidence? How to use a statement of accused u/s. 313 Cr.P.C if it includes both inculpatory and exculpatory aspects?
13.	Whether conviction can be based on the confession of the accused in 313 Cr.P.C examination admitting guilt?
14.	What is the methodology for recording the statement of accused under section 313 Cr.P.?
15.	Whether counsel can be examined under section 313 Cr.P.C on behalf of accused?
16.	Whether the accused can be examined more than once?
17.	Whether the statement under section 313 Cr.P.C of one accused can be used against other?

1. Introduction :

Section 313 of Criminal Procedure Code pertains to the examination of accused by the court. It grants the accused an opportunity to explain any circumstances or evidence against him / her, providing a chance for them to present their case and clarify any discrepancies in the prosecution's evidence. The purpose of examination under 313 Cr.P.C is to enable the court to meet the requirement of Principles of Natural justice **audi alterim partem** which means "no one should be condemned unheard". The accused may be asked to furnish some explanation regarding the incriminating circumstances associated against him and the court must take note of such explanation.

2. Scope and Object of Section 313 Cr.P.C :

The scope and objective of Section 313 of the Criminal Procedure Code, is laid down in **Sanatan Naskar & Anr. v. West Bengal, AIR 2010 SC 3507** as follows-

*"It includes establishing **direct communication between the accused and the court.** This section aims to ensure that **all incriminating evidence against the accused is presented before them**, providing an opportunity for the accused to offer explanations. Section 313 serves **the purpose of testing the credibility of the prosecution's case**, as the examination of the accused is not merely a procedural formality but a crucial step in assessing the validity of the prosecution's evidence".*

Section 313 of Cr.P.C :

Power to examine the accused

- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court -
 - (a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary
 - (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:
 - (c) Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).
- (2) No oath shall be administered to the accused when he is examined under sub-section (1).
- (3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.
- (4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.
- (5) The Court may take help of Prosecutor and defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.

The plain reading of section 313 would clearly show that questioning under clause (a) of sub section 1 is discretionary, whereas the questioning under clause

(b) is mandatory as the object is to afford an opportunity to the accused to personally explain any circumstance, appearing in evidence against him. In **Basavaraju Vs. State (2000) 8 SCC 740** it is observed that

"the word 'may' in clause (a) of sub section (1) indicates that even if the court does not put any question under that clause, the accused cannot raise any grievance for it. If the court fails to put the needed question under clause (b) of sub section (1) the circumstances about which the accused was not asked to explain cannot be used against him".

3. Duty of the court :

It is the duty of the court to draw the attention of accused towards inculpatory pieces of evidence and give him an opportunity to offer explanation if he chooses to do so. Court is under legal obligation to put all incriminating circumstances before accused to solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused. Circumstances not put to the accused in his examination under section 313, cannot be used against him. (**State of U.P. vs. Mohd. Iqram and Anr AIR 2011 SC 2296**).

4. At what stage the court can exercise the powers under section 313 Cr.P.C?

The power to question the accused under section 313 (1)(a) of the Cr.P.C., is a *"discretionary power which the court may exercise at any time during the trial or inquiry even before framing a charge"*. (**Emperor vs. Genu Gopal (1929) 31 Bom LR 1134**).

"Under section 313 (1)(b) of Cr.P.C the Court has to put to the accused every such piece of evidence, which appears incriminating against him, and the Court should ask the accused as to whether he has any comment to make or explanation to offer with regard to such incriminating piece of evidence. The accused shall be kept free to answer or not to answer the questions put to him" as held by **Hon'ble Gauhati High court in para no. 26 State of Nagaland vs. Lipok Ao and others 2007 CrI.L.J 3395**.

5. What does the word "personally" in the section mean?

The word "Personally" was not in the earlier code and re-enacted in the code of 1973. In the case **Emperor vs. Bala Krishna ILR 55 Bombay 356** it was found that

“the conviction of the trial court is illegal on the ground that the Magistrate has took a joint statement of all the accused and did not examine them separately”.

In **Vaijinath vs State Of Karnataka 1993 (1) ALT (CRI) 417** the Hon'ble Karnataka High court observed that

“whatever may the number of accused persons each and every accused must be examined separately, distinctly and specifically under section 313 of Cr.P.C to enable him to explain any circumstances against him in the evidence. The Hon'ble court further observed that the provision should not be reduced to a drab formality but should be understood in its true and real spirit as any answer given by the accused has serious consequence of his own in the same trial or in any other trial for any other offence”.

Hence each one of the accused must be examined individually by explaining incriminating material specifically found against him.

6. What is the effect of non compliance of section 313 Cr.P.C?

In **Shivaji Sahabrao Bobade and another vs. State of Maharashtra (1973) 2 SCC 793** the Hon'ble Apex court considered the fallout of omission to question the accused on any incriminating circumstance or evidence held that

“It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration”.

The Hon'ble Court further observed that

“It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction. In such a case, the Court proceeds on the

footing that though a grave irregularity has occurred as regards compliance with Section 342 Cr.P.C (313 of Cr.P.C) the omission has not been shown to have caused prejudice to the accused.

In **State (Delhi Administration) v. Dharampal AIR 2001 SC 2924** the Hon'ble Apex court reiterated the supra view and held

"it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate Court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him".

The same observation is reiterated in **Nar Singh vs. State of Hariyana AIR 2015 SC 310.**

In **Gyan Chand and Others v. State of Haryana AIR 2013 SC 3395** the Hon'ble Apex court observed that

"a plea to non-compliance of the provisions of section 313 of Cr.P.C. was taken for the first time before the Supreme Court. But there was no material showing as to what prejudice has been caused to the accused persons, if facts of conscious possession was not put to them. Thus the court held that the trial was not vitiated for non-compliance of the provisions of section 313 of Cr.P.C".

*"Mere defective/improper examination under section 313, Cr.P.C. is no ground for setting aside the conviction of the accused, unless it has resulted in prejudice to the accused. Unless the examination under section 313 of Cr.P.C. is done in a perverse way, there cannot be any prejudice to the accused" as held in **SC Bahri v. State of Bihar AIR 1994 SC 2420 and Shobhit Chamar v. State of Bihar AIR 1998 SC 1693.***

7. Whether circumstances not put to accused can be used against him?

If the court fails to put needed question under clause (b) of sub section (1) the circumstances about which the accused was not asked to explain cannot be used against him (**Basavaraj supra case**).

The Hon'ble Apex court has discussed about this point in **Sharad Birdhi Chand Sarda vs State Of Maharashtra AIR 1984 SC 1622** that

“the circumstances which were not put to appellant in his statement under section 313 Cr.P.C must be completely excluded from consideration because the appellant did not have any chance to explain them”.

The Hon'ble Apex court in supra case has further observed that the above said observation has been consistently held since 1953 from **Fateh Singh Bagath Singh vs. State of Madhya Pradesh** case.

The Hon'ble court observed that

“It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decision of this Court”.

8. Whether an examination u/s 313 Cr.P.C can be dispensed with?

The proviso to section 313 (1) empowers the court to dispense with the examination of accused under clause (b) in summons cases. The provision of Law would not allow to dispense with the presence of accused when the case is posted for examination under section 313(1)(b) Cr.P.C in warrant case. The exception is provided only for summons cases. The reason is that if a Magistrate exercises his/her power to dispense with personal attendance of accused and permits him to appear by his counsel under section 205 of Cr.P.C only in summons cases as held in **Sanjeev vs. State of Kerala Cri.M.C.No.1798 of 2013 dt.30.10.2015 by Hon'ble Kerala High Court**. The sole question arise and answered in this case is whether the presence of accused is mandatory for examination under section 313 (1)(b) of Cr.P.C.

Even if the presence of accused is dispensed under section 317 of the code, the court cannot dispense with the examination of the accused under section 313(1)(b) of Cr.P.C held in **Usha vs. Raj 1993 Cri.L.J 2669**.

In **Basavaraj (supra) case** it is observed that

“if the obligation of the court under section 313(1)(b) of Cr.P.C works as great prejudice and disadvantage to the accused, in appropriate cases via if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or due to physical incapability or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements of section 313 of the code in a substantial manner via by supplying questionnaire to the advocate of the accused for the accused to answer the same supported by an affidavit”.

9. Whether accused can be confronted with any circumstance which is not in evidence?

No material which was not part of record can be confronted to the accused at the time of examination under section 313 Cr.P.C. Even if it is any document, the same cannot be confronted unless it was brought on record by any of the parties.

In **Kalp Nath Raj vs. State (1997) 8 SCC 732**, the issue involved is at the time of examining accused no.7 under section 313 Cr.P.C, the court has confronted him with two letters said to be addressed by accused no.7 to the court while he was in Jail during pre-trial period. At the time of confronting the said letters, accused no.7 has admitted his signatures in the two letters but denied the knowledge of its contents wherein he seems to have requested the court to take necessary action against persons who has caused his character assassination.

The learned Judge has considered one sentence of that letters which were not part of prosecution evidence. The Hon'ble Apex court observed on this aspect

"It was illegal on the part of the learned judge of the Designated Court to have used any part of the said letters, especially when those letters were not adduced as evidence in the case through any procedure known to law. Not even an affidavit has been filed by any one atleast for formally proving those letters in evidence. Section 313 of the Code is intended to afford opportunity to an accused "to explain any circumstance appearing in the evidence against him." It is trite that an accused cannot be confronted during such questioning with any circumstance which is not in evidence. Section 313 of the Code is not intended to be used as an interrogation. No trial court can pick out any paper or document from outside the evidence and abruptly slap it on the accused and corner him for giving an answer favorable or unfavorable. The procedure adopted by the learned judge in using the said two letters is not permitted by Law. We, therefore, disapprove the said course and dispel the said letters book bell and candle."

10. Whether examination under section 313 Cr.P.C can be used to cure lacunae in defence case?

It was held by Hon'ble Apex court in **Devendra vs. Baldev AIR 2004 SC 3084** that

"statement under section 313 Cr.P.C cannot be used to make up any suggestion during cross examination which ought to be put to the witness by the defence counsel".

11. How to consider the failure of accused to explain circumstances?

No doubt, the accused is having right to keep silence. It is not necessary for the accused to speak and explain the circumstances but when the case rests on circumstantial evidence, failure of the accused to explain the same would enable the court to draw adverse inference, the fact being in exclusive knowledge of the accused - **Ganesh vs. State (2002) SCC 731**.

This situation occurs generally in cases wherein the accused has to explain about the possession of stolen property.

12. Whether statement of accused under section 313 Cr.P.C can be used as evidence? How to use a statement of accused u/s. 313 Cr.P.C if it includes both inculpatory and exculpatory aspects?

The manner in which the statement of accused under section 313 Cr.P.C to be looked into and considered by courts is well explained by **Hon'ble Supreme Court in Indrakunwar vs. State of Chhattisgarh** as follows -

***35.7** This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.*

***35.8** This statement is to be read as a whole. One part cannot be read in isolation.*

***35.9** Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution".*

13. Whether conviction can be based on the confession of the accused in 313 Cr.P.C examination admitting guilt?

Brajendra Singh vs. State of M.P. (2012) 4 SCC 289 the Hon'ble Apex court observed in **para no.15** that

"It is a settled principle of law that the statement of an accused under section 313 of Cr.P.C can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under section 313 of Cr.P.C simpliciter normally cannot be made the basis for conviction of the accused. But where the statement of the accused under section 313 of Cr.P.C is in line with the case of the prosecution, then

certainly the heavy onus of proof on the prosecution is, to some extent, reduced".

It is well settled that where a confession or an admission is separable there can be no objection for taking one part into consideration which appears to be true and reject the other part which is false. **AIR 1978 SC 1096.**

Statement under section 313 of Cr.P.C is not evidence. It is only the stand of the accused or version by way of explanation when incriminating materials appearing against him or brought to his notice. **(Devendra vs. Baldev AIR 2004 SC 3084).**

14. What is the methodology for recording the statement of accused under section 313 Cr.P.C?

It is not sufficient compliance to string together long series of facts and ask the accused what he has to say about them. He must be questioned simply and separately about each material circumstance which is intended to be used against him.

The questioning must be fair and framed in a form which an ignorant and illiterate person may be able to appreciate and understand. Even if the accused is not illiterate, his mind is apt to be perturbed when he is facing a trial of murder. Therefore, it is required that each material circumstance should be put simply and separately in a way that an illiterate person can appreciate and understand. **(Tara Singh v. State of Punjab AIR 1951 SC 44)**

The practice of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is improper as the accused may not be in a position to give a rational and intelligent explanation. **(Naval Kishore v. State of Bihar; (2004) 7 SCC 502)**

This opportunity of examination under section 313 given to the accused, is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. **(Naval Kishore v. State of Bihar (2004) 7 SCC 502).**

It is imperative that each and every question must be put to the accused separately and their answers must also be recorded separately **(Kalpanath supra case).**

Recording of statement of the accused persons simultaneously and putting same set of questions to all the accused may cause prejudice to the accused, hence, it was held not proper. **(State of Maharashtra v. Goraksha Ambaji Adsul 2006 Cri.L.J. (NOC) 45).**

15. Whether counsel can be examined under section 313 Cr.P.C on behalf of accused?

In **Bibhuti Bhusan Das Guptha vs. State of West Bengal AIR 1969 SC 381** it is observed that

“No doubt the form of the summons show that the pleader may answer the charges against the accused, but in so answering the charges, he cannot do what only the accused can do personally. The pleader may be permitted to represent the accused while the prosecution evidence is being taken. But at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place”.

Later, in **Usha K.Pillai vs. Raj. K.Srinivas and others 1993 AIR 2090** (two Judges bench) it was observed by Hon'ble Apex court that

“the newly added proviso is in the nature of an exception to clause (b) of subsection (1) of section 313 of the Code. It applies to a summons-case it states in no uncertain terms that in a summons-case where the court has dispensed with the personal attendance of the accused it would be open to the court to dispense with the examination of the accused under clause (b) of section 313 (1) of the Code. Even in cases where the personal presence of the accused has been dispensed with under section 205(1) or section 317 of the Code the Magistrate can dispense with the mandatory requirement of clause (b) only in a summons-case”.

Later, in **Basavaraj R.Patil vs. State of Karnataka AIR 2000 SC 3214**, the Hon'ble Apex court has referred to the above observation by two Judges bench in Usha K.Pillai case and without over ruling it, also referred to its own observation in **Shivaji Sahabrao Bobade & anr. vs. State of Maharashtra & anr. 1973 (2) SCC 793** and explained about the procedure to be followed as under -

*“The word shall in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. **How this could be achieved?***

If the accused (who is already exempted from personally appearing in the Court) makes an application to the court praying that he may be

allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

(a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.

(b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.

(c) An undertaking that he would not raise any grievance on that score at any stage of the case.

If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire [as a matter of precaution the Court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for answers]. If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning”.

16. Whether the accused can be examined more than once?

*“If examination of the accused under section 313 has taken place, the court can call the accused to answer incriminating circumstances again. There is no implied prohibition on calling upon the accused to again answer questions. However, power to call the accused to answer questions more than once, after conclusion of the prosecution evidence should not be used in a routine or mechanical manner” observed in **Rajan Dwivedi vs. CBI 2008 Cri.L.J. 1440 (1447) DEL.***

17. Whether the statement under section 313 Cr.P.C of one accused can be used against other?

The statement of co-accused under section 313 of Cr.P.C. cannot be used

against main accused for obvious reason that the accused has no opportunity to cross examine the co-accused. But the answers given by the accused may be put in evidence for or against him in any other inquiry or trial.

"Incriminating circumstances in the evidence of the approver is to be put to the accused otherwise that part of evidence shall have to be excluded". **Balwant Kaur vs Union Territory Of Chandigarh AIR 1988 SC 139.**

18. Can examination of accused u/s 313 Cr.P.C can be postponed?

State vs. Annegowda (2006) 5 SCC 716 -

In the above case at trial court the accused had 11 criminal cases against him wherein one case has reached the stage of examination under section 313 of Cr.P.C and the accused has filed an application under section 309 of Cr.P.C to differ recording his statement under section 313 of Cr.P.C till all the other 10 cases reaches that stage. The said application was dismissed by trial court but the same was reversed by Hon'ble High court when challenged under section 482 of Cr.P.C

State of Karnataka preferred appeal against the order of Hon'ble High court (single Judge bench) wherein the Hon'ble Apex court observed that

"There is no provision in the Code of Criminal Procedure which enables the Court to postpone the examination of the accused under section 313 Cr.P.C. till the completion of the trial in other cases. Merely because certain other charge sheets have been filed against the same accused for similar offences cannot be a ground to postpone the examination of the accused under section 313 of Cr.P.C. The apprehension of the respondent-accused that if his statement is recorded under section 313 of Cr.P.C. he would be required to divulge his defence and in that event he would be prejudiced in the trial of other cases filed against him is without any basis and foundation. The charges in other cases against the accused may be under the same provisions of Indian Penal Code and may also be similar but documentary or oral evidence may be different which ultimately has to be appreciated and evaluated by the Court separately in each case."

Summoning of Additional Accused U/S 319 of Cr.P.C
(Corresponding section 358 of BNSS)

SYNOPSIS

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2.	Scope and object
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4.	What is the nature of power vested under this section?
5.	What are the essentials under section 319 of Cr.P.C?
6.	What is the methodology of exercising power conferred under section 319 of Cr.P.C and procedure to be adopted?
7.	Who can make an application and against whom the power can be exercised?
8.	Whether the court of Sessions can exercise the power vested under section 319 of Cr.P.C?
9.	Whether court can summon an accused under section 319 Cr.P.C after pronouncing Judgment?
10.	What material amounts to evidence to summon a person u/s 319 Cr.P.C?
11.	Can an accused summoned u/s 319 Cr.P.C plead discharge?
12.	Whether the order u/s.319 of Cr.P.C is revisable?
13.	Whether petition under section 319 of Cr.P.C can be dismissed for default?
14.	When an order of dismissal of petition under section 319 of Cr.P.C is confirmed in revision then whether the accused can be summoned again?
15.	What about bar of limitation under section 468 of Cr.P.C?

1. Introduction :

There are cases where after the production of evidence, the court thinks that a person other than the accused has committed the offence. In such cases, the court has the power under Section 319 of the Code of Criminal Procedure to summon, detain or arrest such a person after service of notice. Section 319 of Cr.P.C deals with the power of the court to proceed against other persons appearing to be guilty of such an offence for which the accused is prosecuted. During the trial if it appears to the court that a person who has not been joined as accused in the case has committed the offence, then in such a case, the person can be tried together with the accused. This section ensures justice and takes into account the convenience of both the parties by taking cognizance of the newly added accused in the same case. The code also takes into consideration the interests of the person who has been joined as accused and the same is provided under section 319(4) of Cr.P.C.

The Hon'ble Apex Court has observed in **Babu Bhai Bhimabhai Bokhiria & Anr v. State of Gujarat AIR 2014 SC 2228** that "the power under Section 319 of Cr.P.C cannot be exercised in a casual manner. It should be exercised only when strong and cogent evidence occurs against a person.

The Section emphasizes the principle of double jeopardy which has been enshrined in Article 20(3) of the Indian Constitution. The Hon'ble Supreme Court reiterated in *Manjeet Singh v. State of Haryana, 2021* that once the accused has been acquitted, he cannot be summoned as an additional accused. It is based on the principle that the culprit must not be acquitted and the accused must not be punished.

2. Scope and object

A Constitution Bench of Hon'ble Apex Court in **Hardeep Singh v. State of Punjab and Ors (2014) 3 SCC 92**, explained the purpose behind this provision in the following manner :

"The constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the Law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of Law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the Law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the Law. It is these ideals as enshrined under the Constitution and our Laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished".

The Hon'ble Apex court observed in **Hardei vs. State of UP AIR 2016 SC 1615** that

"it is well accepted in criminal jurisprudence that F.I.R may not contain all the details of the occurrence or even the names of all the accused. There are varieties of crimes and by their very nature, details of some crimes can be unfolded only by a detailed and expert investigation. This is more true in crimes involving conspiracy, economic offences or cases not founded on eyewitness accounts. The fact that police chose not to send up a suspect to

face trial does not affect power of the trial court under section 319 of Cr.P.C to summon such a person on account of evidence recorded during trial”.

In the said case, the following five questions fell for consideration before the Hon'ble Court:

“(i) What is the stage at which power under section 319 of can be exercised?

(ii) Whether the word “evidence” used in section 319 (1) of Cr.P.C could only mean evidence tested by cross- examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word “evidence” used in section 319 (1) Cr.P.C has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under section 319 of Cr.P.C to arraign an accused? Whether the power under section 319(1) of Cr.P.C can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under section 319 of Cr.P.C extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?”

After considering the above questions the Hon'ble court observed in Para no.12 and 13 -

*“Section 319 of Cr.P.C springs out of the doctrine **Judex damnatur cum nocens absolvitor** which means Judge is condemned when guilty is acquitted and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.*

It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial”.

3. What is the standard of proof required to summon a person under section 319 of Cr.P.C as an accused in a case?

“While a prima facie case against the new accused needs to be established from the evidence presented before the court, it requires evidence that is much stronger than just a mere probability of the person's involvement. The standard of proof that should be applied should be more

than a prima facie case as exercised at the time of framing of charges but short of satisfaction that the evidence, if unchallenged, would lead to a conviction. If such a level of satisfaction is not met, the court should refrain from exercising power under Section 319 of Cr.P.C". (Hardeep Singh Supra).

4. What is the nature of power vested under this section?

The power under section 319 of Cr.P.C is an extraordinary power that is conferred on the courts and exercised at the discretion of the Judge. It should be used carefully and cautiously if compelling reasons exists against the individual. It is a special power to meet an extraordinary situation.

"The Hon'ble Supreme Court in Para 98 of Hardeep Singh supra described the nature of power vested with courts under section 319 of Cr.P.C as a special and arbitrary power. It should only be employed sparingly and when the situation clearly calls for it. It cannot be utilized because the Magistrate or Sessions Judge thinks another individual may also be responsible for committing that crime. Only when there is clear and convincing evidence against a person in the evidence provided to the court should this power be used, and not arbitrarily or carelessly".

5. What are the essentials under section 319 of Cr.P.C?

Section 319 of Cr.P.C

Power to proceed against other persons appearing to be guilty of offence -

- (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
- (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
- (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
- (4) Where the Court proceeds against any person under sub-section (1), then -
 - (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard
 - (b) subject to the provisions of clause (a), the case may proceed as if such

person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

As per the contents of the section, the essentials are -

1. There must be a trial or inquiry of an offence. Section 319(1) makes it mandatory for the courts to exercise their power only during the trial or inquiry of an offence. Section 319(1) gives the court the power to proceed against such a person not being the accused, whom it thinks, from the evidence gathered during the course of inquiry or trial, to have committed the offence. Further, sub clause (2) of the Section also gives additional power to the court to arrest or summon that person if he is not present during the proceedings. In case the person is attending the proceedings, then the court may detain him for the purpose of inquiry under Section 319(3).
2. Court must be satisfied by the evidence presented that any other person other than the accused has committed such offence. A stronger evidence is required than mere probability of complicity of that person is the test to be applied. **Hardeep Singh supra, Sugreev Kumar vs. State of Punjab AIR 2019 SC 2903 and ors, Ramesh Chandra Srivastava vs. State of UP AIR ONLINE 2021 SC 799.**
3. Such a person has to be tried together with the accused. He must be tried with the accused simultaneously but according to section 319(4)(a) the proceedings against him have to be started **denovo** and the witnesses have to be examined again.

6. What is the methodology of exercising power conferred under section 319 of Cr.P.C and procedure to be adopted?

It can be exercised either suo motu or upon application by any person including the accused. The trial court can take suo motu cognizance only when there is evidence recorded during the trial which involves the persons to be added as accused and the statements recorded during investigation should not be relied upon.

The guidelines of Hon'ble Apex court in **Sukhpal Singh Khaira vs. State of Punjab 2022** (Five judges constitution bench) says that -

"If the competent court discovers evidence or receives a request under Section 319 CrPC regarding the involvement of any other person in committing the crime based on the evidence presented at any stage of the

trial, the trial must be stopped before a decision on acquittal or sentence is made.

- *The Court will then examine whether it is essential to summon the additional accused and issue directions accordingly.*
- *The summoning order must be issued before the main case trial can be carried forward, if the court decides to exercise its power under Section 319 of Cr.P.C and summon the accused.*
- *The Court shall also consider whether the new accused to be summoned is to be tried together with the other accused or separately, depending on the stage at which the summoning order is granted.*
- *If the decision is for a joint trial, the new trial will not commence until securing attendance of the summoned accused.*
- *If it is decided that the accused who was summoned can be tried separately from other accused, the court will not encounter any problem in concluding the trial against the accused who were being pursued.*
- *If the trial is paused as in a case where the accused who were tried are to be acquitted, and the decision is that the summoned accused can be tried separately in a new trial. There shall be no impediment in passing the Judgment of acquittal in the main case.*
- *If the power under Section 319 of the Cr.P.C is not invoked or exercised during the main trial until its conclusion, and if there is a split-up (bifurcated) case. Then, the power under Section 319 of the Cr.P.C can only be invoked or exercised in the split- up (bifurcated) trial if there is evidence pointing to the involvement of the additional accused to be summoned.*
- *The right course of action, if the circumstances call for the court to invoke and exercise the authority under Section 319 of the Cr.P.C after arguments have been heard, and the case has been reserved for judgment, is to put the case aside for re-hearing.*
- *On setting down the case for re-hearing, the above-described method to decide whether to summon and hold a joint trial or continue in another manner shall be decided and proceeded with, accordingly.*
- *Even in such a scenario, at that stage, if the decision is to summon additional accused and hold a joint trial, the trial shall be conducted and **denovo** proceedings will be held.*
- *If, under those circumstances, it is decided to have a separate trial for the accused who was summoned, as previously indicated:*
 1. *Before a new trial against the accused who was called is started, the verdict and sentence in the primary case may be revealed.*

2. *If there is an acquittal, it will be ordered in the main case, and the summoned accused will then go through a new trial.*

7. Who can make an application and against whom the power can be exercised?

In para no.16 of **Sarojben Ashwin Kumar Shah Vs. State of Gujarat, 2011(74) ACC 951 (SC)** the Hon'ble Supreme Court has drawn following guidelines for exercising the jurisdiction by courts u/s 319 CrPC :

“(I) The Court can exercise the power conferred on it under Section 319 of the Code suo moto or on an application by someone.

“(II) The power conferred under Section 319(1) applies to all Courts including the Sessions Court.

“(III) The phrase “any person not being the accused” covers any person who is not being tried already by the Court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Court.”

while exercising powers under section 319 Cr.P.C against an accused who has already been discharged, the court must also take into consideration about the constitutional bar under Article 300 (**double jeopardy**)

The accused against whom proceedings have been quashed can also be added under section 319 of Cr.P.C (**Jovindar Singh vs. State of Punjab (1979) 1 SCC 345**)

The power under section 319 does not exclude from its operation an accused who has been released by the police under section 169 Cr.P.C.

8. Whether the court of Sessions can exercise the power vested under section 319 of Cr.P.C?

The **Hon'ble Apex court in Raghubans Dubey vs. State of Bihar AIR 1967 SC 1167** stated that

*“once cognizance of an offence is taken it becomes the Court's duty **to find out who the offenders really are** and if the Court finds that apart from the persons sent up by the police some other person are involved, it is the duty of the court to proceed against those persons' by summoning them because the summoning of the additional accused is part of the proceeding initiated by taking cognizance of an offence”.*

The Sessions court also has the power to add any person for trial without there being a committal order against such person. In **Joginder Singh v. State of Punjab AIR 1979 SC 339** the Hon'ble Apex court observed that

*"It will thus appear clear that under section 193 read with section 209 of the Code when a case is committed to the Court of Session in respect of an offence the **Court of Session takes cognizance of the offence and not of the accused** and once the Sessions Court is properly seized of the case as a result of the committal order against some accused the power under section 319(1) can come into play and such Court can add any person, not an accused before it, as an accused and direct him to be tried along with the other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial".*

However the Sessions Court is empowered to array any person as accused only after reaching the stage of collecting evidence.

9. Whether court can summon an accused under section 319 Cr.P.C after pronouncing Judgment?

In **Sukhpal Singh Khaira vs. State of Punjab 2022** the Hon'ble Punjab and Harayana High Court observed that

"even after the pronouncement of the Judgment of conviction, the trial is not complete since the learned Sessions Judge is required to apply her/his mind to the evidence which is available on record to determine the gravity of the charge for which the accused is found guilty, the role of the particular accused when there is more than one accused involved in an offence and in that light, to award an appropriate sentence. Therefore, it cannot be said that the trial is complete on the pronouncement of the judgment of conviction alone, though it may be so in the case of acquittal as contemplated under section 232 of Cr.P.C, since in that case there is nothing further to be done by the court except to record an order of acquittal which results in conclusion of trial".

In the above case the constitutional bench of Hon'ble Supreme Court held that

*"once the trial Judge passes an order on sentence, the court become **functus officio** and it is not within its jurisdiction to pass an order under section 319 of Cr.P.C".*

10. What material amounts to evidence to summon a person u/s 319 Cr.P.C?

Para no 106 of Hardeep Singh case says

"that the power under Section 319 Cr.P.C can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till

the said evidence is tested on cross- examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person/ persons, not facing the trial in the offence”.

In para no.14 of **Hardeep Singh case**,

*“the words used in section 2(g) has to be understood distinctively from the one used in section 319 Cr.P.C. The legislature has used the words “**magistrate or court**” in 2(g) and used te word “**court**” in 319 Cr.P.C. The pwer under section 319 Cr.P.C can be exercised only by court and not by any officer not acting as a court. This means that the material collected by a Magistrate or court of sessions while exercising powers as court forms evidence to be considered to summon a person under this section”.*

11. Can an accused summoned u/s 319 Cr.P.C plead discharge?

Jogender yadav vs State of Bihar and ors M R (Cri) 3707 (SC)

answers this point.

“This is a murder case tried by Sessions court after committal from Magistrate court. In this case four persons has been added by the Hon’ble Sessions court after recording the evidence of three witnesses by exercising powers under section 319 of Cr.P.C and after giving an opportunity to the said four persons to be heard. Later, the said four persons got discharged from the offence by filing an application under section 227 of Cr.P.C due to which state has preferred revision before Hon’ble High court of Allahabad and the Hon’ble High court has set aside the order of discharge by observing that it amounts to nullifying the order under section 319 of Cr.P.C which was made earlier”.

The matter came before Hon’ble Supreme Court wherein the Hon’ble court after referring to dictums in Hardeep Singh case, Ajay Kumar Parmar vs. State of Rajasthan (2012) 12 SCC 406 has observed that

“the order for addition of an accused made after considering the evidence cannot be undone by coming to the conclusion that there is no sufficient grounds for proceedings against the accused without appreciation of evidence”.

This means that for an order of discharge, court has to consider the material available and court is not supposed to appreciate the evidence. In such case the order of adding accused under section 319 of Cr.P.C which was passed after recording the evidence available cannot be thrown away by way of a discharge petition in which evidence cannot be considered.

The Hon'ble court further observed that

“the exercise of power under section 319 Cr.P.C must be placed on a higher pedestal. However, the accused summoned under section 319 of Cr.P.C are entitled to invoke remedy under Law against an illegal or improper exercise of power under section 319 but cannot have the effect of undoing the order by seeking discharge”.

12. Whether the order u/s.319 of Cr.P.C is revisable?

An order rejecting application under section 319 of Cr.P.C to summon additional accused is not an interlocutory order. Revision lies against such order.

(Mohit @ Sonu & Anr vs State Of U.P and another AIR 2013 SC 2248)

13. Whether petition under section 319 of Cr.P.C can be dismissed for default?

In **Halima Bibi vs. State of Orissa 2001 TLP 108 Orissa** it is observed that

“it is not only the responsibility of the prosecution or the informant but also equally the duty of the court to apply its judicial mind to seek if any person should be or should not be added as an accused in a case.”

14. When an order of dismissal of petition under section 319 of Cr.P.C is confirmed in revision then whether the accused can be summoned again?

In **Ladu Devi Vs. State of Rajasthan 2005 CRLJ 543(Raj)**, it is held that

“where a petition under section 319 of Cr.P.C is summoning the person as accused is dismissed and order is confirmed in revision such person cannot be summoned again on the basis of further investigation and supplementary charge sheet. Principles of estoppel applies.”

15. What about bar of limitation under section 468 of Cr.P.C?

As discussed supra in Joginder Singh case, court has already taken cognizance of the offence within limitation then summoning some other persons as accused into the same trial is not barred by limitation.

No bar of limitation shall arise by inclusion of accused - **“Chandamaltak Vs. State of Rajasthan and another (2008) CRLJ 1264 Raj”**.