

Court No. - 89

Case :- APPLICATION U/S 482 No. - 42125 of 2023

Applicant :- Man Singh

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Rajeev Chaddha

Counsel for Opposite Party :- G.A., Pramod Kumar Dubey

Hon'ble Deepak Verma, J.

1. Heard learned counsel for the applicant and learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to set aside the order dated 20.10.2023 passed by Additional Sessions Judge/Special Judge P.C. Act (U.P.S.E.B.), Gorakhpur in Session Trial No.4 of 2007 (State vs. Aman Singh and others) partly allowing the application moved by Rakesh Tripathi and Akhilesh Kumar Tripathi under section 311 Cr.P.C.

3. Brief fact of the case is that on 19.12.2005 an incident took place as alleged in the FIR that opposite party no.2 alongwith his two brothers and his colleagues had attacked on the house of the applicant and three persons have lost their lives and case was registered as Case Crime No.490 of 2005, under section 302 I.P.C and other allied sections. Thereafter, some unknown persons killed the mother of opposite party no.2. FIR was lodged as Case Crime No.490A of 2005, under sections 147, 148, 149, 302, 394, 452, 436 I.P.C at Police Station Pipiganj, District Gorakhpur. Police submitted charge-sheet against four accused persons on 21.03.2006. Thereafter, case was committed to Court of Session and prosecution produced 18 witnesses, 17 witnesses of fact and one witness of investigation. After recording statement of all the prosecution witnesses, case was fixed for recording statement under section 313 Cr.P.C. and same was recorded on 29.03.2023 and court fixed date for arguments on 31.03.2023 and on 31.03.2023 arguments could not took place and case was adjourned. On 28.09.2023, one Rakesh Tripathi and Akhilesh Kumar Tripathi claiming themselves to be the eye witness of the incident, moved application under section 311 Cr.P.C. for their evidence. Applicant and his brother filed objection stating therein that Rakesh Tripathi has already been examined as P.W.10 and he has not supported the prosecution story and declared hostile.

4. Learned counsel for the applicant submits that learned Additional Session Judge/trial court without considering the correct facts and entire evidence, allowed the application and summoned Akhilesh Kumar Tripathi as prosecution witness. Summoning by trial court to examine Akhilesh Kumar Tripathi as a prosecution witness, is abuse of the process of the court and at this stage of argument of the case, such evidence is not permissible under section 311 Cr.P.C. Proceeding of evidence under section 313 Cr.P.C. has been closed and thereafter summoning prosecution witness to collect evidence cannot be permitted to fill up lacuna in the prosecution case. The power under section 311 Cr.P.C. can be exercised only before the statement under section 313 Cr.P.C. and after recording statement under section 313 Cr.P.C. and closing of defence witnesses prosecution cannot be permitted to fill up lacuna just for the purposes of punishment. Akhilesh Kumar Tripathi was not appeared before the Investigating Agency nor his statement was recorded by the Investigating Officer and at this stage, it cannot be said that he was present at the time of alleged offence. Statement of any person as witness cannot be allowed when it is apparent that the prosecution has failed to establish the case beyond doubt. It is well settled principle of law that at the stage of argument only defence can be permitted to produce evidence to prove him innocent and not the prosecution for punishment, therefore, the view taken by the court below in allowing the application, is arbitrary and unjustified. The order passed by learned trial court does not disclose as to why new evidence is required for adjudication of the case. The order challenged here is illegal and not tenable in the eye of law.

5. *Per contra*, learned A.G.A. vehemently opposed the contention of learned counsel for the applicant.

6. Considered the argument raised by learned counsel for the applicant and learned AGA. It is admitted fact that Akhilesh Kumar Tripathi, who has been summoned as prosecution witness is real brother of Rakesh Tripathi @ Sintu Tiwari, P.W.10. The Investigation officer has not recorded his statement nor he was produced as eye witness whereas from the record as well as order challenged herein, it appears that he was present at the time of incident and himself has moved application that being eye-witness of the case his examination as prosecution witness is necessary for just decision of the case.

7. As object underlying Section 311 Cr.P.S. is that there may not be failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in statements of

witnesses examined from either side. The discretionary power vested under section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons with caution and circumspection to meet ends of justice. In present case eye witness has moved an application to examine himself as witness.

8. Learned trial court has rightly rejected the re-examination of Rajesh Tripathi @ Sintu Tiwari, who was earlier examined as P.W.10 by the court. The legal proposition is that if prosecution does not produce evidence, which is necessary for just decision of the case, the court suo-moto summon or either on application, call or summon evidence. Further the application under section 311 Cr.P.C. can be moved at any stage of the proceeding, if Court finds that summoning/examination of the witnesses is required for just decision of the case. The argument raised by learned counsel for the applicant that after closing of the defence witness, court cannot summon prosecution witness under section 311 Cr.P.C. is not acceptable. Court is empowered to summon any of the witness as provided under section 311 Cr.P.C. for just decision of the case. The trial court has also considered the Apex Court judgment and judgment is based on principal laid down in **V.M.Patil vs. K.Niranjan Kumar (2021)3 SCC 651** and judgment in **Varsha Garg vs. State of Madhya Pradesh dated 08.08.2022 of the Supreme Court in Criminal Appeal No.1021 of 2022**. The trial court order is based upon facts and circumstances of the case as well as on legal proposition laid down by Supreme court. The order dated 20.10.2023 is just and proper. No interference is warranted.

9. In view of the above, this Court does not find any ground to interfere. The present 482 application is **dismissed** with the aforesaid observation.

Order Date :- 17.11.2023/SKD