

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 845 of 2015

Heera Singh Kaushal S/o Ganesh Ram Kaushal Aged About 30 Years R/O
Village Gidhwa, Police Station - Nandghat, Civil & Revenue District -
Bemetara Chhattisgarh

---- Petitioner

Versus

State of Chhattisgarh Through : Police Station - Nandghat, Civil &
Revenue District - Bemetara Chhattisgarh

---- Respondent

For Petitioner – Shri V.A. Goverdhan, Advocate.
For Respondent/State- Smt. M. Asha, PL.

Hon'ble Shri Justice Goutam Bhaduri

Order

23/09/2015

1. Challenge in this petition is to the order dated 22/06/2015 passed by the Additional Sessions Judge, Bemetara in Sessions Trial No.04/15 in between State Vs. Hira Singh Kaushal and another whereby an application preferred under section 311 of Cr.P.C. to recall the prosecutrix has been dismissed.

2. Learned counsel for the petitioner would submit that the sessions trial against this petitioner is pending under section 363, 366 and 376 of IPC wherein the witnesses are being examined and on 19/03/2015 prosecutrix was examined. He would submit that counsel who appeared on behalf of the petitioner/accused was engaged on the same date and because of the paucity of time proper instruction could not be obtained and certain questions were left out which goes to the entire root of the case as the case is entirely interdependent upon statement of the prosecutrix. He submits that it is not a case that the petitioner wants to delay the

proceeding since proceeding itself will go to show that after 19/03/2015 still prosecution witnesses are to be examined which is evident from the impugned order dated 22/06/2015, date of evidence was fixed for 24/07/2015 and 25/07/2015. He further submits that as per instruction received still the trial is pending adjudication and the prosecution witnesses are still to be examined. He therefore submits that in case one chance is given to the petitioner to cross examine the prosecutrix it will advance fair play and good sense and allowing prayer to examine the prosecutrix will be for correcting errors and therefore submits that only one opportunity may be given.

3. Learned state counsel opposes the same.

4. I have heard learned counsel for the parties and perused the order.

5. Perusal of the impugned order dated 22/06/2015 would reveal that an application was filed under Section 311 of Cr.P.C. wherein it was contended that some of the important questions which were numbered into 4 were left out and counsel who was examining the prosecutrix was engaged on the same date of such cross examination. Order further purports that on 19/03/2015 the prosecutrix was examined and cross examined and the fact and submission made by the petitioner is also supported by the order sheet. It is not in dispute that on the same date counsel for the accused was engaged. An application under Section 311 of Cr.P.C. has been rejected considering the requirement of questions posed on merits. Thereby court has pre-conceived the answer of questions and has adjudicated that such question and answer may not be relevant. However, perusal of the application under section 311 of Cr.P.C. wherein questions have been shown at this stage would reveal that relevancy of such question cannot be decided as that to be irrelevant by the court as

against the circumstances projected.

6. The law with respect to recall witness has been laid down by the Hon'ble Supreme Court in case law reported in **2013 AIR SC Weekly 4179 between Raja Ram Prasad Yadav Vs. State of Bihar**. The Court therein has interpreted the principle behind Section 311 with respect to the power of the Court to summon, recall or re-examine any witness. The following principles were summarised which are enumerated in para 23 are quoted herein below:-

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C., read alongwith Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311, Cr.P.C., should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311, Cr.P.C., should be resorted to only with the

object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

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

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

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

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

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

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

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

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C., must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

7. Recently in another case law reported in **AIR 2014 SC 2950 between Mannan Sk & Ors. Vs. State of West Bengal and Another**, the

Hon'ble Supreme Court again examined the scope of Section 311 of Cr.P.C. and has held at para-10, which is reproduced as under :-

“10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the

circumstances and decide whether the prayer for recall is genuine.”

8. Applying such principles laid down by the Hon'ble Supreme Court, the argument advanced by learned counsel for the petitioner appears to have considerable force. The facts in this case would show that the trial court while dismissing the application has decided on the relevancy of the same on the merits which cannot be ordered and considering facts and situation which is evident that counsel who was examining the prosecutrix was engaged on the same date, consequently, it is obvious that there might have been some slip over the instruction might have caused. Taking into facts that prosecution witnesses are still to be examined, in my considered opinion application under section 311 of Cr.P.C. deserves to be allowed. In the result order dated 22/06/2015 is set aside. Application under section 311 of Cr.P.C. is allowed whereby prayer made to recall prosecutrix is allowed. The court shall further summon the prosecutrix for examination on the date as and when it is fixed by the trial court.

9. With such observation petition stands disposed of.

Sd/-
(Goutam Bhaduri)
JUDGE