

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Criminal Revision No. 563 of 2016**

1. Gaurav Sonkar, aged about 21 years, son of Shri Damodar Sonkar
 2. Akhilesh Srivas, aged about 20 years, son of Shri Nareh Srivas
- Both are resident of village Badikala, P/s. Badi, District Raisen (MP)

---- Applicant**Versus**

State of Chhattisgarh, through the Police Station- Manendragarh,
District Korea, CG

---- Respondent

For Applicants	:	Shri Malay Kumar Bhaduri
For Respondent/State:		Shri Prafull N. Bharat, Additional Advocate General along with Smt. M. Asha, P.L.

Hon'ble Shri Justice P. Sam Koshy**Order On Board****05/07/2016**

By way of the present Revision petition under Section 397 read with Section 401 of CrPC the applicants have challenged the order dated 10.05.2016 passed by the 1st Additional Sessions Judge, Manendragarh, District Korea in Sessions Trial No.11/2011 whereby the Court below has rejected the application under Section 233 of CrPC preferred by the applicants.

2. The facts in brief are that the applicants in the instant case are the accused in Sessions Trial No.11/2011 wherein they have been charged for the offence under Section 376 of IPC and the trial is going on against them since 2011. On 26.03.2012 the prosecutrix was examined before the Court below and was also elaborately cross-examined by the defence. Subsequently, after more than three years time, the prosecutrix filed an affidavit before the trial Court stating that there were certain compelling circumstances which made her file an FIR against the applicants and that

after release of the applicants on bail, she got married to applicant No.1 on 31.01.2015 and now she does not want to prosecute the applicants any further.

3. Later on, an application under Section 311 CrPC was filed by the applicants before the Court below on 04.02.2016 which was rejected on 15.02.2016 on the ground that no sufficient and strong ground has been made by the defence for recalling the prosecution witness for cross-examination invoking the powers under Section 311 of CrPC. Against the said rejection order dated 15.02.2016, the applicants preferred a revision petition before the High Court which was registered as Criminal Revision No. 205 of 2016. The said Criminal Revision came up for hearing on 22.03.2016 and before the Court could enter into the merit of the case, the applicants, at the outset, prayed for withdrawal of the criminal revision with liberty to approach the Court below by moving an application under Section 233 of CrPC which was allowed and the Criminal Revision was accordingly dismissed as withdrawn with the aforesaid liberty. However, the Co-ordinate Bench while allowing the withdrawal of the criminal revision had made an observation that while considering the application under Section 233 CrPC if moved by the defence, the interim order dated 15.02.2016 shall not come in the way of the defence. For ready reference the order dated 22.03.2016 passed in CRR No. 205/16 is reproduced hereunder:

“1. At the outset, learned counsel for the applicants submits that she be permitted to withdraw the instant criminal revision with liberty to file appropriate application to call the prosecutrix as defence witness when the applicants will enter upon defence, as per provisions of Section 233 of the Code of Criminal Procedure, 1973 and the Court may consider such prayer without being influenced with the order dated 15.02.2016 on its merits.

2. On due consideration, the instant criminal revision is disposed of as withdrawn without any appreciation on its merit reserving the aforesaid liberty. Needless to mention that while considering any such application, the interim order dated 15.02.2016 shall not come in the way.”

4. A plain perusal of the order passed in Criminal Revision No.205/16 two things admittedly are evident; firstly at the outset counsel for the applicants had prayed for withdrawal of the revision petition. Secondly, in paragraph-2, the Court had very specifically enumerated that the applicants are being permitted to withdraw the criminal revision without appreciation on its merit which clearly indicates that the applicants had voluntarily withdrawn the criminal revision without entering into the merit of the case so far as the veracity of the order dated 15.02.2016 rejecting the application under Section 311 CrPC is concerned.

5. Subsequently, the applicants moved an application under Section 233 of CrPC before the Court below on 11.04.2016. The main contention of the applicants in the said application under Section 233 CrPC was that subsequent to the examination of the prosecutrix before the Court below as early as on 26.03.2012 she has filed an affidavit before the Court below on 24.11.2015 bringing certain subsequent developments on record more particularly the fact that the prosecutrix has since married the applicant no.1 and is staying with him as husband and wife and that initially she had filed an FIR against the accused persons under certain compelling circumstances.

6. This application under Section 233 CrPC was rejected by the Court below vide impugned order dated 10.05.2016 holding that since the prosecutrix had been elaborately examined and cross-examined and her evidence was recorded as early as more than three years back and that Section 233 CrPC does not envisage calling a prosecution witness who has already been examined before the Court as a defence witness also in the same trial. The Court below has placed his reliance upon a judgment of the Supreme Court passed in the case of State of M.P. v. Badri Yadav &

Anr. reported in AIR 2006 SC 1769. It is this order dated 10.05.2016 which is under challenge in the present revision.

7. Counsel for the applicants submits that the Court below has wrongly rejected the application under Section 233 of CrPC. According to him, the Court below has not appreciated the facts of the case in the proper perspective in as much as the Court below ought not to have given weightage to the fact that the application under Section 311 has already been rejected by it as the provisions under Section 311 and Section 233 are entirely different and cannot be read together. According to the counsel for the applicants, the Court below while rejecting the application should have given specific reasons for rejecting the application which is a mandatory requirement under Sub Section 3 of Section 233 CrPC. According to him, the three grounds on which the Court below can reject the application under Section 233 CrPC are that firstly the application should have been with vexatious intention, secondly the application should have been moved with an intention of delaying the trial and the third ground for rejection was that the application should have been moved with an intention of defeating the ends of justice. According to the counsel for the applicants, there is no such finding of the Court below that the application was filed with any of these grounds while rejecting the same and therefore the impugned order is bad in law.

8. Counsel for the applicants referring to the judgment of the Supreme Court in the case of State of M.P. (supra) submits that the said judgment is entirely distinguishable as the same has been passed under altogether different factual background as compared to the facts of the present case. According to the counsel for the applicants, the said judgment is also distinguishable on the fact that in the said judgment the Supreme Court has held in the event if the application has been moved for frivolous and vexatious reasons, the judge is justified in rejecting the application. But in

the present case there is no such finding that the application was filed with vexatious and frivolous reasons. Therefore, the Court below has wrongly applied the ratio laid down in the said judgment in the facts of the present case. He submits that the case of the applicants is squarely covered by one of the decisions of the Madhya Pradesh High Court in the case of Harbhajan and others v. State of M.P. reported in 1989 J.L.J. 217 wherein in paragraph-8 it has been held that:

“It is true that the trial Court did commit an error in recording the statements of these witnesses at two places and by statistically numbering them initially as PW's and then as D.W's.

“Under Section 233 of the Code of Criminal Procedure, 1973 when called upon to enter on his defence, the accused is entitled to apply for issue of process compelling attendance of witnesses and the Court is bound to issue such process unless for reasons to be recorded, the Court may find the application to be vexatious or designed to delay or defeat the ends of justice. The Trial Court rightly permitted the recall of the two witnesses because it was necessary to do so in the ends of justice. The only error in which it fell, wittingly or unwittingly, was to have recorded the statements at two places. It should have inserted a note on the earlier depositions of these witnesses and resumed examination, cross-examination, etc. in continuation of the original depositions.”

9. Counsel for the applicants further submits that in the instant case, the application under Section 233 ought to have been allowed by the Court below as there is no bar whatsoever for the defence in calling for a prosecution witness as its witness and therefore sought for quashment of the impugned order dated 10.05.2016. Counsel for the applicants referred to a decision of the Supreme Court in the case of Jamatraj Kewalji Govani v. State of Maharashtra reported in 1968 Cr.L.J. 231 wherein in paragraph-14 it has been held:

“It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything

suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

10. The State counsel, however, opposing the revision petition submits that in the instant case the Court below has not committed any error of law while rejecting the application under Section 233 CrPC. He submits that the instant case is not the one where the defence could have been permitted to call the prosecutrix herself as defence witness for the reason that the prosecutrix had already been brought as prosecution witness PW-1 and she had been elaborately examined and cross-examined by the applicants themselves. Once the prosecutrix is elaborately cross-examined, the question of further calling the same witness as a defence witness on an application under Section 233 is not permissible. He further submits that even otherwise the law also would not permit the defence to call the prosecutrix in the instant case as defence witness for the reason that the prosecutrix has already been examined and she has supported the case of the prosecution in toto and subsequently, she cannot be permitted to be called as a defence witness to resile the statement which she had earlier made and therefore prayed for rejection of the criminal revision.

11. Having heard the rival contention put forth by the counsel appearing on either side if we first look at the judgments referred by the counsel for the applicants that is the case of Harbhajan (Supra), it would be evident that the Supreme Court in the very same paragraph-8 has held that:

"The substantive law of evidence or the procedural criminal law does not permit the statement of one witness being recorded twice so as to read the two as separate deposition. After all the same witness cannot be a witness for prosecution and a little latter a witness for defence."

12. Similarly, if we take into consideration the judgment of the Supreme Court in the case of *Jamatraj Kewalji Govani (supra)*, the ratio laid down by the Supreme Court in the said judgment also would not be applicable in the facts of the present case for the reason that the said judgment was filed under Section 540 CrPC under the old Act which under the new Act would be Section 311 CrPC which deals with the recalling/re-examination of a witness as is evident from the provisions referred and relied by the counsel for the applicant itself and therefore the said judgment is distinguishable in the facts of the present case.

13. So far as the law in respect of the provisions under Section 233 CrPC is concerned, in the opinion of this Court, the Court below has aptly referred to the judgment of the State of MP v. Badri Yadav & Anr (Supra) wherein in paragraph-12 the Hon'ble Supreme Court has in very categorical term expressed that:

“There is no provision in the Code of Criminal procedure that by filing affidavit the witnesses examined as PWs (PW-8 and PW-9 in this case) could be juxtaposed as DW-1 and DW-2 and be examined as defence witnesses on behalf of the accused.”

Similarly, in paragraph-14 of the same judgment the Supreme Court again has held that:

“The provisions of Sub-section (3) of Section 233 CrPC cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as Dws.”

14. The judgment of the Supreme Court very clearly indicates that the provisions under Section 233 CrPC should not be permitted for the defence to move an application for calling upon a prosecution witness who has been examined and cross-examined at one point of time and later on has to be called as a defence witness to give entirely contradictory statement from what has already been given earlier as a prosecution witness.

15. If we peruse the provisions under Section 233 CrPC, it clearly gives an indication that the said provision is to be attracted after the prosecution evidence is closed and that the Court has reached to the conclusion that prima facie, there is sufficient material against the accused persons for proceeding further with the case and at that time the accused persons can bring his defence witness and adduce any evidence in support of their defence. It further envisages that under Section 233 CrPC if the accused persons take for issuance of any process for compelling the attendance of any witness or production of any document or thing, the judge shall issue such process unless he considers, for reasons to be recorded that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. This itself clearly indicates that it is not a matter of right that the accused persons can initiate process for compelling any prosecution witnesses to be adduced as defence witness just to make a statement in contrast what they have earlier made. On the contrary, it refers to the fact that in a given facts and circumstances of the case the Court below can reject the request of the accused persons seeking for calling upon a person as a witness in case if there are justified reasons.

16. In the instant case, the justified reasons is explicit from the record itself that of the prosecutrix whom the defence intends to call as a defence witness has already been examined as a prosecution witness and has also been cross-examined elaborately by the defence and only because subsequently the prosecutrix has changed her mind and filed an affidavit, she cannot be permitted to be called as a defence witness in the same case.

17. Thus, in the opinion of this Court, the Court below does not appear to have committed any error of law or on facts while rejecting the application under Section 233 of CrPC.

18. Accordingly, the instant Criminal Revision being devoid of merit deserves to be and is rejected.

**Sd/-
(P. Sam Koshy)
JUDGE**