

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 518 of 2016**

Surendra Singh Bagga S/o Late Gyani Inder Singh Aged About 54 Years
Caste Sikh, R/o Main Road Vishrampur, Police Station Vishrampur,
District Surajpur, Civil & Revenue District Surajpur, Chhattisgarh.

---- Applicant

Versus

1. State of Chhattisgarh Through Police Station Anusuchit Jati Kalyan Thana Surajpur, District Surajpur, Chhattisgarh.
2. Manoj Singh S/o Late Vidhya Singh Aged About 48 Years Caste Kshatri, R/o Qtr. No. 1/ B 163, Vishrampur Colliery, P.S. Vishrampur, District Surajpur, Chhattisgarh.

---- Respondents

For Applicant	:	Shri AK Prasad, Advocate.
For Respondent/State	:	Shri Vaibhav A Gowardhan, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

Order On Board

22/07/2016

1. The present revision petition has been preferred assailing the order dated 31.05.2016 passed by the Special Judge (Atrocities), Surajpur, in Sessions Trial No.49 of 2013.
2. Facts in brief necessary for disposal of this revision is that the applicant along with other co-accused persons is facing trial in connection with offence under Sections 384/34 and 323/34 IPC as also under Section 4 of the Prevention of Money Laundering Act and under Section 3(1)(x) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. In the instant case, the charges were framed on 22.08.2013 and thereafter it was ordered for the examination of prosecution witnesses who in due course of time have also been examined and cross examined. The victim in the instant case i.e. PW-1 Basanti was examined on 07.10.2014 and was also extensively cross examined on 09.10.2014. Subsequently, J. Toppo, PW-6, the Investigating Officer, was also examined after about a period of 10 months time on 04.07.2015. After completion of evidence, the matter was fixed for recording defence statement on 31.05.2016 when the present applicant is said to have moved an application under Section 311 CrPC seeking for a prayer of recalling PW-6, J. Toppo, the Investigating Officer for further cross examination. The said application was rejected on the same day i.e. 31.05.2016 holding that no strong case is made out by the applicant for recalling of the said witness. It is this order dated 31.05.2016 which has been assailed by way of present revision.
4. Learned counsel appearing for the applicant submits that in the instant case, the defence in the course of examining the Investigating Officer had inadvertently missed to put a question as to whether the victim in her 161 statement has stated that she did not report the matter to the nearest police station to the place of incident on the ground that accused persons were standing near the said police station and therefore she lodged a report at a different police station away from the place of incident. This according to the applicant is a vital fact which has been missed during the course of cross examination which may substantially prejudice the interest of the accused persons while deciding the matter

on merits.

5. In support of contention, reliance has been placed in cases of Natasha Singh Vs. Central Bureau of Investigation (State)¹ and Mannan Shaikh and Others Vs. State of West Bengal & Another².
6. Counsel for the applicant further submits that it is a case where the court below should not have rejected his application under Section 311 CrPC. Rather, the court below should have considered the provisions of Section 311 CrPC in its proper perspective and should have given a wider interpretation while considering the said application. He next submits that in the event an application under Section 311 CrPC is moved, the court shall summon, examine or recall the witness at any stage of trial or other proceedings. Therefore, if the powers have been conferred upon the court to recall any witness at any stage and if the applicant are able to make out a case for justified reasons that the presence of the Investigating Officer is required for further cross examination the court below ought not to have rejected his application.
7. So far as judgment relied upon by the applicant in case of Natasha Singh (Supra) is concerned, if we peruse the same, it has been emphatically held that application under Section 311 CrPC must not be allowed only to fill up the lacuna in the case of the prosecution, or of the defence. For ready reference, para-15 of said judgment is reproduced as under:

“15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C.

1 2013 (5) SCC 741

2 2014(13)SCC 59

must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred 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 great caution and circumspection. The very use of words such as 'any Court', 'at any stage", or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

Emphasis is being made by this court on the underlined portion.

8. Similarly in case of Mannan Shaikh (Supra) the Supreme Court very specifically applying the same analogy what has been laid down in case of Natasha (Supra) has again held that application under Section 311 CrPC should not be permitted for the prosecution to fill up the lacuna or for defence. It is further held that since the power is wide its exercise has to be done with greater circumspection and that wider the power, greater is the responsibility on the courts which exercise it. Further, it has been left for the court before whom trial was conducted to consider and decide whether permission for recall is genuine or not.
9. On the basis of analogy laid down by the Supreme Court in above referred two judgment, if we look into the facts of the case as mentioned in which the applicant seeks for recalling of the Investigating Officer is to put a question as to whether the complainant while recording her 161

statement has made the fact that she did not lodge complaint to the nearest police station because the accused persons were standing near the said police station and it was for this reason she had lodged a complaint to a police station away from the place of incident.

10. The victim in the instant case was examined on 07.10.2014 and the Investigating Officer was examined after more than 10 months on 04.07.2015. The defence had the entire version of victim at in their hand coupled with the fact that both the accused persons in the case were being represented by two different counsel and when this Investigating Officer was being cross examined and if both the counsel had deliberately not put the question to the said Investigating Officer in respect of fact which was in their knowledge and which they were aware all along, it cannot be said that it is a case where some new facts have been learnt by the defence and which could not be put to Investigating Officer at the time of his cross examination.
11. In the opinion of this court, the present case is a case which would squarely fall within the exceptions carved out by the Supreme Court in above referred two cases wherein it has been emphatically held that it should not be permitted to fill up the lacuna and differences. Thus, the applicant fails to make out a strong case calling for interference with the order impugned dated 31.05.2016 passed by the court below.
12. Accordingly, the revision being devoid of merit is liable to be and is hereby dismissed.

Sd/-

(P. Sam Koshy)
Judge