

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Revision No. 541 of 2016**

Trilok Singh Thakur aged about 33 years, Son of Shri Chhatrapal Singh Thakur, Occupation Service, Food Inspector, R/o Village Gabaud, Post- Memra, PS Sankra, District Mahasamund, Chhattisgarh.

---- Applicant

Versus

State of Chhattisgarh through the Anti Corruption Bureau, Bilaspur, Chhattisgarh

---- Respondent

For Applicant	:Shri P. K. C. Tiwari, Senior Advocate along with Shri Kripesh G. Kela, Advocate
For Respondent/State	:Shri Vaibhav Goverdhan, P.L.

Hon'ble Shri Justice P. Sam Koshy**Order On Board****27/06/2016**

Challenge to the present revision is the order dated 31.05.2016 passed by the Special Judge (under PC Act), Raigarh in Special Case No. 02/15 whereby the Court below has rejected the application under Section 311 CrPC preferred by the applicant for recalling the complainant PW-1 Gokul Patel for his cross-examination.

2. The learned Senior counsel appearing for the applicant submits that the applicant is an Officer who is being prosecuted before the Court below for the offence under Sections 7, 13, (1) (d) read with Section 13 (2) of PC Act. He submits that in the instant case, charges were framed against the applicant on 27.11.2015 and the matter was fixed on 14.12.2015 for evidence of the prosecution witnesses. During initial two days of hearing, two witnesses could not be examined since the complainant was not examined first. It was only on 08.02.2016, for the first time, the

complainant was present before the Court below, but due to ill health, the applicant was not present. Therefore, the applicant moved an application for exemption of his appearance. Though reluctantly but the Court below allowed the said application. On the same day i.e. 08.02.2016 counsel for the applicant also showed his inability to cross-examine PW-1 in the absence of the accused/applicant who was not present on account of ill health. Counsel for the applicant had also filed an application u/s 309 of Cr.P.C. seeking for a short adjournment. However, the Court below did not grant adjournment for cross-examination of PW-1 and after recording the evidence of PW-1 proceeded further for recording of the evidence of other witnesses. Counsel for the applicant submits that on 30.05.2016, the applicant moved an application under Section 311 CrPC seeking for recalling PW-1 for his cross-examination which was rejected by the Court below vide the impugned order leading to the filing of the present revision.

3. According to the counsel for the applicant, the Court below has rejected the application under Section 311 CrPC in a mechanical manner without proper application of mind and it is sheer violation of the provisions of the Code of Criminal Procedure more particularly the provisions of Section 273 of CrPC where it says that the trial and other proceedings shall have to be taken place in presence of the accused. According to the applicant, even now, if the said application is allowed, no prejudice would be caused to the prosecution. Rather if the said application is not allowed, it would be detrimental to the accused-applicant and he would not get substantial justice in the course of the trial amounting to denial of a fair trial. Counsel for the applicant submits that the matter is fixed on 30.06.2016 for recording the statement of the accused and that the Court below may pass an order expeditiously against the applicant. He further submits that since there is no effective cross-examination of PW-1 complainant, the applicant may lose his effective right of defence. In

support of his contention counsel for the applicant relies upon the decisions of the Supreme Court passed in the case of P. Sanjeeva Rao v. State of A.P. reported in AIR 2012 SC 2242 and in the case of Sudevanand v. State through CBI reported in 2012 AIR SCW 953.

4. State counsel opposing the contentions made by the counsel for the applicant submits that the order dated 31.05.2016 itself is self explanatory and therefore does not warrant any interference.

5. Having considered the rival submissions put forth by the counsel for the parties and on perusal of the record what is an admitted position is that it was for the first time on 08.02.2016 PW-1 complainant was present before the Court below on which date incidently the applicant was not well and therefore he had moved an appropriate application seeking for exemption of his appearance which though reluctantly but was allowed by the Court below. At the same time, the Court below did not grant time to the counsel for the applicant for cross-examining PW-1 on some other day in presence of the accused/applicant. In this regard, it is trite to refer to the decisions of the Supreme Court passed in the case of P. Sanjeeva Rao (supra) wherein in paragraphs 15 & 16 it has been held :

“15. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs., 2012 (3) SCALE 550 : (AIR 2012 SC 1727 : 2012 AIR SCW 2162). A timely reminder of that solemn duty was given, in the following words:

“What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.”

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer

prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself. “

This principle laid down by the Supreme Court also stands fortified from another judgment of the Supreme Court reported in 2012 AIR SCW 953 wherein the apex Court has again dealt with the issue of recalling of a witness.

6. Further admitted position is that the application under Section 311 CrPC was moved while the evidence of the prosecution witnesses was going on and as such, there was no inordinate delay in moving the said application nor any prejudice would have been caused to the prosecution in case PW-1 is recalled for cross-examination except for the fact that the conclusion of the trial might get delayed by sometime. Even otherwise, the requirement of law as per the provisions of the Code of Criminal Procedure is that the evidence has to be recorded in the presence of the accused. For ready reference, Section 273 Cr.P.C. is reproduced hereunder:

“273. Evidence to be taken in presence of accused.- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.”

7. A plain reading of Section 273 CrPC by itself shows that the intention of the law makers was that all evidences which were to be recorded in the course of the trial shall have to be taken in the presence of the accused. Emphasis has been given to on all evidence and term

“shall” used in section which gives a mandatory force so far as the requirement of the presence of the accused person is concerned. In the present case, it was the very first date when the witness had come, on which the accused was not present. It is not a case where the complainant on many earlier occasions had also come to the Court but gone back without being examined. It is also not a case where the complainant had already been cross-examined and the application under Section 311 CrPC has been moved for further cross-examination of the said witness which could not be done at the first instance because of the accused being not present on account of his ill health. Since the accused/applicant claims himself to be not well, denying him the chance of cross-examination of the most important prosecution witness i.e. the complainant himself that too on the very first date on which the complainant had appeared appears to be too harsh and strong decision. Though it may not be strictly wrong but in a broader perspective, it would definitely fall within the term of denial of a fair trial. Fairness should not only be reflected from the order sheet but it should also be appear to have been put into play while imparting justice particularly when it is a criminal case and where the applicant/accused can also be convicted and sent behind the bars only relying upon the evidence made by the complainant in the examination-in-chief where there was no cross-examination conducted.

8. Taking into consideration the total facts and circumstances of the case, this Court is of the opinion that ends of justice would meet if the applicant is granted another opportunity to cross-examine the complainant (PW-1).

9. Accordingly, the impugned order dated 31.05.2016 is set aside/quashed. The matter is remitted back to the Court below with a

direction that the Court below shall order for recalling of PW-1 complainant on a date to be fixed by it on the next date of hearing.

10. It is made clear that on the date given by the Court below, two things should be borne in mind of the Court; firstly ensuring the presence of the complainant PW-1 for cross-examination and secondly the applicant/accused shall cross-examine the said witness under any circumstances without further trying to adopt delaying tactics by avoiding cross-examination. Thereafter, the Court shall proceed with the matter in accordance with law.

11. It has been informed at the Bar that the next date of hearing is 30.06.2016 and therefore the parties are directed to appear before the concerned Court below on the said date and inform about the order passed by this Court for an appropriate date to be so provided by the Court below for presence of the parties with their consent.

12. Accordingly, the instant criminal revision stands disposed of.

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