

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Revision No. 1150 of 2016

Judgment reserved on : 15.12.2016

Judgment delivered on : 21.12.2016

- Akash Nirmalkar, S/o Sanharan Nirmalkar, aged about 31 years, R/o Vill Kuthur, PS & Tah Pamgarh, dist- Janjgir-Champa (CG)

---- Applicant/accused

Versus

- State of Chhattisgarh through SHO. Mulmula Police Station & Tahsil Mulmula, District Janjgir- Champa, Chhattisgarh.

---- Respondent

For Applicant : Shri HV Sharma, Advocate
For Respondent/State : Shri Neeraj Sharma, Dy GA

Hon'ble Shri Justice Anil Kumar Shukla

CAV Order

1) This revision is directed against the order dated 26.11.2016 passed by the Special Session Judge (Atrocity Act), Janjgir, dist.Janjgir-Champa in Special Session Case No.69/2016, whereby the trial Court has dismissed the application filed under Section 311 of the Criminal Procedure Code (for short, 'the Code') for recalling two prosecution witnesses for further cross-examination.

2) The present applicant/accused is facing trial for offences punishable under Sections 376 IPC and Section 4 and 6 of Tonhi Pratarna Act. Charge-sheet has already been filed on 27.03.2016. Prosecutrix (PW-2) has lodged a written report against the present applicant for the offences aforementioned and FIR has been registered on 27.02.2016. It appears from the proceedings that

Prosecution witnesses Jamuna Prasad (PW-1) and the prosecutrix (PW-2) had been examined on 19.07.2016. At this stage, the accused filed an application under Section 311 of the Code for recalling of the above two prosecution witnesses for further cross-examination, whose deposition was already over. It was contended in the said application that the advocate whom the accused himself had appointed could not cross-examine the prosecution witnesses effectively and the case of the accused/applicant would be seriously prejudiced, therefore, he be permitted to recall the above prosecution witnesses as he is facing the serious charge of Section 376 of the IPC.

3) The learned Special Session Judge (Atrocity Act) by a reasoned order after hearing both the parties, rejected the said application of recalling the prosecution witnesses on 26.11.2016.

4) The aforementioned order is challenged on the ground that the trial Court has committed an illegality by rejecting the application filed by the accused/applicant for recalling Jamuna Prasad (PW-1) and the prosecutrix for re-examination. Learned trial Court held that those prosecution witnesses had already been examined at length and mere changing of the old counsel is not sufficient ground to recall the said witnesses, therefore, the application filed by the applicant is dismissed as not acceptable at that stage.

5) Heard learned counsel for the accused/applicant Shri HV Sharma and Shri Neeraj Kumar Sharma, Dy GA for the State.

Perused the order impugned and other documents relevant to the present case.

6) Learned counsel for the accused/applicant submits that the trial Court has committed an illegality by rejecting the application filed by the accused/applicant for recalling Jamuna Prasad (PW-1) and the prosecutrix for re-examination. He placed reliance in the matter of **Natasha Singh Vs CBI (State)** {2013 SAR (Criminal) 629 SC} wherein the appeal was allowed and the witnesses had been recalled for further cross-examination.

7) Shri Sharma, Dy GA appearing for the State submits that no special circumstances had been shown by the accused/applicant for re-examination of the witnesses, hence, order of rejection of the application filed under Section 311 of the Code deserves to be upheld. In support of his argument, learned State counsel has relied in the matter of **Popatlal Jethabhal Shah Vs State of Maharashtra**, {2002 CRLJ 794 (Bombay High Court)}.

8) In exercise of revisional jurisdiction, this Court may examine the concurrent finding of the Courts below for the purpose of satisfying itself as to the correctness, legality or propriety of any finding of the impugned order.

9) The scope of Section 311 of the Code is very vast. It is divisible in two parts. In the first part discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon any one as a witness, or (b) to examine any person in the Court, or (c) to recall and re-examine

any person whose evidence has already been recorded; on the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The scope of this section is very wide. It enables any Court at any stage of any inquiry, trial or other proceeding under this Code, to act in one of three things,

- (1) to summon any person as a witness;
- (2) to examine any person in attendance, though not summoned; or
- (3) to recall and re-examine any person already examined.

10) So far the Section is permissive. But where the evidence of any person appears to be essential to the just decision of the case, it is obligatory on the Court to summon and examine or recall and re-examine him.

11) In the present case Jamuna Prasad (PW-1) and the prosecutrix (PW-2) had been examined on 19.07.2016. Thereafter, new counsel appeared on 25.11.2016 to argue on behalf of the applicant. Prosecution witnesses 1 to 4 had been examined in the time of old counsel and witnesses 5 to 7 had been examined in presence of the new counsel. The accused/applicant filed an application under Section 311 of the Code for recalling the prosecution witness as the old counsel Shri DP Tiwari, old counsel had not cross-examined Jamuna Prasad (PW-1) and the prosecutrix (PW-2) properly. On 19.07.2016 when the witnesses

were being examined, Shri DP Tiwari was present and there was no objection from the side of the accused/applicant regarding recording the evidence Jamuna Prasad (PW-1) and the prosecutrix (PW-2). On 20th and 21st of July, 2016, the matter was fixed for hearing. Thereafter, prosecution witnesses Dr NK Sahu (PW-4) and Jitesh Patel (PW-5) have been examined on 24th and 25th July, 2016 respectively. On 25.07.2016, new counsel had appeared to argue on behalf of the accused/applicant and prosecution witnesses Dr Rashmi Dahire (PW-6) and JS Rajput (PW-7) had been examined in his presence.

12) On perusal of the application filed under Section 311 of the Code, there was no explanation as to why the prosecution witnesses had been recalled for cross-examination. Only reason mentioned in the said application was that old counsel Shri DP Tiwari had not cross-examined the prosecution witnesses (PW-1 and 2) properly and effectively, therefore, requested to re-examine the witnesses in presence of the new counsel, who was appointed by his choice. But, these prosecution witnesses had already been examined in presence of the old counsel and while cross-examining these witnesses, there was no objection from the side of the accused/appellant. Learned counsel for the applicant has also not cleared in his application that what material left from his side while conducting the cross-examination of the aforementioned witnesses.

13) Apex Court in the matter of **Umar Mohammad and others Vs State of Rajasthan** (AIR 2008 SCW 120), held that after

detailed examination in chief and cross-examination of the witnesses recalling of the witnesses at the request of the defence shows that witness was won over by the accused persons and re-examination of such witnesses is not necessary for the just decision of the case.

14) In the present case at hand, however, it seems that the applicant/accused, in spite of engaging advocate of his choice and after recording the evidence of seven prosecution witnesses, vide this application, is taking frivolous contentions for recalling prosecution witnesses Jamuna Prasad (PW-1) and the prosecutrix (PW-2). The intention of the applicant was therefore, to effectively carry out cross-examination of the prosecution witnesses, of whom cross-examination had already over, in my view, is certainly not permissible and it is deplorable.

15) Accordingly, the revision being without substance is liable to be dismissed and it is hereby dismissed.

Sd/-
(Anil Kumar Shukla)
JUDGE