

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 451 of 2018

Rajesh Yadav S/o Shiv Bhajan Yadav Aged About 37 Years R/o
Ward No. 07, Arjunda, Police Station Arjunda, Distt. Balod
Chhattisgarh

---- Petitioner

Versus

State Of Chhattisgarh Through District Magistrate, Balod, Distt.
Balod Chhattisgarh

---- Respondent

For petitioner – Shri Shrawan Agrawal, Advocate.
For State- Ms. Madhunisha Singh, PL.

Hon'ble Shri Justice Goutam Bhaduri

Order

6/03/2018

Heard.

1. Instant petition is against the closure of the right of the petitioner to cross examine the prosecutrix which was passed on 18/09/2017 and 27/09/2017.
2. Learned counsel for the petitioner submits that there are two accused in the sessions trial one is named Gopi Nirmalkar and another is Rajesh Yadav who is present petitioner and accused. It is submitted that both the accused have separate set of advocates and initially the cross examination was commenced by the advocate who was engaged by other accused Gopesh. Cross examination continued for intermittent period and when cross examination was again fixed for the prosecutrix in absence of the counsel for the other accused right to cross examine of this accused was also closed. He further submits that each and every accused should be given right of cross examination and it cannot be inferred that one cross examination by counsel of one of the accused shall be deemed to be cross examination by the other accused unless and until such cross

examination by one accused is accepted by other. It is further stated that while continuation of cross examination by one of the accused the further cross examination could not have been commenced by this accused and no opportunity was given to the accused/petitioner herein to further cross examine the witness, therefore one opportunity to cross examine the witness may be given.

3. Learned State counsel vehemently opposes the same and would submit that initially the prosecutrix was cross examined and court has recorded that during such cross examination counsel for the present petitioner adopted the cross examination as would be evident from the order. Consequently, no separate chance can be provided to the accused/petitioner herein and the orders are well merited.

4. Perused the respective order sheet right from 27/07/2017. Order of 27/07/2017 would show that initially on that date the prosecutrix was examined as PW-1 and after examination in chief an application was preferred on behalf of the accused that their counsel Mr. Tarendra Jain was not well as such time was sought for cross examination. On such prayer at a cost of Rs.400/- date was given for cross examination of the witness on 9/08/2017. Order sheet of 9/08/2017 would show that both the accused were brought from the jail and one of the accused Gopi was represented by Mr. Tarendra Jain whereas present petitioner Rajesh Yadav was represented by Mr. M.A. Siddiqui, advocate. Order further reflects that cross examination started but in the midst of the cross examination since witness started crying as such cross examination was stopped in the middle and further date was given for cross examination. When the copy of the deposition is referred it shows that cross examination started by Tarendra Jain on behalf of the Gopesh @ Gopi who is one of the accused. Cross examination of the prosecutrix continued and when started after tea it also record the fact that cross

examination was conducted by one of the accused Gopesh @ Gopi.

5. On 18/09/2017 both the accused were brought from the jail and application was preferred by the accused that their advocate comes from out side and therefore the cross examination may be deferred for some time. The reasons for refusal has been recorded in the deposition sheet and it recorded that on behalf of the Gopesh one advocate Devanand Sahu appeared and it records that initially the cross examination in detail has been done by one of the accused and since it was 1.30 pm and court has to record another statement in Sessions Trial No.33/2017 in between State Vs. Balakdas wherein witness were present as such the prayer to defer the cross examination of the witness was disallowed. The order sheet dated 18/09/2017 would show that right to cross examination by the accused was closed.

6. At this moment this fact cannot be ignored that there were two accused before the court one is Gopesh and another is Rajesh Yadav present petitioner. Order sheet and the deposition do not reflect that Rajesh Yadav was any time was represented by any counsel for cross examination. Court in its order dated 27/09/2017 while dismissing the application filed by the other accused Gopesh @ Gopi under Section 311 of Cr.P.C. has recorded that sufficient opportunity was given for cross examination of the witness and presumption can be drawn that present accused adopted the cross examination done by one of the other accused. In the opinion of this court, such presumption cannot be drawn under the criminal law as it would defeat the fair opportunity of hearing. Right of cross examination has to be given to the accused to place his case so as to allow him to surface his defence before the court. Cross examination by one of the accused cannot be presumed that other accused adopts cross examination of the other co-accused by implications. Order sheet and the deposition sheet no where reflects that

cross examination was conducted on behalf of the petitioner/accused. Therefore it would be too far fetched to presume that one accused has adopted the cross examination of the other when it is not reflected in the order sheet or in the deposition so recorded. Under the facts of this case it reflects that no opportunity of cross examination was ever given to the present petitioner/accused and as such the same right cannot be taken away. In view of this the trial court is directed that the petitioner herein who is the other accused shall be given opportunity to cross examine the witness irrespective of the fact that witness have been cross examined by the counsel of the other co-accused. The witnesses may be summoned for the same. No unnecessary adjournment to be granted to the accused and accused shall also co-operate to cross examination of the same. If the counsel of the petitioner avoids the hearing the court may provide legal aid to the petitioner.

7. With such observation, the petition stands allowed.

Sd/-

(Goutam Bhaduri)

JUDGE