

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Order reserved on 25.07.2019****Order delivered on 20.09.2019****CRR No. 823 of 2019**

- Wakesh Kumar Sahu S/o. Omkar Sahu aged about 21 years R/o Tada, P.S. Dharsiwan, District Raipur (C.G.)

---- Petitioner**Versus**

- State of Chhattisgarh, through District Magistrate, District Raipur (C.G.)

---- Respondent

For Applicant	:	Mr. N. Naha Roy, Adv.
For Respondent/State	:	Mr. Anant Bajpai, PL

Hon'ble Smt. Justice Rajani Dubey**C.A.V. Order****20.09.2019**

1. Heard on admission.
2. With the consent of both the parties, revision heard finally at motion stage.
3. This revision has been filed by the applicant/accused against the order dated 09.05.2019 passed by learned Fifth Additional Sessions Judge, Raipur, Chhattisgarh in Sessions Case No. 35/2018, whereby the learned trial Judge has rejected the application of applicant filed under Section 311 of Cr.P.C. for recalling witness.
4. Before the trial Court, the accused is facing trial under Section 302 of IPC. After examination of prosecution witnesses, accused filed application under Section 311 of Cr.P.C. for recalling witness namely Nirmal Dhebar (PW/2), on the ground that, the applicant/accused wants to contradict this witness from

his previous statement. Witness was examined before Juvenile Justice Board on 02.05.2018, but the learned trial Court rejected the application on 09.05.2019. Hence, this revision.

5. Learned counsel for the applicant submits that the order impugned rejecting the application for recalling of the witness being absolutely arbitrary and illegal amounting to denied of opportunity to defend oneself against the charge imposed do not deserve to be sustained even for a moment. He further submits that the learned Court below ought to have considered that the application seeking recalling of witness could not be rejected on the ground that non filing of such application on 19.03.2019, the same could not be filed on a later date. The learned Court below was not justified in rejecting the application for recalling by saying that the same was an effort to prolong the trial without appreciating the impact of denying such opportunity on final outcome of the trial. He added that absence of testing of the statements recorded before the Juvenile Justice Board, the applicant herein failed to avail a proper opportunity of defense. The scope of Section 311 of the code of criminal Procedure, 1973 is very wide and under it, at any stage, the application for recalling could have been filed. Denial of the application under Section 311 of the Code of Criminal Procedure, 1973 would violate the mandate of Section 145 of Indian Evidence Act. The learned trial Court below was not justified in taking away the right of defense from the applicant in the manner aforesaid amounting to a great violation of the Article 20 of the Constitution of India. Learned counsel for the applicant placed reliance in ***Sanjay Vs. State of Haryana (2005 Cr.L.J. 287)***, ***Mangesh Kumar Vs. State of U.P. (2006 Cr.L.J. 1436)***, ***Jitendra Vs. State of Haryana (2004 Cr. L.J. 2726)***, ***Tahir Vs. State of Up (2000 Cr.L.J. 1342)***, ***Dwarika Das v. State of H.P. (1980 Cri. L.J. 1018)***, ***Kailash Sahu v. Basant Kumar (1992 Cr.L.J. 1918)***

6. On the other hand, learned State counsel supported the impugned order passed by the Court below.

7. Heard learned counsel both the parties and perused the material available on record.

8. Applicant filed deposition sheet of prosecution witness Nirmal Dhebar (Annexure A/2 and Annexure A/3). Annexure A/2 is deposition of witness as PW-2 before the Additional Sessions Judge and Annexure A/3 is deposition of witness as PW-7 before Principal Magistrate, Juvenile Justice Board Raipur. Statement of the witness, before Additional Sessions Judge, was taken on 17.04.2018 and before Juvenile Justice Board, it was taken on 02.05.2018. Thereafter, the applicant filed application under Section 311 of Cr.P.C. on the ground that he wants to contradict this witness on his statement, which he gave before Juvenile Justice Board on 02.05.2018 (Annexure A/3)

9. Section 145 of Indian Evidence Act provided as under.

“Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

10. It is clear from the deposition sheet of witness (PW/2) that he was examined as (PW/2) in Sessions Trial No. 35/1 before the trial Court on 17.04.2018, and as PW/7 in Criminal Case No. 552/17 before the Juvenile Justice Board on 02.05.2018. Both the case are arisen out of same incident and this witness is common

in both the cases. Therefore, considering the facts and circumstances of the present case, it would be appropriate, in the interest of justice to afford an opportunity to the accused/applicant for recalling the prosecution witness (PW/2)

11. In the result, the impugned order dated 09.05.2019 is set aside and the application of the applicant is allowed with a condition that he will pay process fee for recalling, PW/2 and also to pay traveling expenses of Rs. 2,000/- to him. It is made clear that if any defect or lapse is found in the process fee, the opportunity for recalling the witness shall stand cancelled. Further, if the traveling expenses of Rs. 2,000/- is not paid on his appearance, right to cross-examine will stand closed.

12. The revision is thus allowed to the extent indicated above.

Sd/-
(Rajani Dubey)
JUDGE