

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.87355 of 2019

Arising Out of PS. Case No.-138 Year-2016 Thana- SAHIYARA District- Sitamarhi

RABINDRA SINGH S/o Debdhari Singh Resident of Ward No. 03, Latipur,
P.S.- Bathnaha, District- Sitamarhi

... .. Petitioner/s

Versus

THE STATE OF BIHAR

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr.Madhubala Verma

For the Opposite Party/s : Mr.Navin Kumar Pandey

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
CAV JUDGMENT

Date : 14-08-2020

Heard Mr. Ajay Kumar Verma, assisted by Ms. Madhubala Verma, learned counsels appearing for the petitioner, the learned APP for the State and the learned counsel appearing for the informant.

2. The present petition has been filed for quashing the order dated 5.12.2019 passed by the learned court of F.T.C.-II, Sitamarhi in Sessions Trial No. 344 of 2017 (arising out of Sahiyara P.S. Case No. 138 of 2016), under Sections 341, 323, 307, 498A, 34 of the Indian Penal Code and Sections 3/4 of the Dowry Prohibition Act and later on Section 304 (B)/34 of the Indian Penal Code has been added, whereby and whereunder the petition filed by the prosecution under Section 311 Cr.P.C. for recall of P.W.-4, Dr. Nimal Kumar Singh, for his re-



examination, has been rejected.

3. The brief facts of the case are that a Sahiyara P.S. Case No. 138 of 2016 was initially registered on the basis of the statement of the victim lady, namely, Khushbu Kumari against her husband and her in-laws, inter alia alleging therein that her marriage had taken place according to Hindu Right and Customs with one Satish Kumar Singh about two and a half years back and on 30.10.2016 at about 5.30 pm. in the evening, when she was in her in-laws' house, her husband, namely, Satish Kumar Singh, her father-in-law, namely, Rambabu Singh, her brother-in-law, namely, Tunni Ji @ Avinash Kumar, her elder brother-in-law, namely, Rajesh Singh, her sister-in-law, namely, Bharti and her mother-in-law, namely, Pawan Devi, who were always torturing the informant for non-fulfilment of the demand of motorcycle, had conspired together and her brother-in-law, namely Tunni had injected an injection from behind, in the body of the informant, whereafter the mind of the informant became restless. It is further alleged that thereafter, all the accused persons had sprinkled kerosene oil on the body of the informant and had set her body on fire resulting in her becoming grievously injured, whereupon she was taken in an injured condition by her in-laws to Sitamarhi, however, the Doctor,



sensing that the condition of the informant was serious, had advised to take the informant elsewhere and then the informant was brought at I.T. Memorial Hospital Bhikhanpur where she was admitted in ICU in a serious condition. The fardbeyan of the informant was recorded by the ASI, Ahiyapur, leading to registration of Sahiyara P. S. Case No. 138 of 2016 dated 7.11.2016 under Sections 341/323/307/498(A)/34 of the Indian Penal Code and Sections 3/4 of the Dowry Prohibition Act.

4. It appears that the victim lady i.e. the informant of the present case died on 13.11.2016, whereupon Section 304(B)/34 of the Indian Penal Code was added. The police, upon investigation, has found the case to be prima facie true as against the accused persons and had then submitted a charge-sheet against all the FIR named accused persons under Section 304B/34 of the Indian Penal Code as well and then the learned court below has also taken cognizance and committed the case to the sessions court for trial and disposal.

5. The learned counsel for the petitioner has submitted that Dr. Nirmal Kumar Singh was examined as P.W.-4 by the prosecution and after cross-examination by the defence, he was discharged. It is submitted that the evidence of the P.W.-4 shows that he has made statement in contradiction to the injury report,



which could be discovered only after discharge of P.W.-4, hence an application for recall of PW-4 was filed by the prosecution on 15.9.2018, under Section 311 Cr.P.C., so that he could be re-examined. It is further submitted that the injury report of the deceased, namely, Khushbu Kumari shows that she had received 80 per cent burn injuries on her body and she is stated to have been treated at 6 pm. on 30.10.2016, however, the said injury report has been signed by the Doctor only on 21.4.2017. It is further submitted that the injury report does not contain any mark of identification of the deceased as also the same does not show that the police was informed or the statement of the deceased was taken or the deceased was in a good mental condition to give her statement. It is further submitted that P.W.-4, in his deposition before the learned trial court, has stated that he had informed the police and thereafter, the statement of the injured victim was recorded. In such view of the matter, it is submitted that it is necessary to re-examine P.W.-4 so that the relevant facts pertaining to the injury report may be brought on record, by way of evidence on behalf of the prosecution. It is submitted that despite the aforesaid facts being pleaded before the learned trial court, the Ld. court of F.T.C.-II, Sitamarhi, by the impugned order dated 05.12.2019 has rejected the petition of



the prosecution dated 15.9.2018, filed under Section 311 Cr.P.C.

6. The learned counsel for the petitioner has assailed the aforesaid order dated 5.12.2019 passed by the learned trial court on the grounds mentioned in the preceding paragraphs and has submitted that since the Doctor i.e. the P.W.-4 has deposed before the court contrary to the injury report, it is necessary to re-examine P.W.-4 so that actual facts pertaining to the injury report may be brought by way of evidence of the prosecution. It is thus submitted that the order dated 5.12.2019 passed by the learned trial court rejecting the petition of the prosecution under Section 311 Cr.P.C. is bad in law and fit to be set aside.

7. Per contra, the learned counsel for the opposite party-informant has submitted that the prosecution evidence has already been completed and the statement of the accused persons under Section 313 of the Cr.P.C. has also been recorded and the case is running for final arguments. The learned counsel for the opposite party-informant has also relied on a judgement rendered by the Hon'ble Apex Court in the case of ***Pannayar Vs. State of Tamil Nadu***, reported in ***2009 (9) SCC 152***, paragraph no. 26 whereof is reproduced herein below:-

“26. We do not know what was the public prosecutor doing at the time of the examination-



in-chief and why he did not confront the witness on these ornaments. We do not know as to how the Trial Court permitted these questions in re-examination. The purpose of the re-examination is only to get the clarifications of some doubts created in the cross-examination. One cannot supplement the examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination. The Trial Court has obviously faulted in allowing such a re-examination. Be that as it may, even if we accept that the Trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in our firm opinion, is nil.”

8. It is thus submitted by the Ld. Counsel for the informant that the purpose of re-examination is only to get the clarifications of some doubts created during the course of cross-examination, however, one cannot supplement examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have got no concern with



the cross-examination.

9. The learned counsel for the informant has further relied on a judgment rendered by the Hon'ble Apex Court in case of ***Hanuman Ram Vs. The State of Rajasthan & Ors.***, reported in ***2008 (15) SCC 652***, paragraphs nos. 8 and 9 whereof are reproduced herein below:-

“8. *In Mishralal and Ors. v. State of M.P. and Ors.* (2005) 10 SCC 701, this Court observed *inter alia* as follows:

5. The learned counsel for the appellants seriously attacked the evidence of PW 2 Mokam Singh. This witness was examined by the Sessions Judge on 6.2.1991 and cross-examined on the same day by the defence counsel. Thereafter, it seems, that on behalf of the accused persons an application was filed and PW-2 Mokam Singh was recalled. PW-2 was again examined and cross-examined on 31.7.1991. It may be noted that some of the persons who were allegedly involved in this incident were minors and their case was



tried by the Juvenile Court. PW 2 Mokam Singh was also examined as a witness in the case before the Juvenile Court. In the Juvenile Court, he gave evidence to the effect that he was not aware of the persons who had attacked him and on hearing the voice of the assailants, he assumed that they were some Banjaras. Upon recalling, PW-2 Mokam Singh was confronted with the evidence he had given later before the Juvenile Court on the basis of which the accused persons were acquitted of the charge under [Section 307](#) IPC for having made an attempt on the life of this witness.

6. In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an



inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW-2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the



court should take a serious action against such witnesses.

9. The factual scenario in Mishri Lal's case (supra) has great similarity with the facts of the present case. The High Court's view for accepting the prayer in terms of [Section 311](#) of the Code does not have any legal foundation. In the facts of the case, the High Court ought not to have accepted the prayer made by the accused persons in terms of [Section 311](#) of the Code. Above being the position, we set aside the impugned order of the High Court.”

10. The learned counsel for the informant has also referred to a judgment rendered in the case of ***Shiv Kumar vs. Hukum Chand & Ors.***, reported in ***1999 (7) SCC 467***, paragraph no. 17 whereof is reproduced herein below-

“17. Another Division Bench of the same High Court in re Bhupalli Malliah & ors. AIR 1959 A.P. 477 had in fact deprecated the practice of Public Prosecutor’s sitting back and permitting private counsel to conduct prosecution, in the



following terms:

We would like to make it very clear that it is extremely undesirable and quite improper that a Public Prosecutor should be allowed to sit back, handing over the conduct of the case to a counsel, however eminent he may be, briefed by the complainant in the case.”

11. Thus, the submission of the learned counsel for the informant is that the learned trial court has rightly rejected the petition filed by the prosecution under Section 311 Cr.P.C. by the impugned judgment dated 5.12.2019 and for the reasons mentioned hereinabove, there is no merit in the present petition, hence, the same is fit to be dismissed.

12. I have heard the learned counsel for the parties, perused the materials on record and have gone through the judgments relied upon by the learned counsel for the informant.

13. At the outset, it would be relevant to reproduce Section 311 of the Code of Criminal Procedure, 1973 herein below:-

“311. Power to summon material witness, or examine person present.—Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a



witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

14. This Court thinks it apt to rely upon a judgment rendered by the Hon’ble Apex Court in the case of ***Rajaram Prasad Yadav vs. The State of Bihar & Anr.***, reported in **2013(14) SCC 461**, paragraph nos. 14, 17, 17.1 to 17.14 and 23 whereof are reproduced herein below:-

“14. A conspicuous reading of [Section 311 Cr.P.C.](#) would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”,



and “person already examined”. By using the said expression “any” as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. [Section 138](#) of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of [Section 311](#) Cr.P.C. and [Section 138](#) Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under [Section 138](#), will have to necessarily be in consonance with the prescription contained in [Section 311](#) Cr.P.C. It is, therefore, imperative that the invocation of [Section 311](#) Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for



achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under [the Code](#) for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.



17. From a conspectus consideration of the above decisions, while dealing with an application under [Section 311](#) Cr.P.C. read along with [Section 138](#) of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under [Section 311](#) is noted by the Court for a just decision of a case?

17.2. The exercise of the widest discretionary power under [Section 311](#) Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-



examine any such person.

17.4. The exercise of power under [Section 311](#) Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5 The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just



decision of the case.

17.8. The object of [Section 311 Cr.P.C.](#) simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.



17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other



party.

17.14. The power 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

23. We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under [Section 311](#) Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under [Section 311](#) Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion



and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under [Section 311](#) Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused, as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before



the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under [Section 311](#) Cr.P.C. In our considered opinion, the trial Court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court.”

15. Now coming back to the present case, this Court finds from a bare perusal of the injury report and the evidence of the P.W.-4, namely, Dr. Nirmal Kumar Singh, led before the learned trial court in connection with Sessions Trial No. 344 of 2017 that there is no contradiction or discrepancy in between the two so as to warrant recall of PW-4 and his re-examination thereupon. This Court is further of the view that that test laid down by the Hon'ble Apex Court in the Case of **Rajaram Prasad Yadav (supra)** for entertaining an application under Section 311 Cr.P.C. is not fulfilled in the present case so as to warrant recall / re-examination of P.W.-4 inasmuch as the



prosecution has been granted full opportunity to cross-examine P.W.-4 and only thereafter, he has been discharged. This Court also comes to a finding that no case has been made out by the petitioner / prosecution so as to persuade this Court to invoke its power under Section 311 Cr.P.C. inasmuch as neither there is any strong or valid reason nor any cogent ground has been shown by the petitioner / prosecution so as to warrant interference in the impugned order dated 5.12.2019 passed by the learned court of F.T.C.-II, Sitamarhi in Sessions Trial No. 344 of 2017, arising out of Sahiyara P.S. Case No. 138 of 2016, hence, the present petition stands dismissed, being devoid of any merit.

(Mohit Kumar Shah, J)

Ajay/-

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