

1 MCRC No.3873/2018
(Rajesh Kushwah Vs. State of M.P.)

Gwalior, Dated : 26/02/2018

Shri Sunil Kumar Dubey, Advocate for applicant.

Shri G.S. Chauhan, Public Prosecutor for respondent/State.

This application under Section 482 of Cr.P.C. has been filed against the order dated 26/10/2017 passed by the First Additional Sessions Judge, Vidisha in Special Sessions Trial No.27/2017 by which the application filed by the applicant under Section 311 of Cr.P.C. has been dismissed.

The necessary facts for disposal of the present application in short are that the father of the prosecutrix lodged a report in the Police Station Gyarpur on 7/4/2017 that her daughter aged about 12 years and 7 months is missing and he suspected that the applicant must have enticed her and must have kidnapped her. On the basis of said report, offence under Sections 363 and 366-A of IPC was registered. Prosecutrix was recovered and on the basis of the allegations made by her in her case diary statement, an offence under Section 376 of IPC was also registered. The police after concluding the investigation, filed the charge-sheet.

The prosecutrix was examined and cross-examined. Thereafter, the applicant filed an application under Section 311 of Cr.P.C. seeking recall of the prosecutrix on the ground that initially he had appointed Shri Kaushal and Shri Ashish Jain, Advocates, but those counsel were engaged just for understanding the case. The prosecutrix has suppressed the material facts and she has deposed under the instruction of her counsel and, therefore, she has also not replied to certain questions asked by the defence counsel and had kept quiet. Thus, the prosecutrix has tried to suppress the fact and,

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therefore, her further cross-examination is necessary. The said application was rejected by the trial court by order dated 26/10/2017 on the ground that full opportunity was given to the counsel for the applicant and recall of the witness is not required.

Challenging the order passed by the trial court, it is submitted by the counsel for the applicant that the evidence of the prosecutrix is suspicious and she has not narrated the truth before the trial court and under these circumstances, she is required to be recalled for further cross-examination.

Per contra, it is submitted by the State counsel that the prosecutrix was cross-examined by a senior lawyer and full opportunity was given to the applicant to cross-examine the witness. It is the self assessment of the applicant that the evidence of the prosecutrix is suspicious or was tutored by the counsel. The witness cannot be recalled unless and until the applicant points out that further cross-examination of the witness is essential to the just decision of the case. It is further submitted that the trial court has rightly rejected the application filed under Section 311 of Cr.P.C.

Heard learned counsel for the parties.

The applicant has not placed copy of the application filed under Section 311 of Cr.P.C. on record. However, from the facts mentioned in the rejection order, the applicant has submitted that in the evidence, the prosecutrix has not narrated the correct facts, but she was under tutoring by her counsel and, therefore, a false evidence has been given by her and under these circumstances, it is necessary for the just decision of the case to recall the witness, so that she can be further cross-examined.

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Section 311 of Cr.P.C. reads as under:-

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.

Thus, from the plain reading of this Section, it is clear that the witness cannot be recalled unless and until the Court comes to the conclusion that his/her further cross-examination is necessary to the just decision of the case. The applicant has not pointed out any circumstance to indicate that full opportunity was not given to the applicant to cross-examine the witness. The witness was cross-examined by a Senior Advocate of the Bar. Nothing could be pointed out by the counsel for the applicant from the deposition of the prosecutrix that as to how he is of the view that she has not narrated the correct facts. A witness cannot be recalled merely on the saying of an accused.

The Supreme Court in the case of **Rajaram Prasad Yadav Vs. State of Bihar and another** reported in **(2013) 14 SCC 461** has held as under:-

16. Again, in an unreported decision rendered by this Court dated 8-5-2013 in *Natasha Singh v. CBI, (2013) 5 SCC 741*, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paras 15 and 16: (SCC pp. 748-49)

“15. The scope and object of the provision is to enable the court to determine the truth

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and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to *cause serious prejudice* to the defence of the accused, or to give an *unfair advantage to the opposite party*. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as 'any court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails

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the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. [Vide *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, AIR 1958 SC 376, *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158, *Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374, *Kalyani Baskar v. M.S. Sampooram*, (2007) 2 SCC 258, *Vijay Kumar v. State of U.P.*, (2011) 8 SCC 136 and *Sudevanand v. State*, (2012) 3 SCC 387.]”

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC 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 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and 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.

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17.4. The exercise of power under Section 311 CrPC 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 CrPC 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 safeguard, 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

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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 CrPC 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.

If the facts of the case are considered in the light of the proposition of law laid down by the Supreme Court in the case of **Rajaram Prasad Yadav (supra)**, then it is clear that except saying that the prosecutrix has given a tutored evidence, nothing has been pointed out that as to how recall of the witness is necessary in the interest of justice.

Considering the facts and circumstances of the case, this Court is of the considered opinion that the trial court did not commit any mistake in rejecting the application filed under Section 311 of Cr.P.C. Accordingly, the order dated 26/10/2017 passed by the First Additional Sessions Judge, Vidisha in SST No.27/2017 is hereby affirmed.

The application fails and is hereby **dismissed**.

(G.S. Ahluwalia)
Judge

Arun*