

HIGH COURT OF MADHYA PRADESH AT JABALPUR

M.Cr.C. No.609/2017

Bachchu Lal Yadav

Vs.

State of MP

[Single Bench : Hon'ble Smt. Anjuli Palo, Judge]

Shri P.K. Verma, learned counsel for the applicant.

Shri Ramesh Kushwaha, learned PL for
respondents/State.

ORDER
(03/03/2017)

1. This petition under Section 482 of Cr.P.C. has been preferred being aggrieved by the order dated 2.1.2017 passed by the Special Judge District Sidhi in Special Case No.13/16, whereby an application under Section 311 of Code of Civil Procedure, 1973 filed by the applicant has been rejected.

2. In short the prosecution case is that the applicant committed rape on the prosecutrix and due to which the complainant became pregnant. She conceived a child of 7 months. She narrated the incident to her parents on 16.3.2016, then they lodged the First Information Report at Police Station, AJK, Sidhi.

3. The learned trial Court framed charges under sections 376, 506 (B) of IPC and 3 (2)(5) of Atrocity Act and Section 3/4 of POCSO Act against the applicant. During trial the applicant found that necessary questions and suggestion could not be asked to PW3 (Khumbhdas) and (PW4) prosecutrix which are important for fair trial.

4. Learned counsel for the applicant has placed reliance upon a judgement of Hon'ble Supreme Court in the case of **State Vs. Thukchuk Lachugpa & Another [2005 Cr.L.J. 201 (Sikkim)]** wherein it was held that if the prosecution or defence has failed to produce some evidence, which is necessary for just decision of a case then Section 311 of Cr.P.C be applied to arrive at the truth, which is necessary for a just decision of a case. Some material points and suggestion had been left during the examination of prosecutrix (PW4) and Kumbhdas (PW3). Hence, the application for recalling of aforesaid witnesses is felt necessary. The applicant wants to bring certain important facts of the case on record. Therefore, he filed an application under Section 311 of Cr.P.C. for recalling of witness of Kumbhdas (PW3) and prosecutrix (PW4) and to re-examine them.

5. Heard the learned counsel for the parties.

6. Learned Panel Lawyer on behalf of the State has vehemently opposed the petition and submitted that the order of the trial Court is just and proper and no interference is called for.

7. Looking to the facts and circumstances of the case, no notice is required to the prosecutrix.

8. The object underlines section 311 is that there may not be any failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statement of the witness examined by either party. In the case of **Zahira Habibullah Sheikh Vs. State of Gujrat [AIR 2006 SC 1367]** wherein it was held that the object of this section is to bring on record of evidence not only from the point of view of the accused and the

prosecution, but also from the point of view of orderly society. The determinative factor is whether it is essential for the just decision of the case. This section contains two parts; the first part gives a discretionary power to the Court and the second part is mandatory. It would therefore, be convenient to deal with the conditions and incidents of the two parts separately.

9. The record of the present case shows that the learned counsel for the applicant has obtained full opportunity to cross-examine the prosecutrix and PW3 (kumbhdas) particularly on the points of “her age of minority” and her “date of birth”. The learned counsel for the petitioner already cross-examined the prosecutrix. There is no necessity to recall the aforesaid witness for re-examination. Under Section 311 of Cr.P.C. the Code has very limited power for recalling of witnesses which is applicable only in rare cases.

10. The Hon'ble Supreme Court in the case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav and Anr. (2016) 2 SCC 402** has held that recall cannot be allowed on plea that previous defence counsel was not competent and has not effectively cross-examined witnesses. Recall is not a matter of course and discretion given to court has to be exercised judiciously to prevent failure of justice and not arbitrarily. Plea for recall for advancing justice has to be bonafide and has to be balanced carefully with other relevant considerations including uncalled for hardship to witnesses and uncalled for delay in trial. Mere observation that recall was necessary “for ensuring fair of trial” is not enough unless there are tangible reasons to show how fairness of trial suffered without recall.

11. In view of the aforesaid and the law laid down by the Hon'ble Supreme Court in the case of Shiv Kumar Yadav (supra), no case is made out to interfere with order passed by the trial Court. It is found that the discretion has been applied by the learned trial Court judiciously not arbitrarily. Hence, this application is dismissed.

[Smt.Anjuli Palo]
Judge

skm