

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE  
HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL**

**ON THE 22<sup>nd</sup> OF JULY, 2024**

**MISC. CRIMINAL CASE NO.25914 OF 2023**

*Ashish Kumar Mishra & Others*

*Versus*

*State of M.P. & Others*

.....  
**Appearance:**

*Shri Vishal Daniel – Advocate for the petitioners.*

*Shri Akhilendra Singh – Government Advocate for the respondent  
No.1/State.*

.....  
**ORDER**

With the consent of learned counsel for the parties, arguments are heard finally.

This petition under Section 482 of Code of Criminal Procedure, 1973 has been filed by the petitioners to invoke the extraordinary jurisdiction of this Court being aggrieved and dissatisfied by the order dated 13.05.2023 passed by learned X<sup>th</sup> Additional Sessions Judge, Rewa (MP) in Session Trial No.130/2022 (*State of M.P. Vs. Ashish Kumar Mishra & Others*) for commission of offence under Sections 304-B, 498-A/34 of IPC and Section 3/4 of Dowry Prohibition Act, 1961 whereby an application under Section 311 of the Cr.P.C. filed on behalf of the prosecution to recall three prosecution witnesses viz.

Mathura Prasad Tiwari (P.W.-2), Seeta Tiwari (P.W.-3) and Sandhya Tiwari (P.W.-4) for re-examination has been allowed.

2. Facts of the case, in short, are that on 11.05.2022, accused Ashish Kumar Mishra resident of Shaktinagar, Urhat, District-Rewa (MP) informed police of Police Station Sanam, Rewa that his marriage was solemnized with Sakshi Mishra D/o Mathura Prasad Tiwari on 20.11.2021. Family life was going smooth. On 10.05.2022, at around 11:30 pm, he came from the market and after having dinner alongwith the wife had gone to sleep in upstairs room. At around 04:00 pm, his younger brother Abhinav Mishra opened the door of his room and informed that sister-in-law (*bhabhi*) after bolting the door of your room from outside has committed suicide by hanging herself in stairs railing. He had seen that her wife has committed suicide by hanging herself. *Merg* was registered for unnatural death under Section 174 of Cr.P.C. In the course of enquiry and investigation, on 16.05.2022, Mathura Prasad Tiwari (father of the deceased) informed that he had performed the marriage of his daughter Sakshi (since deceased) with Ashish Mishra as per Hindu Customs & Rites. After marriage, Sakshi twice visited her parental house and informed that her husband is in habit of quarrelling and used to abuse her and used to say her “your parents have not given sufficient money in dowry, therefore, ask your father to give Rs.7,00,000/- in cash or one four-wheeler vehicle.” For fulfillment of demand of dowry, he had transferred Rs.40,000/- in the bank account of Ashish Mishra. It was also alleged that Ashish Mishra used to talk with some girl namely ‘Dhruv’ when Sakshi asked him not to talk with her, he used to quarrel with her. On account of persistent torture and

harassment, they all compelled her daughter to commit suicide. FIR was registered. After investigation, charge-sheet for commission of aforesaid offence has been filed.

3. In the course of investigation, learned trial Judge framed the charges against the accused persons/petitioners for commission of offence under Section 304-B, 306, 498-A/34 of IPC and Section 3/4 of the Dowry Prohibition Act, 1961. Petitioners claimed to be tried. Hence, they are facing session trial.

4. On 11.03.2023, prosecution witnesses *viz.* Mathura Prasad Tiwari (P.W.-2), Seeta Tiwari (P.W.-3) and Sandhya Tiwari (P.W.-4) were examined, cross-examined and discharged. On 13.05.2023 i.e. almost after two months of examination or cross-examination of the aforementioned three prosecution witnesses, learned Additional Public Prosecutor moved an application under Section 311 of Cr.P.C. contending that aforesaid three witnesses had tendered their evidence under threat, duress and coercion, therefore, they may be recalled for reexamination and further evidence.

5. Application under Section 311 of Cr.P.C. filed by the learned Additional Public Prosecutor was allowed on the same day by the learned Additional Sessions Judge *vide* the impugned order. Hence, this petition.

6. Learned counsel for the petitioners has submitted that on 11.03.2023, witnesses *viz.* Mathura Prasad Tiwari (P.W.-2), Seeta Tiwari (P.W.-3) and Sandhya Tiwari (P.W.-4) were examined and cross-examined in the open Court. In their evidence, they nowhere stated that they are under any threat or giving evidence under any duress or

pressure. It is further contended that they were examined-in-chief and cross-examined by the counsel for the parties, but no such allegation were made. It is contended that aforesaid three prosecution witnesses never moved any application alongwith affidavit before the trial Court that when they tendered their evidence before the Court, they were in any way threatened or were under any pressure while tendering the evidence. They never made complaint to the police or any other competent authority making such allegations, therefore, filing of application under Section 311 of Cr.P.C. by learned Additional Public Prosecutor without any basis and allowing of the said application by learned Trial Judge by the impugned order is against intention of the Legislation and objective of the provisions of Section 311 of Cr.P.C., therefore, it is prayed that the impugned order may be set-aside.

7. On the other hand, learned Government Advocate appearing for the State has opposed the prayer made by the petitioners and has supported the impugned order passed by the learned Trial Court.

8. I have heard learned counsel for the parties, perused the impugned order & other material available on record.

9. I find force in the submissions of the counsel for the petitioners, as the same merits acceptance. In order to appreciate the stand of the petitioners it will be worthwhile to refer to Section 311 Cr.P.C. The same is extracted hereunder:

**“Section 311, Code of Criminal Procedure:-**

**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.”

**10.** 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.

**11.** It is imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case where witnesses can be ordered to recall 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 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.

**12.** In the case of **Natasha Singh Vs. CBI (State); (2013) 5 SCC 741**, Hon'ble the Apex Court has held as under:-

“15. The scope and object of the provision is to enable the Court to determine the truth 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 Cr.P.C. 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 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 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 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 jeopardized. 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 & Anr.*, AIR 1958 SC 376; *Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.*, AIR 2004 SC 3114; *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.*, AIR 2006 SC 1367; *Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.)*, (2007) 2 SCC 258; *Vijay Kumar v. State of U.P. & Anr.*, (2011) 8 SCC 136; and *Sudevanand v. State through C.B.I.*, (2012) 3 SCC 387.)”

**13.** In view of the above discussion of the Hon'ble Apex Court, it is clear that 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. However, 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. The wide discretionary power should be exercised judiciously and not arbitrarily. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results. 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. 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.

**14.** In the light of above principles, when I examine the facts and circumstances of the case on hand, at the very outset, it is apparent that learned Trial Court while passing the impugned order has completely ignored the principal objectives with which the provisions under Section 311 of Cr.P.C. has been brought into the statute book. As rightly argued by the learned counsel for the petitioners that when witnesses have not made any complaint to the police or to Court and there is nothing on record to show that at the time of tendering evidence before the Trial Court, witnesses were under any threat, duress or coercion. It was not justified on the part of the learned Trial Court to allow the application



under Section 311 of Cr.P.C. and to re-call the aforesaid witnesses for further evidence. A perusal of the impugned order discloses that learned Trial Court appears to have passed orders on the very first hearing date when application was filed, unmindful of the consequences involved.

**15.** On the other hand, it is apparent that witnesses have not filed any complaint or any application before the Trial Court or before the police making complaint that they while tendering evidence or before tendering evidence in any way were threatened, pressurized or intimidated by the accused persons or any one on the side of accused persons. It is worth mentioning that this Court had issued notices to Mathura Prasad Tiwari (father of the deceased) (P.W.-2) and Seeta Tiwari (mother of the deceased) (P.W.-3) to appear and to contest the present petition; but, despite service of notice upon them, they did not turned up. As such, it is apparent that they had to say nothing to support the prosecution application.

**16.** It is worthwhile to note that learned Trial Court before passing any order on application under Section 311 of Cr.P.C. which was neither supported by any affidavit of the aforesaid witnesses nor any one on the prosecution side had never issued notices to the witnesses to hear them and to enquire whether at the time of tendering evidence, they were under any pressure, threat or duress. Therefore, in absence of any affidavit by witnesses and in absence of witnesses making any complaint about threat or pressure not to tell the truth before the Court, mere on basis of filing an application by the prosecution, it was not justified on the part of the Trial Court to allow the application under Section 311 of Cr.P.C. and to summon them to tender further evidence.

**17.** On perusal of the evidence tendered by the aforesaid three prosecution witnesses before the Trial Court, it is apparent that they have stated that Sakshi Mishra (daughter of P.W.-2 & P.W.-3) (since deceased) whose marriage was solemnized with Ashish Kumar Mishra had committed suicide in her matrimonial home. In cross-examination, they have clearly admitted that no dowry was demanded at the time of marriage and it was also admitted that their daughter was not having any distress or problem in her matrimonial home. Thus, they did not support the prosecution story.

**18.** In aforesaid scenario, it was not justified on the part of the Trial Court to allow application under Section 311 of Cr.P.C. which was filed after two months of examination of the witnesses before the Trial Court by the prosecution. In lack of any concrete proof or complaint by the witnesses themselves that evidence which they had tendered on 11.03.2023 before the Trial Court was not out of their own free will and volition, but due to threat and coercion at the instance of the accused persons, including the petitioners. It was not just and proper for the Trial Court to allow the application under Section 311 of Cr.P.C.

**19.** As in the case on hand, neither at the time of their evidence before the Court or subsequent to their evidence, witnesses never made any complaint to the Court or any other officer or any police officer that accused persons had yielded any pressure upon them to turn hostile to the prosecution and to give a go by to the prosecution case. It cannot be said to be justified to recall prosecution witnesses for further evidence mere on an application filed by the prosecution without any proof of any pressure or coercion on the part of the accused persons.

**20.** In the light of the above discussion, I am convinced that the impugned order passed by the Trial Court requires interference as same has been passed without any basis and only on the basis of the application of the prosecution which was not supported by any affidavit or any complaint of coercion or threat. Therefore, this petition succeeds and the impugned order dated 13.05.2023 passed in Session Trial No.130/2022 (*State of M.P. Vs. Ashish Kumar Mishra and Others*) by learned X<sup>th</sup> Additional Sessions Judge, Rewa (MP) is set-aside. The Trial Court is directed to proceed with the trial and to conclude the same expeditiously as early as possible.

**21.** With the aforesaid observations, the petition under Section 482 of Cr.P.C. stands **allowed** and **disposed of**.

**(DINESH KUMAR PALIWAL)**  
**JUDGE**

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