

THE HIGH COURT OF MADHYA PRADESH**M.Cr.C.No.19849/2021***(PAHALWAN SINGH Vs STATE OF MADHYA PRADESH & ANOTHER)***Jabalpur; Date:14/03/2022**

Shri Manish Datt, senior Advocate with Shri Rohit Sharma, counsel for the applicant.

Manas Mani Verma, Government Advocate for the respondent-State.

Shri Rajroop Patel, counsel for the objector.

This petition has been filed under Section 482 of Cr.P.C questioning the validity of the order passed by the Court below on 13/01/2021 i.e Special Judge, SC/ST Act, Jabalpur in SC Case No.177/2018 rejecting the application submitted by the petitioner under Section 311 of Cr.P.C for recalling of prosecution witness no.2 namely Sapna Choudhary.

As per the case of the prosecution, complainant lodged the FIR on 16/04/2018 alleging therein that on 07/04/2018 present petitioner along with other co-accused forcefully abducted the prosecutrix and till 11/04/2018 committed sexual intercourse with her one by one against her will. Offence has been registered vide Crime No.159/2018 charge sheet was filed and prosecutrix got examined.

After examination of the prosecutrix a detailed cross examination was done, but thereafter, she filed an affidavit on 30/07/2020 before the High Court in a pending bail application of the applicant stating therein that he has not committed any crime with her and also pleaded no objection if the bail is granted to him.

Counsel for the applicant submits that the affidavit plays an important role in the matter indicating that the prosecutrix was the consented party and as such accused defence gets strength from the said statement by way affidavit submitted by the prosecutrix. Under such a circumstance, according to the petitioner it was very necessary to recall the prosecutrix so as to re-examine her in view of subsequent circumstance whereby she had come forward and presented herself to be a consented party in respect of present petitioner Pahalwan Singh,

therefore, an application under Section 311 Cr.P.C was filed but court rejected the application on the ground that merely because earlier counsel has not cross examined the witness properly a changed counsel cannot make such a request.

Counsel for the applicant submits that it is not a case in which witness is being recalled merely because she was not properly cross examined by the lawyer earlier representing the accused but it is being recalled also on the ground that the subsequent development should come on record before the trial court so as to consider the defence of the accused whereby they are trying to establish a case of consent.

He submits that trial court did not appreciate the proper issue involved in the case and deprived the accused persons to defend themselves properly.

Counsel for respondents opposed the submissions made by counsel for the petitioner and supported the impugned order saying that the trial court did not commit any illegality rejecting the application filed under Section 311 of Cr.P.C. According to the respondent it would be the endless process and it is not the basic object of Section 311 of Cr.P.C and in the existing circumstance the witness cannot be recalled.

After hearing submissions made by counsel for parties and perusal of record, I am of the opinion that the facts which have been brought to the notice of this Court by the counsel for the petitioner that prosecutrix before the trial court has alleged against the present petitioner but later on filed an affidavit before the High Court in which she has stated that present petitioner did nothing against her wish and also pleaded that if bail is granted she would have no objection. This material development will help the accused persons to establish their defence and as such prosecutrix can be recalled and application filed by the petitioner should be allowed.

It is basic principle of criminal jurisprudence that no innocent person can be convicted and accused should be given full opportunity to defend himself. The respective provision i.e Section 311 of Cr.P.C empowers the Court to recall the witness. If court thinks fit in the facts and circumstances. At present trial is going on and if prosecutrix

is recalled no prejudice would cause to the prosecution and to any other person. As such this Court can invoke the power provided under Section 311 of Cr.P.C for recalling of the witness and as such order passed by the Court below which is impugned in this petition is set aside. The application submitted by the petitioner under Section 311 of Cr.P.C for recalling the witness i.e prosecutrix Sapna Choudhary be recalled and defence may be granted permission for further cross examination of PW-2 Sapna Choudhary.

The scope and object of Section 311 of Cr.P.C is to enable the Court to determine the truth and to render a just decision after discovery all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. This power must be exercised judiciously and not capriciously or arbitrarily as any improper or capricious exercise of such power may lead to undesirable results. Undoubtedly, an application under Section 311 of Cr.P.C cannot 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. However, in the present case, an application of Section 311 of Cr.P.C deserves to be allowed as the subsequent development in a case may have impact over the defence taken by the accused.

With the aforesaid, this petition is allowed and disposed of.

(Sanjay Dwivedi)
Judge