

IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR  
BEFORE

HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL  
ON THE 20<sup>th</sup> OF AUGUST, 2024

MISC. CRIMINAL CASE No.46462 of 2023

*RAJKUMAR AHIRWAR*

*Versus*

*THE STATE OF MADHYA PRADESH*

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**Appearance:**

*Shri L.C.Chourasiya – Advocate for the applicant.*

*Shri Manoj Kushwaha – Panel Lawyer for the respondent/State.*

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**ORDER**

This application under Section 482 of Cr.P.C., 1973 has been filed by the applicant being aggrieved by the order dated 15.05.2023, passed by the 3<sup>rd</sup> ASJ, Sehore in S.T. No.212/2022 (State of M.P. Vs. Rajkumar Ahirwar) whereby the application under Section 311 of Cr.P.C. moved by the applicant/accused for recalling prosecutrix for further cross-examination has been rejected by the Trial Court.

2. Learned counsel for the parties are heard.
3. On a perusal of the impugned order, it is revealed that an application under Section 311 of Cr.P.C. was moved on behalf of the accused for recalling prosecutrix for further cross-examination on the ground that she has filed an affidavit after her evidence before trial Court and some important questions could not be put to her in her

cross-examination and therefore her further cross-examination is necessary. Hence, she may be called for further cross-examination. The application was rejected by the Trial Court vide impugned order dated 15.05.2023. Aggrieved by the impugned order, applicant has filed this petition under Section 482 of Cr.P.C.

4. Learned counsel for the applicant/accused has submitted that the Trial Court has rejected his application without applying judicial mind on the ground that prosecutrix has already been examined and cross-examined fully. Now, she cannot be permitted to recall on the basis of affidavit filed subsequently to resile from her earlier deposition. It also rejected the application on the ground that no witnesses can be recalled for further cross-examination on the ground that some important question on behalf of the applicant/accused could not be put in cross-examination of the witness.

5. It is also the submission of learned counsel that only questions which are mentioned in the application have to be put. Therefore, learned Trial Court was not justified to reject the application only on the ground that earlier she has not given two statements. It is submitted that in the interest of justice, prosecutrix be re-summoned for further cross-examination in the light of affidavit furnished by her at later stage for her further examination and cross-examination on the points mentioned in the application preferred by the applicant/accused.

6. On the other hand, learned counsel for the respondent/State has

opposed the prayer made by learned counsel for the applicant. It is submitted that prosecutrix has already been examined and cross-examined fully. After her full examination and after elapse of time, she has given affidavit denying from the incident. In such situation where witnesses have been examined and cross-examined fully, she cannot be recalled to resile from her earlier testimony given before the trial Court. It is also the submission of learned counsel that no party can be permitted to fill up the *lacuna* left in cross-examination of the witness by recalling her for further examination on some particular points.

7. It is also submitted by learned counsel for the State that applicant/accused cannot be permitted to get the witness hostile after her full examination and cross-examination and to resile from her earlier testimony given before the trial Court. Therefore, he has prayed for dismissal of the petition.

8. I have carefully considered the rival submissions advanced by learned counsel for the parties and also the impugned order and material available on record.

9. The nature and scope of the power exercised by the Court under Section 311 of Cr.P.C. was elaborately considered in the case of ***Raja Ram Prasad Vs. State of Bihar and another, 2013(14) SCC 461*** and it was held that 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. There is no doubt in the legal position that Court has to bear in mind the essentiality of evidence for just decision of the case while deciding the application under Section 311 of Cr.P.C. as held by the Hon'ble Apex Court in catena of judgment and also the duration of a case cannot displace the specific requirements of the just decision after taking all the necessary material evidence on record. In the case of ***Soneram Rathore Vs. State of M.P., reported in 2015(2) MPLJ (Cri) 68***, it has been held that in a case where application for recalling of prosecution witness had been filed on the ground that earlier counsel has not cross-examined witness properly and had not put some material questions cannot be ground to recall the witnesses already examined. Such application cannot be allowed for mere asking reasons and for reasons related to mere convenience. The Hon'able Supreme Court in case of ***State (NCT of Delhi) Vs. Shiv Kumar Yadav and Another, reported in 2016(3) MPLJ (Cri.) SC 271*** has held that discretion given to Court for recalling of witness has to be exercised judiciously to prevent failure of justice and not arbitrarily. Mere observation that recall was necessary for ensuring fair trial is not enough unless there are tangible reasons to show how fair trial suffered without recall.

10. In case of ***Ratan Lal Vs. Prahlad Jat, reported in 2018 (1)***

**M.P.L.J. (Cri.) (S.C.) 195** it has been held as under:

*“The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order. Pws 4 and 5 were examined between 29.11.2010 and 11.3.2011 They were cross-examined at length during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has recorded a finding that they were not under any pressure while recording their evidence. After a passage of 14 months, they have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over. We do not find any reasons to allow such an application. The Sessions Judge, therefore, was justified in rejecting the application. The High Court was not right in setting aside the said order. The order of the High Court is set aside.”*

11. A perusal of the impugned order makes it clear that prosecutrix was examined and cross-examined fully long back. A lengthy cross-examination was put to prosecutrix and she gave reply to all the questions put to her, but later on, an affidavit was filed wherein she has denied from the incident. It is to be noted that prosecutrix in her FIR and statement recorded under Section 161 and 164 of Cr.P.C. supported the story. Even before the trial court, she supported the story. After a passage of time, applicant/accused filed the application for her re-

examination on the ground that the statements made by her earlier were false and under pressure. No reason has been assigned for the delay in moving application. The entire scenario shows that she has been won over. Therefore, I am of the view that learned Sessions Judge has not committed any error in rejecting the application.

**12.** It is settled position of law that help of Section 311 of Cr.P.C. cannot be given to accused to fill up the *lacunas*. Mere submission that some questions could not be put to the prosecutrix in her lengthy cross-examination, cannot be a ground to recall the witness who has already been examined and cross-examine fully. As far the provisions of Section 311 of Cr.P.C. are concerned, same can be invoked only in order to meet the ends of justice for strong and valid reasons, with great caution and circumspection and not to permit accused to harass the prosecutrix by permitting him to call her again and again for cross-examination.

**13.** In *Manghi @ Narendra Vs. State of M.P.* reported in **2005 (4) MPLJ 136**, a coordinate bench of this Court held that “once the witness is examined as a prosecution witness, he cannot be recalled for examination/cross-examination, merely because he filed affidavit contrary to his deposition made before the trial Court”.

**14.** An application under Section 311 of Cr.P.C. cannot be allowed to fill up the *lacuna* of prosecution or defence case and no prosecution witness can be called for examination/cross-examination merely

because he/she filed affidavit contrary to his deposition made before the trial Court. Unfair advantage cannot be given to any of the parties and no one can be permitted to recall the prosecutrix for further cross-examination merely on the ground that she has filed affidavit after her deposition before the trial Court denying the incident. As such, it can be said that no witness can be recalled for further cross-examination without valid and strong reasons as to why her recalling is necessary for further cross-examination as prosecutrix has already been examined and cross-examined.

**15.** It is settled position of law that an opportunity of fair trial has to be given to the accused but it should also be kept in mind that no party can be permitted to fill up the *lacuna* by moving an application that some questions could not be put to the prosecutrix in her cross-examination or after her deposition before the trial Court she has denied from the commission of incident. In such circumstances, no fault is visible in the impugned order passed by the learned trial Court.

**16.** In view of the above discussion, this Court does not find any error in the impugned order and is not inclined to interfere with it. Accordingly, this petition under Section 482 of Cr.P.C. being sans merits is **dismissed**.

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

*Jasleen*