



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 574 of 2022

Besahu Lal Yadav S/o Ram Kishore Yadav Aged About 19 Years R/o Jaitpur,
District- Shahdol (M.P.) **---- Petitioner**

Versus

State Of Chhattisgarh, Through The Station House Officer, Police Station-
Janakpur, District- Korea (C.G.) **---- Respondent**

For Petitioner : Shri Hemant Kumar Agrawal, Advocate.

For Respondent/State : Shri Arjit Tiwari, PL.

HON'BLE SHRI JUSTICE GOUTAM BHADURI

ORDER

06/04/2022

Heard.

1. Instant petition is against the order dated 24/02/2022 whereby an application filed by the petitioner under Section 311 of the Cr.P.C. was rejected.

2. The brief facts of this case are that the petitioner is facing a trial under Section 341, 354, 376 of IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 before the Additional Sessions Judge, F.T.S.C. (POCSO) Manendragarh, District Korea. The prosecution witnesses were examined. The mother and father of the prosecutrix who were examined as PW-1 and PW-3 turned hostile. The prosecutrix was examined as PW-2. The prosecutrix in her statement in the examination-in-chief supported the case of the prosecution, however in the cross-examination she denied the commission of offence by the petitioner, at that juncture the court in exercise of power under Section 165 of the Evidence Act asked the question to the prosecutrix as to which version of her is correct then she again affirmed the happening of the incident. Under these



circumstances, on a later stage an application under Section 311 of the Cr.P.C. read with section 165 of the Indian Evidence Act was moved. Learned court below rejected the application by holding that on the earlier occasion the accused/petitioner was being represented by a competent lawyer and with the change of lawyer section 311 of Cr.P.C. cannot be invoked.

3. Learned counsel for the petitioner would submit that the power under Section 165 of the Indian Evidence Act though gives a discretionary power to the court but in the facts of this case, the petitioner should have been given an opportunity to cross-examine to remove the ambiguity. It is stated initially the prosecutrix supported the case of the prosecution but in the cross-examination incident was disowned and subsequently again when the court asked the question, she supported the version of the prosecution, therefore in order to clarify the same, the application under Section 311 of the Cr.P.C should have been allowed which would in turn lead to fair opportunity of trial.

4. Learned State counsel opposes the argument and would submit that the order sheet itself would reflect that fair opportunity was given to the petitioner and it is the discretion of the court to allow or disallow the question when there is power under Section 165 of the Evidence Act and it would amount to filling up the lacuna, therefore the order is well merited.

5. Perused the document, the statement and the order of the learned court below. The statement of PW-1 and PW-3 who are the mother and father of the prosecutrix would show that they have not supported the case of the prosecution. The prosecutrix who was examined as PW-2, she in her examination-in-chief supported the case of the prosecution, however, in the cross-examination she completely disowned the happening of the incident. It is at this juncture, the court in exercise of power under Section 165 of the Evidence Act asked the question to clarify wherein the prosecutrix answered that the petitioner had committed wrong



with her. For the sake of brevity Section 165 of the Indian Evidence Act reads as under:-

“165. Judge's power to put questions or order production.-The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question;

Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved;

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein-before excepted.”

6. Primary reading of it would show that the court would be within its domain to disallow any further cross-examination after the examination is conducted by invoking the section 165 of the Evidence Act.

7. Reading of the statement of the prosecutrix would show that initially she supported the case of the prosecution. Subsequently in the cross examination it was demolished and entire incident was disowned. At this moment, the court exercised the power under Section 165 of the Evidence Act wherein specific question was made with a query as to which version of the prosecutrix is correct, whether statement given in examination-in-chief or in the cross-examination. The question put forth by the court and answer given by the prosecutrix are reproduced hereunder:-



“न्यायालय द्वारा प्रश्न :-

प्रश्न 1.— आपने अपने मुख्य परीक्षण में अभियुक्त द्वारा आपके साथ गलत काम करना बताया है परंतु प्रतिपरीक्षण के दौरान आपने अभियुक्त द्वारा आपके साथ गलत काम न करना बताया है, दोनों में से कौन सी बात सही है?

उत्तर — अभियुक्त ने मेरे साथ गलत काम किया था यह बात सही है।

प्रश्न 2.— आपने अपने मुख्य परीक्षण में अभियुक्त द्वारा आपके साथ छेड़छाड़ एवं जबरदस्ती करने वाली बात बताई है परंतु प्रतिपरीक्षण के दौरान आपने अभियुक्त द्वारा आपके साथ छेड़छाड़ एवं जबरदस्ती न करना बताया है, दोनों में से कौन सी बात सही है?

उत्तर — अभियुक्त ने मेरे साथ छेड़छाड़ एवं जबरदस्ती किया था।

साक्ष्य समाप्ति समय 03:45 P.M.”

8. The Supreme Court in the case of **Himanshu Singh Sabharwal Vs. State of M.P. & ors.** reported in **AIR 2008 SC 1943** has examined the necessity of fair trial. It has also discussed the scope and ambit of Section 165 of the Indian Evidence Act read with Section 311 of the Cr.P.C. The Supreme Court held that the courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The Supreme Court also emphasized the fair trial which is to be granted which denotes that a fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial also means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. The Supreme Court at para 13, 14, 16 & 17 of the judgement observed as under:-

“13. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

14. "Witnesses" as Bentham said: are the eyes and ears of justice.



Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived





at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

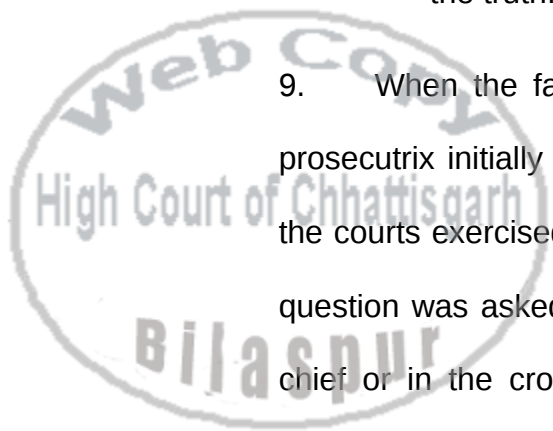
16. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. [Section 311](#) of the Code and [Section 165](#) of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

17. The power of the Court under [Section 165](#) of the Evidence Act is in a way complementary to its power under [Section 311](#) of the Code. The section consists of two parts i.e (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. [In Mohan Lal v. Union of India](#) (1991 Supp (1) SCC 271) this Court has observed, while considering the scope and ambit of [Section 311](#), that the very usage of the word such as, 'any Court' 'at any stage', or 'any enquiry or trial or other proceedings' 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the



discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions [of the Code](#). The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of [Section 311](#) but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth."

9. When the facts of this case are examined, it would show that when the prosecutrix initially supported the case of the prosecution and it was demolished, the courts exercised its power under Section 165 of the Evidence Act and specific question was asked as to which version is correct whether in the examination-in-chief or in the cross-examination. The primary reading of the statement would show that the learned court below stepped into the shoes of the prosecution. To ask such question, whether it would have an effect of prejudice or not is required to be eliminated for fair trial. The principle which has been laid down by the Supreme Court strikes a balance between the prosecution and defence and in either way it should not prejudice the right of the accused or prosecution. The courts are required to take a participatory role during trial but can not loose it's balance. It is also not expected that until and unless the statement in support of the prosecution is made, the question can be put to the witness in exercise of power under Section 165 of the Evidence Act. When the courts have exercised such power and when the leave of the court was asked for to cross-examine to eliminate the further truth, having denied, it would result into trial not eclipsed by any ambiguity. The question put forth by trial Judge will only mutate in favour of prosecution therefore giving an





opportunity to petitioner to further cross-examination will wipe out any further criticism and rather will restore the promise of fair opportunity. Therefore in the opinion of this Court, the application so moved by petitioner to cross examine the witness further should have been allowed or otherwise it would lead to suppression of a fair trial. Consequently, the order dated 24/02/2022 is set aside. The application under Section 311 of Cr.P.C. read with Section 165 of the Evidence Act is allowed. The consequence will follow.

10. With such observation, the petition stands disposed of.

Sd/-
(Goutam Bhaduri)
Judge

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Head Note
CRMP No. 574 of 2022

On examination of witness under Section 165 of Evidence Act in a given case cross-examination to eliminate further truth is required.

किसी प्रकरण में भारतीय साक्ष्य अधिनियम की धारा 165 के तहत साक्षी का परीक्षण किये जाने पर अन्य सुसंगत तथ्यों का पता लगाने हेतु उसका प्रति-परीक्षण किया जाना आवश्यक है।

