
(2013) 05 MP CK 0084

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 2109 of 2011

Pappu @ Chandra Pravesh Tiwari

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 07-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 233(3), 311

Citation : (2013) CriLJ 3707 : (2013) ILR (MP) 1208

Hon'ble Judges : N.K. Gupta, J

Bench : Single Bench

Advocate : S.K. Dwivedi, for the Appellant; Ajay Tamrakar, Panel Lawyer, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Gupta, J.—The applicant has preferred the present revision against the order dated 23.11.2011 passed by the learned 4th Additional Sessions Judge, Katni in S.T. No. 152/04, whereby the application filed by the applicant u/s 233(3) of Cr.P.C. was dismissed. The facts of the case, in short are that, the applicant is an accused in a murder trial pending before the trial Court. In that trial, the witnesses namely Arun Tiwari (PW-9) and V.P. Singh were examined and cross-examination. Thereafter, an application u/s 311 of Cr.P.C. was moved to recall these witnesses but the same was dismissed by the trial Court. Thereafter, an application u/s 233(3) of Cr.P.C. was moved, which was dismissed by the trial Court by passing the impugned order.

2. I have heard the learned counsel for the parties.

3. The learned counsel for the applicant has submitted that the name of the applicant was not mentioned in the FIR and therefore, re-examination of the witnesses namely Arun Tiwari and V.P. Singh is necessary. The right given to the accused u/s 233(3) of Cr.P.C. is absolute and the Court cannot deprive him from his rights. In support of his contention, the judgment of the Federal Court in the

case of AIR 1949 6 (Federal Court) is referred. Also the orders passed by the Single Bench of this High Court and various High Courts are referred. One judgment of Kerala High Court passed in the case of T.N. Janardhanan Pillai Vs. State, is also referred, whereas the order passed by the Single Bench of this Court in the case of Nyaju Niyaj Mohd. Vs. State of M.P., is also cited. Similarly, the order passed by the Single Bench of this Court in the case of Nandlal and others Vs. State of Maharashtra,] is also referred. The learned counsel for the applicant has further submitted that the witness, who is examined as a prosecution witnesses may be recalled as a defence witness again and in support of this contention, the order passed by the Single Bench of this Court in the case of Harbhajan and Others Vs. State of Madhya Pradesh, is referred.

4. On the other hand, the learned Panel Lawyer has submitted that the scope of Provision under Sections 311 and 233(3) of Cr.P.C. are different and the applicant cannot get that relief under the garb of Provision u/s 233(3) of Cr.P.C., which was refused u/s 311 of Cr.P.C. and therefore, the learned Additional Sessions Judge has rightly dismissed the application filed by the applicant.

5. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is apparent that the application u/s 311 of Cr.P.C. was moved to recall the aforesaid witnesses, which was rejected. Thereafter, an application u/s 233(3) of Cr.P.C. was moved. It is true that the scope of both the sections is slightly different. If the provision of Section 311 of Cr.P.C. is perused, which is as under:-

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.

Whereas, the provision of Section 233(3) of Cr.P.C. is perused which is as under:-

If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

On comparison of these two provisions, it would be clear that the Provision u/s 311 of Cr.P.C. is more wide. The Court can recall any prosecution witnesses, if it is required to meet the ends of the justice. It may also call any witness, though not cited by any of the party for the just decision of the case. In general, if a witness is examined by the prosecution then, he can be recalled according to the Provision of Section 311 of Cr.P.C. and that witness cannot be recalled u/s 233(3) of Cr.P.C. For the purpose of Section 233(3) of Cr.P.C. witness is required to prove the defence evidence or to produce any document or a thing. Various

orders cited by the learned counsel for the applicant about the Section 233(3) of Cr.P.C. were about the calling of the witnesses in defence and not about the recalling of the prosecution witnesses therefore, except the order passed in the case of Harbhajan (Supra), and other orders cited by the learned counsel for the applicant they are not at all applicable in the present case because it is a case of recalling of the witnesses.

6. The Hon''ble Apex Court in the case of State of Madhya Pradesh Vs. Badri Yadav and Another, has held that if a prosecution witness, who had been examined, cross-examined and discharged to be juxtaposed as defence witness, then he remains as a prosecution witness. In the light of the judgment passed by the Hon''ble Apex Court, the fact as to whether the prosecution witness can be called as a defence witness needs to be examined. For example, if a doctor is examined by the prosecution, who has proved the various injury reports of the victims and was released after his cross-examination, it was found that he was required to prove the injuries caused to any of the accused persons and the injury reports are filed after his cross-examination by the defence then, such a doctor can be a defence witness for the injury reports of the accused persons. Therefore, if the prosecution witness who has already been fully examined is required to be recalled as a defence witness then, it is for the accused to show as to how he may be counted as a defence witness. In the order passed by the Single Bench of this Court in the case of Harbhajan (Supra), it was observed that, though the prosecution''s witness was recalled as a defence witness but he shall remain a prosecution witness and a further cross-examination if necessary can be done upon that witness. In that order, the Single Bench of this Court has found an error that one witness, who was examined as a prosecution witness also examined a defence witness and his evidence was recorded for two times in a different manner. In the light of the order passed by the Single Bench of this Court in the case of Harbhajan (Supra), it would be apparent that if the prosecution witness is called as a defence witness then, his statement shall continue, which was recorded in the deposition sheet, where his prosecution evidence was completed. His statement shall be started as a defence witness from the end of his previous statement.

7. Under such circumstances, it was for the accused to establish that both the witnesses who were examined as a prosecution witnesses were the defence witness and therefore, examination was necessary. If the application filed by the applicant before the trial Court u/s 233(3) of Cr.P.C. is perused then, it would be apparent that no reason has been mentioned by the applicant as to why he wanted to examine those two witnesses as a defence witness. What was the kind of defence that he wanted to prove by those witnesses. The applicant did not mention any reason in that application and therefore, it is apparent that when the application u/s 311 of Cr.P.C. was dismissed and that order attained finality, thereafter to defeat that order, an application u/s 233(3) of Cr.P.C. was moved and therefore, it would be apparent that the applicant''s application was not submitted on bonafide grounds. No defence was to be proved by the applicant

from those witnesses but he wanted to recross-examine them with the help of the application and therefore, the application moved by the applicant u/s 233(3) of Cr.P.C. for the purpose of vexation and therefore, it could not be allowed u/s 233(3) of Cr.P.C. The trial Court has rightly rejected the application filed by the applicant u/s 233(3) of Cr.P.C. because it was moved only to defeat the previous order of the trial Court u/s 311 of Cr.P.C., which attained the finality.

8. On the basis of aforesaid discussion, no illegality or perversity is visible in the impugned order passed by the learned Additional Sessions Judge and therefore, there is no basis by which the revision filed by the applicant can be accepted. Consequently, the revision filed by the applicant is hereby dismissed. Copy of this order be sent to the trial Court for information and to proceed with the case with the direction that the interim stay granted to the applicant is hereby vacated.