IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE ATUL SREEDHARAN

ON THE 9th OF MARCH, 2022

MISCELLANEOUS CRIMINAL CASE No. 13756 of 2021

Between:-

Sandeep Yadav,

.....PETITIONER

(By Shri Satyam Agrawal, learned counsel)

AND

1. State of Madhya Pradesh through Police Station Prithvipur, district Tikamgarh.

2. Victim "X"

.....RESPONDENTS

(Respondent no.1-State by Shri Atmaram Ben, learned Deputy Government Advocate and respondent no.2 by Shri J. P. Singrol, learned counsel)

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This petition coming on for admission and stay this day, the court passed the following:

ORDER

The present petition under section 482 Cr.P.C. has been filed by the petitioner who is aggrieved by the order dated 23.2.2021 passed by the learned First Additional Sessions Judge, Niwadi, district Tikamgarh, in Sessions Trial No.55/2018 whereby an application filed by the prosecutrix/complainant for recalling and re-examining the

witness under section 311 Cr.P.C. has been allowed without conducting any enquiry regarding the authenticity of the allegations made in the complaint.

2. The brief narrative of facts essential to appreciate the present case are that the prosecutrix initially filed a complaint case before the Court of the Judicial Magistrate First Class under section 200 Cr.P.C. disclosing therein offences under sections 498-A and 3 and 4 of the Dowry Prohibition Act, 1961. There was no other allegation relating to any other offence in the said complaint case. Thereafter, the Magistrate passed an order under section 156(3) Cr.P.C. and directed the police to register an FIR and investigate the case.

3. Pursuant to the said order passed by the learned Judicial Magistrate First Class, the police registered an FIR at the behest of the prosecutrix. Therein also, the prosecutrix had only levelled allegations against the petitioner for offences under sections 498-A and 3 and 4 of the Dowry Prohibition Act. The allegations in the FIR also did not disclose any other offences other than that under sections 498-A and 3 and 4 of the Dowry Prohibition Act. Subsequently, upon further statement of the prosecutrix, section 376 IPC was included in the charge-sheet when the same was filed before the learned court below. Thereafter, cognizance was taken of the said offences and the matter was committed to the Court of Sessions. During the course of trial, the prosecutrix was examined and cross-examined on three different dates, which are 29.3.2019, 30.10.2019 and

6.12.2019. Thereafter, she moves the application under section 311 Cr.P.C. alleging therein that on 6.12.2019 when the prosecutrix and her parents had come to attend the court proceedings and had got down from the bus, they were accosted by the petitioner and some other persons and were abducted by them and the prosecutrix was forced to give a statement before the court which was recorded on 6.12.2019. The learned court below has allowed the said application moved by the prosecutrix by giving the following findings. Firstly, the learned trial court has held that the case was listed on 29.3.2019 and after that, the petitioners side has been taking time to cross-examine the prosecutrix. Thereafter, it was listed on 30.10.2019 when again the petitioner sought time to cross-examine the prosecutrix and thereafter finally the statement was recorded on 6.12.2019. The learned court below has also accepted the allegation levelled by the prosecutrix in her application as the gospel truth and the same was one of the considerations while allowing the application. It was also held by the learned trial court that on 6.12.2019 when the prosecutrix was cross-examined she is stated to have resiled from her earlier statement.

4. Learned counsel for the petitioner has submitted that the application having been moved by the prosecutrix and not by the prosecution, was untenable and ought not to have been taken on face value by the learned trial court. As far as this contention is concerned, this court rejects the same as power of the trial court under section 311

Cr.P.C. is concerned is rather wide. It can examine, recall or re-examine any witness at the stage of enquiry, trial or other proceedings where in the opinion of the court below that such recall is essential. The court may have been encouraged to form that opinion on the basis of the application of the prosecutrix but that by itself will not render the impugned order bad in law. Therefore, the contention of the learned counsel for the petitioner, so far it is restricted to the application being untenable and the order being passed only on the basis of the application of the prosecutrix is concerned, is rejected.

5. Learned counsel for the petitioner has thereafter argued that the findings of the learned trial court are incorrect. The learned court below has arrived at a finding that the testimony of the prosecutrix had to be recorded on three different occasions on account of the procrastinative tactics adopted by the petitioner. He has taken this court through the testimony of the prosecutrix on 29.3.2021 where after the examination-in-chief, the trial court itself has recorded in its note that further recording of evidence is kept in abeyance on account of paucity of court time. The said note is immediately under paragraph no.5. Thereafter, the testimony of the prosecutrix continued on 30.10.2019 and on that day also when further testimony was kept in abeyance, the court observed in its note that the proceedings are kept in abeyance on account of paucity of court time. Thereafter, the statement was concluded on 6.12.2019. Under the circumstances, learned counsel for the petitioner submits that

the finding of the learned trial court that the petitioner was responsible for the delay on account of which the statement of the prosecutrix was recorded on three different dates, is not supported by the material on record and, therefore, deserves to be set aside.

6. Thereafter, dealing with the second finding of the learned trial court that on 6.12.2019, the prosecutrix had changed her initial statement given in her examination-in-chief is concerned, learned counsel for the petitioner has drawn the attention of this court to page no.42 where the cross-examination of the prosecutrix commences from paragraph no.13 on 6.12.2019. Having gone through the said cross-examination, I find that it is not a case where the prosecutrix has resiled from her previous statement but contradictions with her previous statement having been brought out in the course of cross-examination by the defence counsel. She did not resile from her previous statement given in her examination-in-chief but has merely contradicted herself in her cross-examination. Therefore, learned counsel for the petitioner submits that the said finding is also incorrect that on account of the actions of the petitioner the prosecutrix was compelled to resile from her previous statement.

7. The third finding of the learned trial court is whereby the trial court has accepted as gospel truth the allegation in the one page application filed by the prosecutrix under section 311 Cr.P.C. as the gospel truth and has made that as one of the grounds for allowing the said application is concerned, learned counsel for the petitioner submits that the finding is

incorrect. He submits that the learned trial court did not make any effort to find out whether the prosecutrix had made a report to the police with regard to the said incident as the incident disclosed in her application under section 311 Cr.P.C. is a serious one and a fresh offence could have been registered against the petitioner herein on the basis of the said complaint. Secondly, he states that on 6.12.2019 when the prosecutrix was in the protection of the court, she could have very well made the statement to the effect that she was abducted by the petitioner and then compelled to give her statement in the manner she did on 6.12.2019 but she has failed to do so. Under the circumstances, learned counsel for the petitioner has prayed that the said order be set aside and the order passed allowing the application under section 311 Cr.P.C. also be set aside.

8. Learned counsel for the objector and the State have argued together in one voice. Learned counsel for the objector has submitted that now that the statement of the prosecutrix has already been recorded (though not recorded pursuant to the order under section 311 Cr.P.C.) on three different dates, it is not for the learned trial court to decide on merits as to what must be done. He has further submitted by referring to the application under section 311 Cr.P.C. that the prosecutrix and her parents were all abducted by the petitioner and then compelled her to give a statement in favour of the petitioner.

9. Learned counsel for the State has referred to the finding of the learned trial court to the effect that the prosecutrix and her parents were abducted and, therefore, the said order does not call for any interference.

10. Heard learned counsel for the parties, perused the impugned order of the learned court below, the petition and the documents filed therewith.

11. From a reading of the evidence given by the prosecutrix on 29.3.2019, 30.10.2019 and 6.12.2019, one thing is clear. She has not resiled from her case. She has not been declared hostile by the prosecution. She has stated against the petitioner in the statement dated 29.3.2019 and 30.10.2019. On 6.12.2019 when she was cross-examined by the defence, it is seen that there were several contradictions that were brought out by the counsel for the defence but the same cannot be said to be an instance where the prosecutrix has resiled from her previous statement. The contradictions have been brought out by the defence counsel on account of his ability to do so by cross-examining the prosecutrix. It is not a case where the prosecutrix has totally abandoned her statement in examination-in-chief and has laid down a totally different case in her cross-examination. Nowhere has she stated in her cross-examination that the incident has not happened but, by the contradictions, the courts may doubt the statement of the prosecutrix.

12. As regards the statements of her parents, which is also recorded on 6.12.2019, they have only stated that they don’t know the factual aspects relating to what has happened to their daughter i.e. the prosecutrix. They

too have not been declared hostile and neither they have been cross-examined by the defence as no necessity to do so was felt by the defence counsel. As regards the first finding of the learned trial court that it was the petitioner who had procrastinated the completion of the testimony of the prosecutrix on a single day is something that must be rejected. As, the statements of the prosecutrix on 29.3.2019 and 30.10.2019 were adjourned to another day as the court time was over, as is reflected by the endorsement of the learned trial court itself in the evidence. Therefore, the finding of the learned trial court that the petitioner was responsible for deliberately taking time to cross-examine the prosecutrix is a fact which is not borne out from the record of the case and, therefore, this finding is unfounded and is liable to be set aside.

13. As regards the finding of the learned trial court that on 6.12.2019, on account of the abduction, the prosecutrix was compelled to give a statement which was not supportive of her cause, also deserves to be rejected as a reading of paragraph no.13 of the cross-examination of the prosecutrix on 6.12.2019 clearly go to show that the contradictions have been brought out in the course of cross-examination and that the prosecutrix does not resile from the statement that she has given in her examination-in-chief and set up a new case on behalf of the prosecution. Thus, the second finding is also rejected.

14. As regards the third finding of the learned trial court that the prosecutrix and her parents were abducted by the petitioner on 6.12.2019,

the finding is totally unfounded. There is nothing more than the allegation in the application filed under section 311 Cr.P.C. to corroborate what the prosecutrix has stated in the application. The trial court also did not carry out any kind of enquiry or asked the police to enquire into the said incident and has merely taken the allegations made in the application itself as a gospel truth, which is impermissible and, therefore, the finding relating to the abduction of the prosecutrix by the petitioner is also unfounded and liable to be set aside.

15. An application under section 311 Cr.P.C. cannot be allowed merely for asking as has been done in this particular case by the learned trial court. Time and again the Supreme Court has reminded the trial courts that the ambit and scope under section 311 Cr.P.C. is not an opportunity, given either to the prosecution or the defence, to cover up the lacuna left by them in not examining the witnesses properly on the first occasion.

16. Under the circumstances, the impugned order being untenable both on facts and on law is set aside and the opportunity to further examine the prosecutrix is set aside. Pursuant to the impugned order if any statement of the prosecutrix has been recorded, the same is illegal in the eyes of law and the same shall not be considered by the learned trial court while deciding the case before it.

17. With the above, the petition stands **finally disposed of**.

(ATUL SREEDHARAN)

ps **JUDGE**

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