

INDRAJIT MAHANTY, J.

CRLMC. NO.2454 OF 2010 (Decided on 26.08.2011)

STATE OF ORISSA

.....Petitioner.

.Vrs.

BIJAYA SANKAR SAHU & ORS.

.....Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.311.

For Petitioner - Mr. D.Panda, Addl. Govt. Advocate
For O.P.Nos.1 & 2 - M/s. B.K.Ragada, L.N.Patel & N.Das.
For O.P. No.3 - None

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the prosecution seeking to challenge the order dated 13.05.2010 passed in S.T. Case No.161/5 of 2009-10, whereby the learned Additional Sessions Judge, (F.T), Sambalpur has rejected a petition filed by the prosecution under Section 311 Cr.P.C. seeking recall and re-examination of P.W.1-Sukanti Dhal (Prosecutrix/victim).

2. Mr. D. Panda, learned Additional Government Advocate appearing on behalf of the State submits that the prosecution filed a petition under Section 311 Cr.P.C. basing on a complaint received from the prosecutrix, P.W.1-Sukanti Dhal, complaining that she had been unable to state the truth in course of her examination-in-chief on the date of her examination i.e. on 2.3.2010 allegedly due to threats received by her, for which reason she prayed for her own recall and re-examination in the interest of justice. This complaint of the prosecutrix was attached to a petition filed by the prosecution under Section 311 Cr.P.C. Mr. Panda further submits that the trial court ought to have favourably considered the prayer of the prosecution and if the prayer of the prosecution to recall and re-examination of P.W.1-Sukanti Dhal (Prosecutrix) had been allowed, there would be no prejudice to the defence, inasmuch, as the defence would have been entitled for further cross-examination.

Mr. Panda further submits that the case at hand is a case of brutal gang rape and the interest of justice would be best served, if the prosecutrix is directed to be recalled and re-examined and that would also enable the trial court to arrive at the truth of the allegation. In this respect reliance was placed on a judgment of the Hon'ble Supreme Court in the case of **Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others**, (2004) 4 Supreme Court Cases 158.

3. While placing reliance on the aforesaid judgment, learned Counsel for the State submits that the Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and the Courts have to ensure that accused persons are punished and that the mighty or authority of the State are not used to shield itself or its men.

4. Mr. B.K. Ragada, learned counsel appearing for opposite party Nos.1 & 2 (accused persons in the court below) submits that the plea that the prosecutrix had been threatened by the defence is wholly false, unsubstantiated and has been raised belatedly after more than two months from the date on which the prosecutrix/victim was examined in court. Admittedly, in the present case, the prosecutrix (P.W.1) was examined in court on 2.3.2010. The alleged complaint was made by the prosecutrix to the Public prosecutor only on 4.5.2010 i.e. after more than two months and basing on such allegation or complaint, a petition under Section 311 Cr.P.C. came to be filed by the Public Prosecutor who attached thereto a copy of the purported complaint received by him from the prosecutrix. The complaint made by the prosecutrix is extracted herein below:

“1. That the case under reference is in trial in your honourable court.

That on 3.3.2010, while I gave my evidence in your honourable court, I was under fear psychosis due to threatening and intimidation from the accused side, for which I could not give my evidence fairly and properly.

Hence I pray that my prayer may kindly be taken in to consideration to recall me to your honour court again for giving my evidence afresh, freely, fairly and properly for the interest of justice and to punish the culprit”

5. Before dealing with the case at hand, it has become necessary to take note of the evidence rendered by the prosecutrix in course of the trial, certified copy of which has been filed by the learned counsel for the State in course of the hearing. On perusal of the evidence in chief of the P.W.1-Sukanti Dhal (Prosecutrix), it appears therefrom that the prosecutrix has wholly supported the case of the prosecution and also categorically stated that she had identified the accused persons in the T.I. parade conducted inside the Circle Jail, Sambalpur to be the culprits, who had committed rape on her.

6. On a careful reading of the examination-in-chief as well as the cross-examination of P.W.1-Sukanti Dhal (Prosecutrix), I find no ground to even indicate any “threat or coercion” being applied on such witness. It is equally important to note herein that the prosecutrix was examined-in-chief as well as cross-examined on the same date i.e. on 2.3.2010. In other words, there was no break between the examination-in-chief as well as the cross-examination which appears to have been recorded in one continuous sitting. The prosecutrix has clearly supported the case of the prosecution in her evidence-in-chief. Therefore, I am clearly in agreement with the views expressed by the learned Additional Sessions Judge (F.T), Sambalpur in the impugned order to the effect that, the prosecutrix’s bald assertion of coercion and threat without any material details whatsoever is wholly inadequate to be acted upon. The complaint of the prosecutrix is also not supported by any affidavit.

7. In the case at hand, the judgment relied upon by the learned counsel for the State in the case of *Zahira Habibulla H. Sheikh and Another* (supra) has no application to the facts of the present case and on the contrary learned Additional Sessions Judge (F.T.), Sambalpur has correctly placed reliance upon an earlier judgment of the Hon’ble

Supreme Court in the case of *Mohanlal Shamji Soni v. Union of India and Another*, AIR 1991 Supreme Court 1346 and in particular, the dicta laid down therein, which directs that power under Section 311 Cr.P.C. must be used judiciously and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Hence, I am of the considered view that this dicta of Hon'ble Supreme Court has been correctly applied by the trial Court to the facts and circumstances which arise for consideration in the present case.

8. In view of the aforesaid conclusion, I find no justifiable reason to interfere with the impugned order and while dismissing the present application, affirm the impugned order dated 13.5.2010 passed in S.T. Case No.161/5 of 2009-10 by the learned Additional Sessions Judge (F.T), Sambalpur and direct vacation of all interim orders.

Application dismissed.