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**(2009) 07 JH CK 0041**

**Jharkhand High Court**

**Case No:** None

Prabir Kumar Roy

APPELLANT

Vs

State of Jharkhand

RESPONDENT

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**Date of Decision:** July 29, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 125, 208, 311
- Dowry Prohibition Act, 1961 - Section 3, 4
- Penal Code, 1860 (IPC) - Section 313, 498A

**Hon'ble Judges:** Dilip kumar sinha, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

D.K. Sinha, J.

The petitioner has challenged the legality, propriety and/or correctness of an order dated 28.7.2008 passed by the Additional Sessions Judge, FTC-II Jamshedpur in S.T. No. 313 of 1998 by which the prayer of the prosecution for recall of the Informant P.W. 2 for her reexamination was allowed.

2. The prosecution story in short was that the petitioner stood charged under Sections 498A/313 of the Indian Penal Code as also under Sections 3 ,4 of the Dowry Prohibition Act in ST. No. 318 of 1993 on the written report of the informant P.W. 2 Bulla Roy in respect of an alleged occurrence, which took place on 20.8.1998. The informant was produced and examined as P.W. 2 but after a long interval the prosecution filed a petition on 29.10.2004 for her re-examination which was allowed by the Trial court on 18.7.2005. However, the prosecution failed to re-examine her within long span of three years. When the matter was reagitated by the prosecution the trial court by the order dated 18.6.2008 disallowed the petition of prosecution for re-examination of the P.W. 2 but with certain liberty. The prosecution then filed a

separate petition on 17.1.2008 reiterating the earlier prayer for reexamination of P.W. 2 Bulla Roy. The trial court after hearing the prosecution and considering the rejoinder of the petitioner accused allowed the petition by the impugned order dated 28.7.2008 granting permission to the prosecution to prove certain documents by reexamining the P.W. 2

3. Having been aggrieved by and dissatisfied with the impugned order, the petitioner preferred this Cr. Revision on the ground that the trial court ought not to have entertained an unaffidavited petition dated 17.7.2008 filed on behalf of the prosecution. Perhaps the trial court lost sight of the fact that at the earlier occasion though the court had permitted the prosecution for re-examination of P.W. 2 which could not be within three years, the counsel submitted.

4. The learned Counsel pointed out fiat subsequent petition was agitated on behalf of the prosecution only with a view to fill in the acuna of the prosecution case against the procedural law. The prosecution wanted to produce new facts on the record by introducing certain documents and for that prayer was made for the re-examination of informant P.W. 2 at the fag end of the trial of the husband-petitioner and the trial court grossly erred by allowing such petition which can not be sustained,

5. The prosecution had not even disclosed in its petition dated 17.7.2008 as to why the re-examination of P.W. 2 Bulla Roy was essential to be recalled u/s 311 Cr.P.C. and to quote part of the contents of the said petition:

That a petition was filed u/s 311 of Cr.P.C. to recall P.W. 2 namely Bulla Ro/ for re-examination in connection with this case and the same was allowed by this Court.

That the said P.W. 2 is physically produced today before this Court as a witness for her examination.

It is therefore, prayed that necessary permission may be given regarding reexamination of P.W. 2 namely Bulla Roy.

It was signed by the Addl. P.P.

6. A rejoinder to that petition was filed on behalf of the petitioner (Annexure-2) dated 21.7.2008 putting strong exception to such move of the prosecution stating that no reason at all was assigned for recall of the informant P.W. 2 and that too after lapse of three years. It was even not disclosed therein that on which point the prosecution wanted to adduce evidence by recalling the informant P.W. 2. The learned Counsel for the petitioner contended that the informant-P.W. 2 was in habit of filing criminal cases after cases against the petitioner-husband only with the intention to harass and extort money from him and that at earlier occasion her petition u/s 125 of Cr.P.C. for alimony vide Misc. Case No. 10 of 1994 was dismissed by the learned Judicial Magistrate and thereafter Cr. Revi No. 46 of 1995 that was filed on behalf of the informant against such dismissal was also dismissed by the

court of Sessions Judge. Therefore, the prosecution ought to have been stopped by the court from producing new materials on the record, the counsel added.

7. Counsel for the petitioner relied upon a decision reported in 2006(2) East Cr. Cases 33(SC) [Nisar Khan v. State of Uttaranchal] wherein Hon<sup>ble</sup> Apex Court observed that where an application is filed by the accused to recall the eye-witnesses after a lapse of more than one year who was earlier examined, cross examined and discharged, the same should not be allowed. But in the instant case such prayer has been made on behalf of the prosecution for proving such documents which were not produced before the investigating Officer at the investigation stage. In that manner the accused-petitioner is prejudiced for denied of his valuable right of rebuttal of any material produced by way of documentary evidence ;the copy of which was not given to him before commitment of the case.

8. Admittedly Section 311 Code of Criminal Procedure confers wide discretion on the court to act as the exigency of justice require. The object of the section is 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 decision of the case. The mandatory part of Section 311 of Cr.P.C. is to dispense justice at all cost, as such, the courts have been assigned jurisdiction to allow witness to be examined at any stage whenever it considers the evidence essential, but certainly not for plugging the loopholes of either party

9 Section 311 of Cr.P.C confers power to summon material witness, or examine persons present which speaks:

Any Court may, as 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.

10. The provision of law referred to hereinbefore clearly speaks about the summon to any one as a witness; or to examine any person present in the court ; or to recall and re-examine any witness though not summoned as witness if his evidence appears to it to be essential to the just decision of the case. This section admittedly does not connote or denote production and examination of any document in express words, yet, contrary to that, the learned court allowed the prosecution to bring the documents on the record upon re-examination of Bulla Roy(P.W. 2) with observation that there was no bar in doing so.

11. The trial judge while allowing the petition if the prosecution for re-examination observed:

Before passing of order dated 18.6.2008, the original documents was not filed on behalf of prosecution, but now the prosecution has filed original documents on 17.7.2008 and prosecution wants to re-examine Bulla Roy informant to prove these documents. There is no bar to produce document during trial which were not given to I.O.

12 I have no hesitation in observing that the trial judge grossly erred while considering the petition of the prosecution for recall of P.W. 2 after lapse of three years and that too without assigning any cogent reason as such, the impugned order cannot be sustained and is liable to be set aside. Bringing certain new facts by production of documents, the prosecution may certainly cause prejudice to the accused in a sessions trial as the said documents were not the part of "police papers" as required to be provided to him before the case was committed on the court of Sessions under mandatory provisions of Section 208 of Cr.P.C. Therefore, the order dated 28.7.2008 passed by the Additional Sessions Judge, FTC II Jamshedpur in S.T. No. 318 of 1998 is set aside. The trial court is directed to proceed in accordance with law expeditiously so as to conclude the trial preferably within three months next. Accordingly, this Cr. Revision is allowed.