

**Prem Babu @ Vinod Kumar Vs. State of Rajasthan and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/761421](http://sooperkanoon.com/761421)

**Court :** Rajasthan

**Decided On :** Mar-17-2009

**Reported in :** RLW2009(3)Raj2434

**Judge :** Raghuvendra S. Rathore, J.

**Appellant :** Prem Babu @ Vinod Kumar

**Respondent :** State of Rajasthan and anr.

**Disposition :** Petition allowed

**Judgement :**

**Raghuvendra S. Rathore, J.**

1. In this criminal 'misc. petition, the petitioner has sought to challenge the order dated 24.10.2000 whereby the learned Additional Judicial Magistrate No. 3, Bharatpur had rejected' the application filed by the petitioner under Section 311 Cr.P.C.

2. Briefly stated, the facts of the case are that a complaint was lodged on 26.08.1997 by one Smt. Manju in the Court of Judicial Magistrate, Bharatpur which was subsequently forwarded to the Police Station Udyog Nagar, Bharatpur under Section 156(3) Cr.P.C. The said complaint was then registered as F.I.R. No. 180/97 for the offence under Section 498-A IPC and under Section 4 of the Dowry

Prohibition Act. Subsequently, on completion of the investigation and submissions of the challan, the trial proceeded in the Court of AJM No. 3 Bharatpur (Criminal Case No. 151/99). An application then came of be filed by the petitioner under Section 311 Cr.P.C. for recalling of the witnesses Smt. Manju PW/3 and her father Brajvasi PW/1. The reason given for recalling of the said witnesses was that the material questions could not be put in the cross-examination of the said witnesses by the counsel for the petitioner as a result of miscommunication. One of the question which is proposed to be put to the said witnesses is with regard to pregnancy of Smt. Manju in the year 1996, even though she was not living with her husband Prem Babu @ Vinod Kumar.

3. It has been contended by the learned Counsel for the petitioner that the petitioner had earlier filed a Divorce Petition against the complainant Smt. Manju with the averment that his wife is not ready and willing to continue matrimonial relationship with him. It was also averred in the said petition that the complainant Smt. Manju was got married against her will because she was interested in some other person, with whom she was having friendship, prior to the marriage. It was also stated in the petition that the complainant Smt. Manju had left the petitioner since the month of November 1994. Further, it was stated that Smt. Manju gave a birth to a child in the year 1996 without any cohabitation by the petitioner. It is also submitted by the counsel for the petitioner. It is also submitted by the counsel for the petitioner that a similar stand was taken by the petitioner in his reply to the application under Section 125 Cr.P.C. Tiled by the petitioner on 18.11.1999. According to him, the petitioner had instructed his lawyer about the aforesaid material facts but on account of error on his part the said material questions could not be put to the complainant Smt. Manju during the course of her cross-examination. In support of his submissions, the learned Counsel for the petitioner places reliance on the case of Rajendra Prasad v. Narcotic Cell reported in : 1999 SCC (Cri.) 1062 : RLW 1999(2) SC 321

4. On the other hand, the learned Public Prosecutor assisted by the counsel for the complainant Smt. Manju has read before me the statements of Brajvasi PW/1 and that of Smt. Manju PW/3 and tried to canvass that the essence of the proposed question had already been put to the aforesaid witnesses during their

cross-examination. Therefore, he has submitted that the application for recalling of the witnesses filed by the petitioner has been rightly dismissed by the learned court below.

5. I have carefully considered the facts and circumstances of the case and the submissions made by the counsel for the rival parties. It is no doubt true that recalling of a witness at a subsequent stage of the trial could not be a matter of course and is not to be done for the purpose of filling up the lacuna in the case, by either side. But it is also true that exercise of discretion in any such like matter depends upon facts and circumstances of each individual case. This Court also in exercise of inherent powers is to restrain itself from allowing the request for recalling of the witnesses. However, in the instant case with aforesaid peculiar facts and circumstances, it would be in the interest of justice and to arrive at a just decision that the complainant Smt. Manju be recalled.

6. In the case of Rajendra Prasad (supra), the Hon'ble Apex Court has observed as under:

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not 'fill the lacuna in the prosecution case.' A lacuna in the prosecution is not to be equated with the fallout of an oversight by a Public Prosecutor during trial, either in producing relevant material or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any

inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function; of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

7. In other words, in a criminal trial a witness may be recalled for the purpose of cross-examine even if the evidences is closed but the court may exercise its discretion in the exigency of the situations which is required in the interest of justice.

8. In view of the aforesaid reasons, I deem it just and proper to allow this criminal misc. petition and set aside the order dated 24.10.2000 passed by learned AJM No. 3 Bharatpur. Further, it is ordered that Smt. Manju PW/3 shall be recalled by the learned trial Court on one particular date so fixed. It is made clear that the petitioner may cross-examine the said witness, on the day when she is recalled and present before the learned trial court and no further time shall be granted to him on any count.