THE HIGH COURT OF MADHYA PRADESH
CRR-575-2022
Ichhashankar Vs. State of MP

Gwalior, Dated : 25/02/2022

Shri Anil Kumar Mishra with Ms. Harshita Mishra, Counsel for the applicant.

Shri A.K. Nirankari, Counsel for the State.

This criminal revision under Section 397, 401 of CrPC has been filed against the order dated 23.12.2021 passed by the Fourth Additional Sessions Judge, Bhind in Sessions Trial No.104/2018, by which the application filed by the applicant under Section 311 of CrPC has been rejected.

It is submitted by the counsel for the applicant that the applicant is facing trial for offence under Sections 302/34, 304-B of IPC and Sections 29 and 30 of Arms Act. Prosecution has already examined nine witnesses. However, counsel for the applicant could not effectively cross-examine Kamlesh (PW-2) and Ambika Prasad (PW-3), therefore, the application under Section 311 of CrPC was moved, however, the said application has been rejected by the impugned order.

Challenging the order passed by the Court below, it is submitted by the counsel for the applicant that it is well established principle of law that no party should suffer because of incompetence of his Lawyer. Kamlesh (PW-2) and Ambika Prasad (PW-3) are important witnesses and since their earlier counsel could not effectively cross-examine them, therefore, the Court below should have granted an

opportunity to the applicant to further cross-examine them, otherwise, the applicant would suffer irreparable loss.

Heard the learned counsel for the applicant.

During the course of arguments, it was fairly conceded by the counsel for the applicant that the applicant has not approached the Bar Council against his counsel for showing his incompetence or professional misconduct.

The Supreme Court in the case of **State of Haryana v. Ram Mehar and others** reported in **(2016) 8 SCC 762** has held as under:-

> "**36.** Keeping in mind the principles stated in the aforesaid authorities the defensibility of the order passed by the High Court has to be tested. We have already reproduced the assertions made in the petition seeking recall of witnesses. We have, for obvious reasons, also reproduced certain passages from the trial court judgment. The grounds urged before the trial court fundamentally pertain to illness of the counsel who was engaged on behalf of the defence and his inability to put questions with regard to weapons mentioned in the FIR and the weapons that are referred to in the evidence of the witnesses. That apart, it has been urged that certain suggestions could not be given. The marrow of the grounds relates to the illness of the counsel. It needs to be stated that the learned trial Judge who had the occasion to observe the conduct of the witnesses and the proceedings in the trial, has clearly held that recalling of the witnesses was not necessary for just decision of the case. The High Court, as we notice, has referred to certain authorities and distinguished the decision in *Shiv Kumar Yadav* [*State (NCT of Delhi)* v. *Shiv Kumar Yadav*, (2016) 2 SCC 402 : (2016) 1 SCC (Cri) 510] and *Fatehsinh Mohansinh Chauhan* [*UT of Dadra & Nagar Haveli* v. *Fatehsinh Mohansinh Chauhan*, (2006) 7 SCC 529 :

(2006) 3 SCC (Cri) 300]. The High Court has opined that the court has to be magnanimous in permitting mistakes to be rectified, more so, when the prosecution was permitted to lead additional evidences by invoking the provisions under Section 311 CrPC. The High Court has also noticed that the accused persons are in prison and, therefore, it should be justified to allow the recall of witnesses.

37. The heart of the matter is whether the reasons ascribed by the High Court are germane for exercise of power under Section 311 CrPC. The criminal trial is required to proceed in accordance with Section 309 CrPC. This Court in *Vinod Kumar* v. *State of Punjab* [*Vinod Kumar* v. *State of Punjab*, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712] , while dealing with delay in examination and cross-examination was compelled to observe thus : (SCC pp. 226-27, para 1)

> "*1*. If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in this country the two reasons that may earn the status of phenomenal signification are, first, procrastination of trial due to non-availability of witnesses when the trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial and the unfathomable reasons for acceptation of such prayers for adjournments by the trial courts, despite a statutory command under Section 309 of the Code of Criminal Procedure, 1973 (CrPC) and series of pronouncements by this Court. What was a malady at one time, with the efflux of time, has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, a diseased one, at present."

And again : (SCC p. 246, para 57.5)

> "*57.5*. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment,

continues. How long shall we say, "Awake! Arise!". There is a constant discomfort."

38. Yet again, in *Gurnaib Singh* v. *State of Punjab* [*Gurnaib Singh* v. *State of Punjab*, (2013) 7 SCC 108 : (2013) 3 SCC (Cri) 49] , the agony was reiterated in the following expression : (SCC p. 124, para 35)

"*35*. We have expressed our anguish, agony and concern about the manner in which the trial has been conducted. We hope and trust that the trial courts shall keep in mind the statutory provisions and the interpretation placed by this Court and not be guided by their own thinking or should not become mute spectators when a trial is being conducted by allowing the control to the counsel for the parties. They have their roles to perform. They are required to monitor. They cannot abandon their responsibility. It should be borne in mind that the whole dispensation of criminal justice at the ground level rests on how a trial is conducted. It needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar. The administration of justice reflects its purity when the Bench and the Bar perform their duties with utmost sincerity. An advocate cannot afford to bring any kind of disrespect to fairness of trial by taking recourse to subterfuges for procrastinating the same."

39. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and

magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.

40. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is, 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction.

41. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are

obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained."

The Supreme Court in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav and another** reported in **(2016) 2 SCC 402** has held as under:-

"26. In spite of the High Court not having found any fault in the conduct of the proceedings, it held that "although recalling of all the prosecution witnesses is not necessary" recall of certain witnesses was necessary for the reasons given in Paras 15(*a*) to (*xx*) of the application of the accused. It was observed that the accused was in custody and if he adopted delaying tactics it is only he who would suffer.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the

> accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.
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> **28.** It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 CrPC has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court [*Jasbir Singh* v. *State of Punjab*, (2006) 8 SCC 294 : (2006) 3 SCC (Cri) 470, paras 10 to 14] . A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order."

Incompetency of a Lawyer engaged by the applicant cannot be presumed by this Court. The applicant had engaged a Lawyer of his

choice. If the applicant is of the view that his Lawyer had deliberately not put certain questions thereby committing professional misconduct, then he has a remedy to approach the Bar Council because in the light of the judgment passed by the Supreme Court in the case of **R. Muthukrishnan Vs. Registrar General, High Court of Judicature at Madras** reported in **(2019) 16 SCC 407,** only the Bar Council is competent to take action against an Advocate of his/her professional misconduct. Since the applicant has not approached the Bar Council, therefore, even otherwise this Court cannot hold that by not putting certain questions to the witnesses, the Lawyer engaged by the applicant had committed any professional misconduct.

Since change of counsel cannot be a ground for recall of the witnesses, this Court is of the considered opinion that no jurisdictional error was committed by the Trial Court by rejecting the application filed under Section 311 of CrPC.

The revision fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

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