

Court No. - 13**Case :-** APPLICATION U/S 482 No. - 6555 of 2024**Applicant :-** Ashwani Kumar Tiwari Alias Guddu**Opposite Party :-** State Of U.P. Thru. Prin. Secy. Home Civil Sectt. Lko.
And Another**Counsel for Applicant :-** Pradeep Kumar, Ashwani Kumar
Srivastava, Kunwar Ravi Prakash**Counsel for Opposite Party :-** G.A.**Hon'ble Saurabh Lavania, J.**

1. Heard.
2. The present application U/s 482 Cr.P.C. has been filed for the following main relief:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may very graciously be pleased to quash impugned order dated 11.07.2024 in Session Trial No. 52/1993; Case Crime (FIR) No. 298/1992 Under Section 302 I.P.C Police Station: Mohanlalganj District: Lucknow (State Vs. Guddu alias Ashwani Kumar); vide which the application under section 311 of Code of Criminal Procedure has been rejected by the learned trial court without arbitrary and mechanical manner without applying his judicial mind which is appended as herewith as Annexure No. (01) to the petition, and further stated that quash all the consequential proceedings related to impugned Case with regard to applicant."

3. The present application under Section 482 Cr.P.C. has been filed by the applicant challenging the order dated 11.07.2024, passed by Additional Sessions Judge/ Special Court

(Anti Terrorist) Act, Lucknow (in short 'trial court'), on an application preferred by the accused/applicant under Section 311 Cr.P.C. praying therein to recall the P.W.1.

4. The facts which can be deduced from the pleadings and material available on record are to the effect that an FIR No. 298 of 1992 was lodged on 04.07.1992 at about 8:30 AM, registered as Case Crime No. 298 of 1992 under Section 302 IPC, by one Ram Shanker brother of the deceased Raja Ram. According to this FIR the applicant and two others caused fire arm injuries to the deceased namely Raja Ram, who was the witness of an incident in which Shiv Lal (Uncle of the informant) was assaulted by Ashwani Kumar s/o Puttan alias Sri Narayan Tiwari, Kallu alias Akhilesh s/o Bheemshanker Shukla, relative of Gunni Tiwari namely Kishor s/o Bhushan Chandra Tiwari. This FIR also indicates that an FIR was also lodged against Vijay Thakur brother of accused Guddu alias Ashwani Kumar s/o Puttan alias Sri Narayan Tiwari, by the mother of the informant under Section 376 IPC.

In the FIR in issue lodged on 04.07.1992 it has been specifically indicated that applicant caused fire arm injury by the countrymade pistol on the neck of the deceased.

5. After lodging of FIR the investigation was carried out and the charge-sheet was filed in the month of August 1992 and concerned court took cognizance on 24.08.1992, thereafter the matter was committed to Sessions Court and case was registered as Sessions Trial No. 92 of 1993. The trial court

framed the charges against three accused persons named above, under Section 302 IPC.

6. On being denial, the accused were put to trial and before the trial court P.W.1/Ram Shanker was examined on 10.09.2007 and he was partly cross-examined on 20.07.2017 and his cross examination was concluded on 28.07.2022.

7. It would be apt to indicate that in the instant application it has not been indicated deliberately or inadvertently on which date the charges were framed and why the statement of P.W.1 was recorded on 10.07.2007 and why his cross examination was concluded on 28.07.2022 after partly cross examined him on 20.07.2017, though the same was required.

8. On 30.08.2022 witness Tatu was examined and cross examined. The statement of P.W.3 namely Madhu was recorded on 03.11.2022 and this witness was cross-examined on 09.11.2022 and 07.12.2022 respectively. P.W.4 Chandra Deep Singh was examined on 09.02.2023. Examination of D.W.5/ Satish Chandra Gupta was concluded on 01.05.2023.

9. It would be apt to indicate at this stage that P.W.1 Ram Shanker was cross examined by the earlier counsel of defence, whose name has also been disclosed in the present application.

10. On 13.09.2022 the defence engaged Sri Kumar Srivastava, Advocate. This Counsel did not move any application immediately after his engagement under Section 311 Cr.P.C. for further cross-examination of PW-1, who was examined on 10.09.2007 and thereafter was partly cross-examined on

20.07.2017 and his cross examination was concluded on 28.07.2022.

11. The newly engaged counsel Sri Kumar Srivastava, Advocate cross-examined PW-3/Madhu and PW-4/Chandra Deep Singh, on the dates already indicated above i.e. 03.11.2022, 03.11.2022, 09.11.2022 and 07.12.2022, respectively.

12. After 07.12.2022 with delay of about two and a half of months, on 14.02.2023 an application was preferred under Section 311 Cr.P.C. with the prayer to recall PW-1/Ram Shankar, was examined on 10.09.2007 and thereafter was partly cross examined on 20.07.2017 and his cross examination was concluded on 28.07.2022.

13. In the application under Section 311 Cr.P.C. the applicant indicated following reasons for recalling PW-1 for further cross-examination:-

"2. यह कि रामशंकर पी0डब्ल्यू0-1 वादी/गवाह का बयान/जिरह दिनांकित 28.07.2022 को अभियुक्त गुड्डू उर्फ अश्वनी कुमार उर्फ व कल्लू की ओर से की गई जिसमें अधिवक्ता महोदय, द्वारा नक्शा नजरी/पंचनामा, पोस्टमार्टम रिपोर्ट तथा घटना के सम्बन्ध व अन्य तथ्यों पर जिरह नहीं की गई है।

3. यह प्रार्थी/अभि0 ने मुझ अधिवक्ता अश्वनी कुमार श्रीवास्तव की माननीय न्यायालय में अपना पक्ष बेहतर तरीके से रखने हेतु दिनांक-13.09.2022 को अधिकृत किया है। जब कि पी0डब्ल्यू-1 की जिरह दिनांक-28.07.2022 को की गई है, जो अपूर्ण है।"

14. The trial Court upon due consideration rejected the application for recalling of P.W.1 for further cross-examination, vide impugned order dated 11.07.2024. Relevant portion of the order dated 11.07.2024 is extracted hereinunder:-

"11-07-2024

आवेदक / अभियुक्त की ओर से दण्ड प्रक्रिया संहिता की धारा 311 के प्रावधान के अन्तर्गत प्रस्तुत प्रार्थनापत्र पर पूर्व तिथि पर उभय पक्ष के विद्वान अधिवक्तागण को सुना जा चुका है, जिसका निम्नवत निस्तारण किया जाता

निस्तारण प्रार्थना पत्र धारा 311 द०प्र०सं०

आवेदक / अभियुक्त को ओर से पी०डब्लू०-1 उमाशंकर को साक्ष्य हेतु पुनः न्यायालय के समक्ष उपस्थित कराये जाने हेतु प्रार्थनापत्र प्रस्तुत कर अभिकथन किया गया है कि प्रस्तुत वाद न्यायालय के समक्ष विचाराधीन है, जो अभियोजन साक्ष्य में नियत चल रहा है। पी०डब्लू० 1 राम शंकर से दिनांक 28.07.2022 को अभियुक्त गुड्डू उर्फ अश्वनी कुमार उर्फ कल्लू की ओर से जिरह की गयी, जिसमें विद्वान अधिवक्ता द्वारा नक्शा नजरी, पंचायतनामा, पोस्टमार्टम रिपोर्ट तथा घटना के सम्बन्ध में तथा अन्य तथ्यों पर जिरह नहीं की गयी है। अभियुक्त के विद्वान अधिवक्ता द्वारा कहा गया है कि अभियुक्त ने उन्हें न्यायालय में अपना पक्ष बेहतर तरीके से रखने हेतु दिनांक 13-9-2022 को अधिकृत किया है, जबकि पी०डब्लू०-1 की जिरह दिनांक 28-7-2022 को की गयी है, जो अपूर्ण है। अतः साक्षी पी०डब्लू०-1 राम शंकर को पुनः न्यायालय द्वारा सम्मन किया जाना न्यायसंगत विनियम के लिये आवश्यक प्रतीत होता है, अन्यथा आवेदक/अभियुक्त न्याय से वंचित रह जायेगा। तदनुसार विद्वान अधिवक्ता द्वारा प्रार्थनापत्र स्वीकार करते हुए पी०डब्लू०-1 राम शंकर को जिरह हेतु आहूत किये जाने की याचना की गयी है।

प्रार्थना पत्र के समर्थन में आवेदक/ अभियुक्त अश्वनी कुमार तिवारी की ओर से स्वयं का शपथ पत्र संलग्न किया गया है।

अभियोजन की ओर से विद्वान सहायक जिला शासकीय अधिवक्ता (फौजदारी) द्वारा प्रार्थनापत्र का विरोध करते हुए कथन किया गया है कि प्रकरण में बचाव पक्ष द्वारा पी०डब्लू०-1 रामशंकर से जिरह की जा चुकी है और बचाव पक्ष को पूरा अवसर प्रदान किया जा चुका है। तदनुसार प्रार्थनापत्र निरस्त किये जाने का अनुरोध किया गया है।

सुना तथा पत्रावली का परिशीलन किया गया।

अभियुक्त के विद्वान अधिवक्ता का तर्क है कि दिनांक 28-7-2022 को अभियुक्त गुड्डू की ओर से गवाह पी०डब्लू०-1 राम शंकर से जिरह की गयी है परन्तु अधिवक्ता महोदय द्वारा नक्शा नजरी, पंचनामा, पोस्टमार्टम रिपोर्ट तथा घटना के सम्बन्ध में व अन्य तथ्यों पर जिरह नहीं की गयी।

पत्रावली के अवलोकन से स्पष्ट हुआ कि गवाह पी०डब्लू०-1 राम शंकर की मुख्य परीक्षा दिनांक 10-09-2007 को अंकित हुई एवं गवाह की प्रति- पृच्छा दिनांक 20-07-2017 को पूर्ण हुई। अभियोजन द्वारा इसके पश्चात दिनांक 30-08-2022 को साक्षी तातू को परीक्षित कराया गया। इसके पश्चात गवाह पी०डब्लू०-3 मधू का बयान दिनांक 03-11-2022 एवं जिरह दिनांक 09-11-2022 एवं 07-12-2022 को अंकित कराया गया। अभियोजन के गवाह पी०डब्लू०-4 चन्द्रदीप सिंह का बयान दिनांक 09-02-2023 एवं पी०डब्लू०-5 सतीशचन्द्र गुप्ता का बयान दिनांक 01-05-2023 को पूर्ण हुआ।

अभियुक्त अश्वनी की ओर से दिनांक 13-09-2022 को नवीन अधिवक्ता श्री कुमार श्रीवास्तव को अपने मामले की पैरवी हेतु नियुक्त किया गया। उक्त तिथि के पश्चात् अभियोजन की ओर से प्रस्तुत गवाह पी०डब्लू०-३ एवं पी०डब्लू०-4 से विद्वान अधिवक्ता द्वारा जिरह की गयी है। इस दौरान कभी भी अभियुक्त की ओर से गवाह पी०डब्लू०-1 से

जिरह करने हेतु धारा-311 द०प्र०सं० के अंतर्गत प्रार्थनापत्र प्रस्तुत नहीं किया गया बल्कि उक्त गवाहों के बयान पूर्ण होने के उपरान्त काफी विलम्ब से उपरोक्त प्रार्थनापत्र दि० 14-02-2023 को प्रस्तुत किया गया है। गवाह पी०डब्लू०-1 राम शंकर से अभियुक्त के पूर्व अधिवक्ता द्वारा दिनांक 28-07-2022 को विस्तृत जिरह की गयी है। जिरह में गवाह से घटना के सम्बन्ध में प्रश्न पूँछा गया है। इस प्रकार स्पष्ट है कि गवाह पी०डब्लू०-1 राम शंकर से पूर्व में अभियुक्त अश्वनी की ओर से उपस्थित विद्वान अधिवक्ता द्वारा जिरह पूर्ण की गयी है एवं उसके पश्चात अभियोजन द्वारा अन्य चार गवाहों को भी परीक्षित कराया गया है। मामला वर्ष 1992 की घटना से सम्बन्धित है जो लगभग 30 वर्ष से अधिक पुराना है। अभियुक्त द्वारा पी०डब्लू०-1 रामशंकर से विस्तृत जिरह की जा चुकी है। अतः पुनः उक्त गवाह को जिरह हेतु तलब किये जाने का कोई औचित्य नहीं है। तदनुसार प्रार्थनापत्र खारिज किये जाने योग्य नहीं है।

आदेश

आवेदक/ अभियुक्त अश्वनी कुमार उर्फ गुड्डू की ओर से दण्ड प्रक्रिया संहिता की धारा 311 के प्रावधान के अन्तर्गत प्रस्तुत प्रार्थनापत्र खारिज किया जाता है। पत्रावली शेष साक्ष्य हेतु दिनांक 15.07.2024 को प्रस्तुत हो।"

15. In the aforesaid background of the case, present application has been filed.

16. Learned counsel for the applicant says that as per settled principle of law the application ought to have been allowed by the trial Court and the order impugned is against the principle settled in this regard as also the observations made by the Hon'ble Apex Court in regard to expression '*Fair Trial*'. As such, interference of this Court is required in the matter.

17. Learned AGA opposed the present application. He stated that the application under Section 311 Cr.P.C. was moved with sole intention to delay the trial, which is impermissible and in these circumstances of the case, the application has rightly been rejected by the trial Court. It is also stated that the application was preferred by newly engaged counsel which ought to have been rejected in view of settled principle of law that such type of practice

should not be permitted by the trial Court. Prayer is to affirm the impugned order and dismiss the application.

19. Considered the submissions advanced by the learned counsel for the parties and perused the record.

20. Considered the aforesaid facts and the observations made by the trial Court in the order dated 11.07.2024 and the principles related to recall of witness under Section 311 Cr.P.C. settled by the Hon'ble Apex Court in the case(s) of *Mohd. Khalid Versus State of West Bengal* (2002) 7 SCC 334, *Hanuman Prasad (Supra)*, *Natasha Singh vs. CBI*, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828 : 2013 SCC OnLine SC 444, *State of Haryana vs. Ram Mehar and others*; (2016) 8 SCC 762, *Swapan Kumar Chatterjee vs. Central Bureau of Investigation*, (2019) 14 SCC 328; *Varsha Garg vs. State of Madhya Pradesh and Others*; 2022 SCC OnLine SC 986 and as also by this Court in *Application under Section 482 Cr.P.C. No. 274 of 2022 (Ram Nayak Singh vs. State of U.P. & Another)*.

21. It is well settled by catena of decisions by the Hon'ble Apex Court that the power under Section 311 Cr.P.C. must be exercised with the care, caution and circumspection and only for strong and valid reasons. The recall of a witness already examined should not be a matter of course and discretion given to the court in this regard has to be exercised judicially to prevent failure of justice. The object of the provision as a whole is to do justice not only from the point of view of the

accused and the prosecution but also from the point of view of an orderly society.

22. The Court is fully conscious of the position that after all the trial is basically for the prisoners/accused and the Court should afford an opportunity to them in the fairest manner possible. At the same time, the Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. Recalling of witnesses has to be applied on the basis of judicially established and accepted principles.

23. In the facts of the case it would be apt to refer the observations made in the judgment(s) passed in the case of Mohd. Khalid (Supra) and Ram Mehar (Supra).

24. In the case of ***Mohd. Khalid (Supra)***, the Hon'ble Apex Court observed as under:-

"Before parting with the case, we may point out that the Designated Court deferred the cross-examination of the witnesses for a long time. That is a feature which is being noticed in many cases. Unnecessary adjournments give a scope for a grievance that the accused persons get a time to get over the witnesses. Whatever be the truth in this allegation, the fact remains that such adjournments lack the spirit of Section 309 of the Code. When a witness is available and his examination-in-chief is over, unless compelling reasons are there, the Trial Court should not adjourn the matter on the mere asking. These aspects were highlighted by this Court in State of U.P. v. Shambhu Nath Singh and others (2001) 4 SCC 667 and N.G. Dastane v. Shrikant Shivde (2001) 6 SCC

135. In the case of *State of U.P. v. Shambhu Nath Singh and others* (2001) 4 SCC 667, this Court deprecated the practice of Courts adjourning cases without examination of witnesses when they are in attendance with the following observations:-

"9. We make it abundantly clear that if a witness is present in Court he must be examined on that day. The Court must know that most of the witnesses could attend the Court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the Court is generally a poor solace for the financial loss incurred by him. It is a said plight in the Trial Courts that witnesses who are called through summons or other processes stand at a doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by every one provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are standard on account of the dimension of his judicial powers, can be a persuading factor for granting such adjournments lavishly, that too in a casual manner."

25. In the case of ***Ram Mehar (Supra)*** the Hon'ble Apex Court observed as under:-

"23. In *Bablu Kumar and others v. State of Bihar and another*, (2015) 8 SCC 787 the Court referred to the authorities in *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC, *Rattiram and others v. State of Madhya Pradesh* (2012) 4 SCC 516, *J. Jayalalithaa and others v. State of Karnataka and others* (2014) 2 SCC 401, *State of Karnataka v. K. Yarappa Reddy* (1999) 8 SCC 715 and other decisions and came to hold that keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty

of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. It has been further stated that the law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. We may note with profit though the context was different, yet the message is writ large. The message is - all kinds of individual notions of fair trial have no room".

"38. At this juncture, we think it apt to state that the exercise of power under Section 311 Cr.P.C. can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one

may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance".

26. Having considered the aforesaid, this Court finds that application was moved with sole intention to delay the trial which has not been concluded despite almost 30 years elapsed and the process adopted by the defence is nothing, but an abuse of process of law. It is for the following reason(s):-

- (i) Specific allegations regarding causing fire arm injury to the deceased were levelled against the applicant in the FIR lodged way back in the year 1992;
- (ii) Before the trial court P.W.1 Ram Shanker was examined on 10.09.2007 and he was partly cross-examined on 20.07.2017 and his cross examination was concluded on 28.07.2022;
- (iii) On 13.09.2022 the defence engaged Sri Kumar Srivastava, Advocate, who did not move any application immediately after engagement under Section 311 Cr.P.C. for further cross-examination of PW-1, who was examined on 10.09.2007 and thereafter was partly cross-examined on 20.07.2017 and his cross examination was concluded on 28.07.2022;
- (iv) The application U/s 311 Cr.P.C. is completely vague, as is evident from the relevant part of the application quoted in paragraph no. 13 of the judgment.

27. For the aforesaid, this Court does not find any illegality in the impugned order dated 11.07.2024. The instant application under Section 482 Cr.P.C. is hereby **dismissed**. Cost made easy.

Order Date :- 26.7.2024/Jyoti/-