

Court No. - 13

Case :- APPLICATION U/S 482 No. - 7682 of 2024

Applicant :- Kamal Kishore Singh @ Pappu Singh

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Deptt. Lko.
And Another

Counsel for Applicant :- Awadhesh Kumar Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania,J.

1. Heard Shri Awadhesh Kumar Mishra, learned counsel for the applicant as well as Shri Ajay Srivastava, learned A.G.A. for the state and perused the records.

2. The present application has been filed for the following main relief:-

"to set aside the impugned order dated 03.08.2024 on application U/s 311 Cr.P.C. dated 31.07.2024 passed by Learned Additional Session Judge Court No. 1, Lucknow on the application filed under section 311 for Recall of the Prosecution Witness No. 10 in Criminal Trial no. 1214/2017 pursuant to Case Crime No. 151/2016 Lodged under section 302, 34, 404, 411, 504, I.P.C. & 7CLA Act & 30 Arms Act Police Station Hazaratganj District Lucknow in State of U.P. Vs. Kamal Kishore Singh @ Pappu and others by which the Learned Trial Court has rejected the application for summoning the prosecution witness PW-10, for cross-examination, after summoning the Lower Court record and direct to consider the application filed under section 311 Cr.P.C. in the interest of justice."

3. By means of the present application under Section 482 Cr.P.C./Section 528 B.N.S.S., the accused/applicant has approached this Court challenging the order dated 03.08.2024, passed by Additional Session Judge Court No. 1, Lucknow (in short 'trial court'), in Session Trial No. 1214/2017 (State Vs. Kamal Kishore Singh @ Pappu Singh and Others) on an application preferred by the accused/applicant under Section 311 Cr.P.C. praying therein to summon Prosecution Witness No. 10/Vijay Pal Singh, Investigating Officer.

4. Brief facts of the case, which are relevant for the purpose of disposal of the instant application, are to effect that an FIR was lodged on 18.03.2016 registered as Case Crime No. 0151 of 2016 under Sections 147, 148, 149, 302, 504, 120B IPC and Section 7 of Criminal Law Amendment Act at Police Station - Hazrat Ganj, District -Lucknow against Pappu Singh, ShyamLal Yadav, Ajit Singh @ Ballu, Dinesh Singh, Arvind Singh @ Narendra Pahadi, Pappu Singh Gomti Nagar, J.P. Singh and two-three unknown persons.

5. The investigating Officer (in short "I.O."), after conducting the investigation, filed the charge-sheet No. 65/2016 dated 05.05.2016 against Pappu Singh alias Kamal Kishore Singh S/o Om Prakash Singh Thakur, Shyam Lal Yadav S/o Harilal Yadav, Dinesh Singh S/o Late Someshwar Singh under Sections 302, 34, 404, 411, 504 IPC and Section 7 of Criminal Law Amendment Act as also Section 30 of the Arms Act.

6. The case after filing of the charge-sheet was committed to the Court of Sessions where the case was registered as Session Trial No. 1214/2017 (State Vs. Kamal Kishore Singh @ Pappu Singh and Others).

7. The accused on denial on charges framed by the trial Court was put to trial. The prosecution to established its case examined witnesses of the facts as also I.O. Vijay Pal Singh (P.W.10) and other witnesses.

8. Witness namely I.O. Vijay Pal Singh (P.W.10) proved the charge-sheet and the documents annexed thereto. P.W.10 was also cross-examined by the defense on 13.09.2019. In other words, I.O. Vijay Pal Singh (P.W.10) was duly cross-examined by the counsel engaged by the applicant on 13.09.2019

9. After huge delay of about more than four years, the accused/applicant preferred an application dated 17.01.2024 under

Section 311 Cr.P.C. to summon I.O. Vijay Pal Singh (P.W.10) for further cross-examination and this application of the accused/applicant was rejected by the trial Court vide order dated 17.01.2024.

10. Without challenging the order dated 17.01.2024, the applicant again moved an application under Section 311 Cr.P.C. on 31.07.2024.

11. It would be apt to indicate that after rejection of the application dated 17.01.2024 which was rejected vide order dated 17.01.2024 itself by the trial Court, the applicant preferred an application under Section 408 Cr.P.C. making certain allegations against the trial Court to get the case transferred which was registered as Criminal Misc. Case No. 723 of 2024 (Kamal Kishore Singh @ Pappu Singh Vs. State of U.P.) and the same was rejected by the Session Judge, Lucknow vide order dated 10.06.2024.

12. Indisputedly, the trial is at the stage of arguments.

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

14. It would be apt to extract the impugned order dated 03.08.2024.

"पत्रावली प्रस्तुत हुई।

पुकार कराये जाने पर अभियुक्तगण कमल किशोर सिंह उर्फ पप्पू सिंह, दिनेश सिंह व श्याम लाल मय विद्वान अधिवक्ता उपस्थित। विद्वान सहायक जिला शासकीय अधिवक्ता, फौजदारी उपस्थित। विद्वान अधिवक्ता अभियुक्त कमल किशोर सिंह उर्फ पप्पू सिंह द्वारा प्रार्थना पत्र अंतर्गत धारा-311 दं.प्र.सं. दिनांकित 31.07.2024 के निस्तारण पर बल दिया गया है।

प्रार्थना पत्र अंतर्गत धारा-311 दं.प्र.सं. दिनांकित 31.07.2024 पी.डब्ल्यू.-10 विजय पाल सिंह, विवेचक को पुनः परीक्षण हेतु तलब किए जाने के निवेदन के साथ प्रस्तुत किया गया है, जिसमें यह आधार लिया गया है कि उक्त साक्षी से दौरान जिरह प्रार्थना पत्र में उल्लिखित चार प्रश्न पूछे जाने छूट गये थे। उक्त साक्षी के साक्ष्य के समय अभियुक्त कमल किशोर सिंह उर्फ पप्पू सिंह कारागार में निरुद्ध था, जिस कारण अपने अधिवक्ता से उचित प्रकार से सलाह मशविरा न होने के कारण उक्त प्रश्न साक्षी से पूछे नहीं जा सके थे।

विद्वान सहायक जिला शासकीय अधिवक्ता फौजदारी द्वारा आपत्ति प्रस्तुत करते हुए कथन किया गया कि उक्त प्रार्थना पत्र विलम्ब कारित करने के उद्देश्य से दिया गया है। पूर्व में दिनांक 17.01.2024 को भी प्रार्थना पत्र अंतर्गत धारा-311 दं.प्र.सं. दिया गया था, जिसका निस्तारण न्यायालय द्वारा किया जा चुका है। उक्त तथ्य को प्रार्थना पत्र में छिपाया गया है, अतः प्रार्थना पत्र निरस्त किए जाने का निवेदन किया गया है।

सुना एवं पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से स्पष्ट है कि प्रस्तुत प्रकरण के विवेचक साक्षी पी.डब्ल्यू.-10 की मुख्य परीक्षा दिनांक 15.02.2019 व 18.04.2019 को अंकित की गयी तथा दिनांक 13.09.2019 को अभियुक्त कमल किशोर उर्फ पप्पू सिंह के विद्वान अधिवक्ता द्वारा साक्षी से जिरह की गयी। अभियुक्त की ओर से काफी विस्तृत प्रतिपरीक्षा की गई है तथा उसके पश्चात् भी तीन गवाहान अभियोजन द्वारा परीक्षित कराए गए हैं। विचारण समाप्त होने के पश्चात् पत्रावली लगातार बहस में नियत है। पत्रावली के अवलोकन से यह भी स्पष्ट है कि पूर्व में भी इसी आशय का प्रार्थना पत्र विद्वान अधिवक्ता अभियुक्त द्वारा दिया गया था, जो दिनांक 17.01.2024 को न्यायालय द्वारा निरस्त किया गया, इसके बावजूद भी साक्षी पी.डब्ल्यू. 10 से पुनः जिरह हेतु यह प्रार्थना पत्र प्रस्तुत किया गया है, जिससे प्रकट होता है कि इस प्रार्थना पत्र का उद्देश्य मात्र इस सत्र परीक्षण में की कार्यवाही को विलम्बित करना है। यहाँ उल्लेखनीय है कि प्रस्तुत प्रकरण को परीक्षाया उच्च न्यायालय द्वारा नियत कालिक समय में निस्तारित करने हेतु निर्देशित किया गया है। अभियुक्त पक्ष द्वारा की गयी कमियों को दूर करने हेतु साक्षी से पुनः जिरह किये जाने के लिये उसे तलब किये जाने का कोई न्यायोचित व विधिक आधार नहीं है। अतः प्रार्थना पत्र अंतर्गत धारा- 311 दं.प्र. सं दिनांकित 31.07.2024 निरस्त किये जाने योग्य है।

आदेश

प्रस्तुत प्रार्थना पत्र अंतर्गत धारा-311 दं.प्र.सं. दिनांकित 31.07.2024 निरस्त किया जाता है। पत्रावली वास्ते बहस दिनांक 08.08.2024 को प्रस्तुत हो।"

15. Challenging the order dated 03.08.2024, 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.

16. Learned AGA opposed the present application which relates to

recall of witness in exercise of power conferred under Section 311 Cr.P.C.. He stated that as per settled principle of law, a witness cannot be recalled or permitted to be recalled. Prayer is to affirm the impugned order and dismiss the application.

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

18. Considered the aforesaid facts and the observations made by the trial Court in the order dated 03.08.2024 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; Natasha Singh vs. CBI, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828 : 2013 SCC OnLine SC 444; Mannan S.K. and Ors. V State of West Bengal and Anr., AIR 2014. SC 2950. 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).**

19. 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.

20. 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.

21. 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)**.

22. 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."

23. 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".

24. In the facts of the case it would be apt to refer the observations made in the judgment passed by the Hon'ble Apex Court in the case of **Munna Lal Vs. State of Uttar Pradesh 2023 SCC OnLine SC 80**. In this case, an accused approached the Hon'ble Apex Court against the judgment of conviction and this appeal was allowed.

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

..28. Before embarking on the exercise of deciding the fate of these appellants, it would be apt to take note of certain principles relevant for a decision on these two appeals. Needless to observe, such principles have evolved over the years and crystallized into 'settled principles of law'. These are:

(a). Section 134 of Indian Evidence Act, 1872, enshrines the well-recognized maxim that evidence has to be weighed and not counted. In other words, it is the quality of evidence that matters and not the quantity. As a sequitur, even in a case of murder, it is not necessary to insist upon a plurality of witnesses and the oral evidence of a single witness, if found to be reliable and trustworthy, could lead to a conviction.

(b). Generally speaking, oral testimony may be classified into three categories, viz.:

(i) Wholly reliable;

(ii) Wholly unreliable;

(iii) Neither wholly reliable nor wholly unreliable.

The first two category of cases may not pose serious difficulty for the court in arriving at its conclusion(s). However, in the third category of cases, the court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

(c). A defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent. While in such a case the court has to be circumspect in evaluating the evidence, a faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.

(d). Non-examination of the Investigating Officer must result in prejudice to the accused; if no prejudice is caused, mere non-examination would not render the prosecution case fatal.

(e). Discrepancies do creep in, when a witness deposes in a natural manner after lapse of some time, and if such discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story, then the same may not be given undue importance.

26. The view of the Hon'ble Apex Court on the issue of 'non-examination of Investigating Officer', can also be deduced from the following judgments.

(i) In the case of **Munna Lal (supra)** after considering the facts and evidence on record, the Hon'ble Apex Court also observed that "non-examination of Investigating Officer creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the case of prosecution."

(ii) In the case of **Bahadur Naik Vs. the State of Bihar (2000) 9 SCC 153**, the Hon'ble Apex Court has observed that "non-examination of the Investigating Officer would not be fatal to the prosecution if there were no material contradictions in the testimony of the witnesses."

(iii) In the case of **Raj Kishore Jha Vs. the State of Bihar and Others (2003) 11 SCC 519**, the Hon'ble Apex Court has observed that "Mere non-examination of Investigating Officer does not in every case cause prejudice to the accused or affects that creditability of the prosecution version."

(iv) In the case of **Baldev Singh Vs. the State of Haryana (2015) 17 SCC 554**, it has been observed that "Mere non-examination of

investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case."

(v) In the case of **Gandipally Srinivas Vs. The State of A.P. (2005) 13 SCC 712**, the Hon'ble Apex Court has observed that "Coming to the next submission of the learned counsel for the accused that non-examination of the Investigating Officer is fatal to the case of the prosecution, it has to be seen that the learned Magistrate had assigned valid reasons for non-examination of the Investigating Officer. In a criminal case, the evidence of the Investigating Officer has its own importance, but non-examination of the Investigating Officer is not fatal in all the cases."

(vi) In the case of **Birinder Rai Vs. State of Bihar. AIR 2005 SC 1284**, the Hon'ble Apex Court has observed that "the investigating officer was not examined in this case and that has resulted in prejudice to the accused. Having gone through the evidence of witnesses and other material on record, we do not find that any prejudice has been caused to the defence by the non-examination of the investigating officer. The mere fact that according to the seizure list a stick with blood stains and pellet marks was seized from the place of occurrence, would not advance this argument any further. The seizures have not been proved in this case because the investigating officer was not examined, and the seizure witness has turned hostile. We, therefore, ignore the seizures made and base our decision on the other evidence and the evidence of two eyewitnesses, who have impressed us as truthful."

27. Upon due consideration of aforesaid facts as also the law settled, this Court does not find any illegality in the impugned order dated 03.08.2024. It is for the following reason(s):-

- (i) An earlier application dated 17.01.2024 under Section 311 Cr.P.C. for summoning I.O. Vijay Pal Singh (P.W.10)

was rejected vide order 17.01.2024 thereafter, the accused/applicant preferred a transfer application under Section 408 Cr.P.C. making allegations therein against the trial judge which was rejected vide order dated 10.06.2024 and thereafter, without challenging the order dated 17.01.2024, the accused/applicant preferred an application dated 31.07.2024 for summoning I.O. Vijay Pal Singh (P.W.10).

(ii) The aforesaid indicates that on one pretext or other, the applicant wants to prolong the trial/criminal proceedings pending before the trial Court.

(iii) I.O. Vijay Pal Singh (P.W.10) has already been examined and cross-examined and he has also proved the charge-sheet and the material collected during the investigation.

(iv) In the instant case, it has not been shown, prima facie, that what prejudice would be caused if I.O. Vijay Pal Singh (P.W.10) is not summoned as also that the applicant dated 31.07.2024 under Section 311 Cr.P.C. is vague.

(v) The trial is pending since 2017 and almost seven years have lapsed and is at the stage of argument and the applicant is avoiding the proceedings before the trial Court and just with the motive to delay the trial, the application under Section 311 Cr.P.C. was preferred.

26. For the aforesaid, the instant application is hereby **rejected**. Cost made easy.

Order Date :- 21.9.2024
Mohit Singh/-