

Court No. - 13**Case :-** APPLICATION U/S 482 No. - 7781 of 2024**Applicant :-** Ramesh Kumar Yadav**Opposite Party :-** State Of U.P. Thru. Prin. Secy. Deptt. Of Home And 3 Others**Counsel for Applicant :-** Amit Kumar Singh**Counsel for Opposite Party :-** G.A.**Hon'ble Saurabh Lavania,J.**

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

"That it would be expedient in the interest of justice this Hon'ble court may kindly be pleased to quash /set aside the is order dated 26.07.2024 passed by trial court in session trial no 01 of 2017 arising out of case crime no 694 of 2016, under section -302/376/511- I.P.C and 3/4 POCSO Act, Police station Gauriganj District Amethi and allowed the application of applicant under section 311 Cr.P.C and it is further prayed that during pendency of the present application the order dated 26.07.2024 and proceeding of. Session Trial No. 694 of 2017 pending before Additional Session Judge court no-13 Sultanpur be stayed till final disposal of the present case."
3. The present application has been filed by the applicant challenging the order dated 26.07.2024, passed by Additional Sessions Court, Court No. 13, Sultanpur (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.-6/Investigating Officer/Shivbahadur Singh.
4. The relevant facts of the case have been narrated in paragraph Nos. 5 to 12 of this application, which are extracted hereunder:-

"5. That first information report lodged by the opposite party No. 2 on 2.10.2016 regarding the incident accrued on 2.10.2016 in F.I.R no. 694 of 2016 under section- 302/376/511/- I.P.C police Station - Gauriganj, District- Amethi against the applicant and others on the basis of the false story developed by himself. A copy of the first information report dated 2.10.2016 is being filed and marked as Annexure No 2 to this petition.

6. That as per allegation leveled in the First information report dated 2.10.2016 that on 2.10.2016 at 5 PM the son Ashish was informed the accused Ramesh has forcefully taken in the Cheediram and after some time when the he was seen in the house the accused has strangle the neck of victim and when see to me run away from the spot and the victim was unconscious and clothes are open the detail story mention in the F.I.R.

7. That the after the F.I.R inquest was prepare on 2.10.2017 in which five persons name mention as witness Ram Shanker, Jitendra Pratap Singh, Udal Radhey Shyam ,Haushela.

8. That during the investigation the investigation officer has taken the statement of the complainant Radhey shyam and his son Ashish who claimed as eye witness.

9. That the investigating officer investigated the matter and files the charge sheet on 28.10.2016 against the accused applicant and 13 names mention as persecution witness out only two witness related to facts witness and 11 witness as government employee and doctor. copy of the Charge sheet dated 28.10.2016 is being filed and marked as Annexure no 3 to this petition.

10. That during trial the investigation officer Shiv Bahadur was examine as P.W. 6 on 2.09.2023 and he has stated no any eye witness of the incident he taken the statement under section 161 Cr.P.C father and brother of the deceased. A copy statement of P.W 6 is being filed and marked as Annexure no 4 to this petition.

11. That the during trial the prosecution has produce only six witness as PW.1 Radheshyam, PW-2 Ashish, P.W 3 Dr P.K Roy,P.W 4- Narendra Kumar, P.W 5- Sudha Tripathi P.W 6 Shiv Bahadur investigation officer thereafter the applicant statement 313 Cr.P.C has been recorded on 20.01.2023.

12. That the when trial came for conclusion the court has summon the one Bittan Devi as prosecution witness and she has given the statement before the court on 26.02.2024 first time and she stated she was seen the incident along with Ashish and during investigation she was not given any statement. A copy of the statement of Bittan as P.W 7 is being filed and marked as Annexure 5 to this petition."

5. From the contents of the FIR in issue lodged on 02.10.2016 (Annexure No. 2 to this application), it appears that Ashish, who was aged about 8 years at the time of incident, is the eye-witness of alleged incident/occurrence/crime in so far as the injury sustained by the deceased on her neck is concerned and it furthers appears from the FIR, in issue, that it is a case of rape and murder of a minor girl.

6. The trial Court upon due consideration of the facts of the case rejected the application under Section 311 Cr.P.C. filed by the applicant for recalling of P.W.-6 for further cross-examination vide impugned order dated 26.07.2024. The order dated 26.07.2024 is extracted hereinunder:-

"26.07.2024 प्रार्थी / अभियुक्त रमेश यादव की ओर से दिनांक 09.07.2024 को प्रार्थना पत्र 50 ख अन्तर्गत धारा- 311 दं०प्र०सं० विवेचक / साक्षी सं० 6 शिवबहादुर सिंह को पुनः जिरह हेतु तलब किये जाने हेतु प्रस्तुत कर कथन किया गया है कि मुकदमे में गवाह बिट्टन की जिरह समाप्त हो गयी है। इनका बयान अभियोजन साक्ष्य समाप्त होने तथा बयान मुल्जिम अन्तर्गत धारा-313 जा० फौ० होने के पश्चात हुआ है। इसलिए पूर्व

में परीक्षित विवेचक साक्षी संख्या-06 शिवबहादुर सिंह को इस गवाह के सम्बन्ध में जिरह करने हेतु पुनः तलब करने की याचना की गयी है।

अभियोजन की ओर से प्रार्थना पत्र का घोर विरोध करते हुए आपत्ति पृष्ठांकित की गयी है कि शिवबहादुर सिंह पी0 डब्लू 06 की जिरह पूर्ण हो चुकी है। प्रार्थना पत्र पोषणीय नहीं है।

उभयपक्षों को सुना एवं पत्रावली का अवलोकन किया।

माननीय उच्च न्यायालय का समयबद्ध निस्तारण हेतु आदेश पत्रावली पर है। प्रस्तुत मामले में अभियोजन की ओर से कुल 06 तथ्य एवं औपचारिक साक्षीगण की मुख्य परीक्षा एवं जिरह अंकित किये जाने के पश्चात प्रार्थी / अभियुक्त रमेश यादव की ओर से पी0 डब्लू-07 के रूप में बिटटन को प्रतिपरीक्षा हेतु पुनः तलब किये जाने के प्रार्थना पत्र के आधार पर दिनांक 09.07.24 साक्षी बिटटन को तलब कर उसकी जिरह पूर्ण की जा चुकी है। पी0 डब्लू06 विवेचक साक्षी शिवबहादुर की जिरह पूर्व में पूर्ण की जा चुकी है तथा पत्रावली में अभियुक्त का बयान अन्तर्गत धारा-313 दं०प्र०सं० दिनांक 20.01.2023 को अंकित किया जा चुका है। उल्लेखनीय है कि जिस साक्षी के बयान के सम्बन्ध में साक्षी पी0 डब्लू0 06 को तलब करने के लिये बचावपक्ष द्वारा उक्त प्रार्थना पत्र अन्तर्गत धारा-311 दं०प्र०सं० दिया गया है, उस गवाह का प्रस्तुत मामले के विवेचक ने दौरान विवेचना बयान अन्तर्गत धारा-161 दं०प्र०सं० अंकित नहीं किया है। प्रार्थी / अभियुक्त की ओर से प्रस्तुत प्रार्थना पत्र में पी0 डब्लू 06 विवेचक साक्षी शिवबहादुर से किस बिन्दु पर जिरह की जानी है, का उल्लेख नहीं किया गया है। प्रार्थी अभियुक्त की ओर से प्रस्तुत प्रार्थना पत्र यह दर्शित करता है कि मात्र मामले को विलम्बित करने के उद्देश्य दिया गया है। अतः प्रार्थना पत्र अन्तर्गत धारा-311 दं०प्र०सं० बाबत तलब किये जाने पी0 डब्लू06 विवेचक साक्षी शिवबहादुर खारिज किये जाने योग्य है।

आदेश

प्रार्थी / अभियुक्त रमेश यादव की ओर से प्रस्तुत प्रार्थना पत्र 50 ख अन्तर्गत धारा-311 दं०प्र०सं० तदनुसार खारिज किया जाता है।

पत्रावली वास्ते अंकित किये जाने अतिरिक्त बयान अभियुक्त अन्तर्गत धारा-313 दं०प्र०सं० दिनांक 01.08.2024 को पेश हो।"

7. In the aforesaid background of the case, present application has been filed.
8. 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.
9. 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 the circumstances of the case, the application has rightly been rejected by the trial court. Prayer is to affirm the impugned order and dismiss the application.

10. The contents of the application dated 09.07.2024 preferred by the applicant under Section 311 Cr.P.C. being relevant are extracted hereunder:-

"प्रार्थना पत्र वास्ते अन्तर्गत धारा 311 जा०फौ०:-

श्रीमान जी,

निवेदन है कि उपरोक्त मुकदमे में आज गवाह विट्ठन देवी PW7 की जिरह समाप्त हो गयी है इनका बयान अभियोजन साक्ष्य समाप्त होने तथा बयान मुल्जिम अ० धारा 313 जा० फौ० होने के पश्चात हुआ है। इसलिए पूर्व में परीक्षित विवेचक साक्षी संख्या 6 शिव बहादुर सिंह से इस गवाह के सम्बन्ध में जिरह होना न्याय हेतु आवश्यक है।

अलः श्रीमान जी से प्रार्थना है कि विवेचक साक्षी संख्या 6 शिव बहादुर सिंह विवेचक को जिरह हेतु पुनः तलब करने की कृपा की जाय।"

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

12. Considered the aforesaid and the observations made by the trial Court in the order dated 26.07.2024 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; Rajaram Prasad Yadav vs. State of Bihar and another, AIR 2013 SC 3081; 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 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)***.

13. 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.

14. 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.

15. 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)***.

16. 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."

17. 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".

18. Having considered the aforesaid, this Court finds that application was moved with sole intention to delay the trial 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 committing crime with the deceased were levelled against the applicant in the FIR lodged on 02.10.2016.
- (ii) Ashish, who was 8 years old at the time of incident, is the eye-witness of alleged incident/occurrence/crime.
- (iii) As per the FIR, in issue, it is a case of rape and murder of a minor girl.
- (iv) The application U/s 311 Cr.P.C. is completely vague.

19. For the aforesaid, this Court does not find any illegality in the impugned order dated 26.07.2024. The instant application is hereby **dismissed**. Costs made easy.

Order Date :- 05.09.2024/Arun/-