

Court No. - 13

Case :- APPLICATION U/S 482 No. - 8288 of 2024

Applicant :- Uday Pratap Singh

Opposite Party :- State Of U.P. Thru. Addl. Chief Secy. Home Deptt.
Govt. Of U.P. Civil Secy. Lko.

Counsel for Applicant :- Birendra Pratap Singh, Anurag
Shukla, Pankaj Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania, J.

1. Shri Anurag Shukla, Advocate, Shri Pankaj Shukla, Advocate and Shri Birendra Pratap Singh, Advocate, appeared on behalf of the applicant and Shri S.P. Tiwari, learned A.G.A. appeared for the state.

2. Heard and perused the record.

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

"pleaded to quash/set aside the non speaking and unreasoned order dated 21.8.2024 passed by the Learned Additional Sessions Judge (Room No.13), Sultanpur in Sessions Trial No.-573/2022 and further the Hon'ble court may kindly be pleased to direct the Learned Additional Sessions Judge (Room No.13), Sultanpur to Summon the prime witness namely; Shahab Lal, Sub Inspector i.e. first Investigating Officer of Case Crime No.0257/2021 under section 311 Cr.P.C. for his on oath testimony statement as well as cross examination, under section 311 Cr.P.C. in Sessions Trial No.-573/2022 (State Vs. Vijay Pratap Singh & Others) pertaining to Case Crime No.-0257/2021, U/s. 302, 120-B IPC, Police Station Munshiganj, District Amethi in the interest of justice."

4. By means of the present application under Section 482 Cr.P.C., the accused/applicant has approached this Court challenging the order dated 21.08.2024, passed by Additional Session Judge, Room No. 13, Sultanpur (in short 'trial court'), in Session Trial No. 573 of 2022 (State Vs. Vijay Pratap Singh and Ors.) on an application preferred by the accused/applicant under Section 311 Cr.P.C. praying therein to

summon the Investigating Officer (in short "I.O.") Shahab Lal, who initiated the process of investigation in relation to the allegations/offence indicated in the FIR lodged on 18.10.2021 registered as Case Crime No. 0257 of 2021 under Sections 304 and 120-B IPC at Police Station - Munshiganj, District -Amethi, by Smt. Madhulika W/o deceased Santosh Singh.

5. According to the FIR, indicated above, the applicant is a conspirator in the alleged accident/incident in which the deceased sustained injuries and ultimately succumbed to his injuries after some treatment.

6. I.O. Shahab Lal, in relation to whom the application under Section 311 Cr.P.C. was preferred on 18.10.2021, on the basis of the material collected on 18.10.2021 converted the offence from 304 IPC to 302 IPC .

7. On 19.10.2021, the investigation of the case was assigned to one Sandeep Kumar Rai.

8. I.O. Sandeep Kumar Rai was produced by the prosecution to prove the charge-sheet and the documents annexed thereto and he was examined as P.W.11 before the trial Court.

9. Before the trial Court, I.O. Sandeep Kumar Rai (P.W.11) indicated the facts pertaining to the investigation carried out by I.O. Shahab Lal and also proved the CCTV footage and other documents which were exhibited as Ka-15, Ka-16, Ka-1, Ka-18, Ka-1, Ka-20, Ka-21 and this witness was duly cross-examined by the defense/applicant.

10. From the record it appears that I.O. Sandeep Kumar Rai (P.W.11) was cross-examined for the first time on 01.08.2024 and his cross-examination was concluded on 28.08.2024.

11. An application dated 16.08.2024 under Section 311 Cr.P.C. [now Section 311 of Bhartiya Nagarik Suraksha Sanhita, 2023

(BNSS)] for summoning the I.O. Shahab Lal was preferred by the defence.

12. The trial Court, upon due consideration of the facts of the case vide order dated 21.08.2024, rejected the application for summoning the I.O. Shahab Lal for examination. The order dated 21.08.2024 is extracted herein-under:

"Called out. Heard defense counsel on applications.

U/S 311 Cr.P.C, 82 kha & 83 kha 7 perused the Record on previous date & also today. Application 82 kha & 83 kha is partly allowed to the extent of Summoning PW-11 & for the rest it is rejected.

Issue Summon to PW-11. Fix 28/08/24 for rest Prosecution Witness."

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

14. Challenging the order dated 21.08.2024, learned counsel for the applicant stated that summoning of I.O. Shahab Lal, who initially investigated the matter, is relevant for proper adjudication of the matter in issue as initially the FIR was lodged under Section 304 IPC and without any proper evidence available I.O. Shahab Lal converted the offence from Section 304 IPC to Section 302 IPC and accordingly if I.O. Shahab Lal is not summoned then the case of the accused/applicant would be prejudiced.

15. It is also stated that under Chapter XII Cr.P.C., the I.O. is an statutory authority and his duty is to collect the evidence not only in favor of the prosecution but also in favour of the accused so as to unearth the truth and in the instant case without any material evidence I.O. Shahab Lal converted the offence from Section 304 IPC to Section 302 IPC.

16. It is also stated that order of the trial Court is cryptic and non-speaking order.

17. It is also stated 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.

18. Shri S.P. Tiwari, learned AGA opposed the present application which relates to summoning of witness in exercise of power conferred under Section 311 Cr.P.C.. He stated that the impugned order passed by the trial Court is just and proper. Prayer is to affirm the impugned order and reject the instant 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 21.08.2024 and the principles related to summoning 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 **Ram Nayak Singh vs. State of U.P. & Another**, reported in **2022(2) ACR 1112 (LB)**.

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. In the facts of the case it would also 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 his appeal was allowed.

27. 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.

28. 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.

29. Upon due consideration of aforesaid facts, this Court does not find any illegality in the impugned order dated 21.08.2024. It is for the following reason(s):-

(i) In the instant case, from the record it is apparent that I.O. Sandeep Kumar Rai, who ultimately concluded the investigation and prepared the charge-sheet and filed the same along with the material/evidence collected during the investigation before the trial Court, has already been examined and has proved the documents/evidence filed along with the charge-sheet, as indicated in para 9 of this judgment, and he was also duly cross-examined.

(ii) In regard to the 'prejudice' to the accused/applicant on account of declining to summon I.O. Shahab Lal, this Court took note of the reasons for summoning I.O. Shahab Lal given in para 40 of the instant application. Para 40 of the instant application reads as under:

"40. That in the present matter, only concern is regarding examination of Investigating Officer namely Shahab Lal, who is the person, who converted simple accidental matter in the murder on two counts namely the alleged video clip in which this was said that deceased stated that he has been dashed with the pre plan of murder howere this video clip subsequently was disbelieved by the prosecution eye witness P.W.-3 namely Suresh Bahadur Singh, who in his statement said that in the video clip voice belong to one Abhimanyu Singh. Secondly the 1.0 has said that alleged eye witness had apprised him about the ambush by the said accused persons which too was subsequently disbelieved by the P.W.-3 in his cross-examination before the learned Trial Court with the say that he did not tell that accused Vijay Pratap Singh and Uday Pratap Singh were doing raiki or sitting for ambush."

(iii) After considering the aforesaid reasons and the effect of non-examination of I.O., as indicated in the judgments referred above, and also the fact that I.O. Sandeep Kumar Rai has proved the facts related to investigation and also the

documents/evidence collected during the investigation, this Court is of the view that no prejudice would be caused to the accused/applicant if I.O. Shahab Lal is not summoned for examination as a witness.

30. For the aforesaid, the instant application under Section 528 BNSS is hereby **rejected**. Cost made easy.

Order Date :- 20.9.2024

Mohit Singh/-