

Neutral Citation No. - 2024:AHC-LKO:64611

Court No. - 13

Case :- APPLICATION U/S 482 No. - 8396 of 2024

Applicant :- Vinay Yadav @ Babloo @ Vinay Kumar Yadav

Opposite Party :- State Of U.P. Thru. Addl. Chief Secy. Home Lko. And Another

Counsel for Applicant :- Amitabh Pratap Singh

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania,J.

Heard learned counsel for the applicant and learned AGA for the State and perused the record.

Accused-applicant namely Vinay Yadav @ Babloo @ Vinay Kumar Yadav has approached this Court challenging the order dated 18.07.2024 passed in exercise of power under Section 311 CrPC by the Additional District & Sessions Judge, Court No. 20, Lucknow (in short "Trial Court") in Session Trial No. 514 of 2015 (State vs. Vinay Yadav @ Babloo & others), arising out of Case Crime No. 36 of 2015 under Section 302, 394, 120-B, 411, 34 IPC, P.S.-Para, District-Lucknow.

Facts, in brief, are to the effect that PW-1/Manoj Kumar Dubey was examined on 25.08.2015, PW-4/Sarwesh Pandey was examined on 09.05.2019, PW-5/Mohd. Shahid was examined on 25.11.2022 and PW-7/Archana Joshi was examined on 19.01.2023.

Vide order dated 18.07.2024, the application dated 01.06.2023 preferred under Section 311 CrPC to recall the witnesses of fact namely PW-1/Manoj Kumar Dubey,

PW-4/Sarwesh Pandey, PW-5/Mohd. Shahid and PW-7/Archana Joshi, for cross-examination has been rejected. Relevant portion of the impugned order dated 18.07.2024 reads as under:-

"पत्रावली के अवलोकन से दृष्टिगत होता है कि साक्षी पी०डब्लू०-1 मनोज कुमार दूबे की मुख्य परीक्षा दिनांक-25.08.2015 को अंकित की गयी थी तथा अभियुक्त के विद्वान अधिवक्ता को दिनांक-03.09.2015 एवं दिनांक-18.09.2015 को जिरह हेतु अवसर दिया गया किन्तु अभियुक्त की ओर से जिरह हेतु कोई उपस्थित नहीं आया, जिस कारण न्यायालय द्वारा अभियुक्त का साक्षी पी०डब्लू०-1 से जिरह का अवसर दिनांक-18.09.2015 को समाप्त करते हुये पत्रावली शेष साक्ष्य में नियत की गयी।

दिनांक-09.05.2019 को पी० डब्लू०-4 सर्वेश पाण्डेय की मुख्य परीक्षा अंकित की गयी, किन्तु प्रतिपरीक्षा हेतु अभियुक्त की ओर से कोई उपस्थित नहीं आया तथा अभियुक्ता संगीता की ओर से स्थगन प्रार्थना प्रस्तुत किया गया। अभियुक्तगणों की ओर से मामले को जानबूझकर विलम्बित किया जाना पाते हुये न्यायालय द्वारा पी०डब्लू०-4 से जिरह का अवसर समाप्त किया गया तथा पत्रावली शेष साक्ष्य में नियत की गयी। दिनांक-25.11.2022 को पी०डब्लू०-5 मो० साहिद की मुख्य परीक्षा अंकित की गयी अभियुक्ता संगीता की ओर से ओर से प्रतिपरीक्षा अंकित की गयी किन्तु अभियुक्त विनय यादव उर्फ बबलू की तरफ से स्थगन प्रार्थना पत्र प्रस्तुत किया गया। न्यायालय द्वारा स्थगन प्रार्थना पत्र को अस्वीकार करते हुये जिरह का अवसर समाप्त किया गया तथा पत्रावली शेष साक्ष्य में नियत की गयी।

दिनांक-12.01.2023 को पी० डब्लू०-7 अर्चना जोशी की मुख्य परीक्षा अंकित की गयी तथा अभियुक्त संगीता की ओर से प्रतिपरीक्षा अंकित की गयी। अभियुक्त विनय यादव की ओर से स्थगन प्रार्थना पत्र प्रस्तुत किया गया। न्यायालय स्थगन प्रार्थना पत्र स्वीकार करते हुये दिनांक-19.01.2023 को अभियुक्त के विद्वान को जिरह हेतु अवसर दिया गया किन्तु अभियुक्त की ओर से पुनः स्थगन प्रार्थना प्रस्तुत किया गया। जिस कारण न्यायालय द्वारा अभियुक्त का साक्षी पी०डब्लू०-7 से जिरह कर अवसर दिनांक-19.01.2023 को समाप्त करते हुये पत्रावली शेष साक्ष्य में नियत की गयी। वर्तमान में प्रार्थी / अभियुक्त विनय यादव उर्फ बबलू की ओर से प्रार्थनापत्र अन्तर्गत धारा 311 दं०प्र०सं० प्रस्तुत कर साक्षी पी०डब्लू०-1-मनोज कुमार दूबे, पी०डब्लू०-4 सर्वेश पाण्डेय, पी०डब्लू०-5 मो० साहिद तथा पी०डब्लू०-7 अर्चना जोशी से जिरह का अवसर प्रदान किये जाने की याचना की गयी है।

अभियुक्त के विद्वान अधिवक्ता की ओर से तर्क दिया गया है कि पूर्व अधिवक्ता की लापरवाही के कारण उक्त साक्षियों से जिरह नहीं की जा सकी थी, मामले के निस्तारण हेतु उक्त साक्षियों की प्रतिपरीक्षा किया जाना आवश्यक है। विद्वान सहायक जिला शासकीय अधिवक्ता (फौजदारी) द्वारा विरोध करते हुये तर्क दिया गया कि अभियुक्त को उपरोक्त गवाहों से प्रतिपरीक्षा करने का पर्याप्त अवसर प्रदान किया गया था, परन्तु उनके द्वारा जानबूझकर साक्षियों से जिरह नहीं की गयी, इसलिए प्रार्थनापत्र निरस्त किये जाने योग्य है।

पत्रावली के सम्यक अवलोकन से स्पष्ट है कि अभियुक्त को पी०डब्लू०-1 मनोज कुमार दुबे पी०डब्लू०-५ सर्वेश पाण्डेय, पी०डब्लू०-5 मो० साहिद तथा पी०डब्लू०-7 अर्चना जोशी से प्रतिपरीक्षा किये जाने का पर्याप्त अवसर प्रदान किया गया था, परन्तु उक्त तिथियों पर अभियुक्त की ओर से अधिवक्ता जिरह हेतु उपस्थित नहीं आये, जिस कारण न्यायालय द्वारा प्रतिपरीक्षा का अवसर समाप्त किया गया। पत्रावली वर्ष 2015 से लम्बित है। पी०डब्लू०-1 की मुख्य परीक्षा 25.08.2015 को अंकित की गयी थी, जिसके संबंध में 8 वर्ष पश्चात वर्ष 2023 में एक प्रार्थना पत्र साक्षी को जिरह हेतु रिकाल करने के लिये प्रस्तुत किया गया है। इसी प्रकार पी०डब्लू०-4 की मुख्य परीक्षा वर्ष 2019 में पी०डब्लू०-5 की मुख्य परीक्षा वर्ष 2022 में व पी०डब्लू०-7 की मुख्य परीक्षा वर्ष 2023 में अंकित हुयी है। न्यायालय द्वारा पर्याप्त अवसर दिये जाने के बावजूद उनके द्वारा जानबूझकर साक्षी से जिरह नहीं की गयी। अभियुक्त के विद्वान अधिवक्ता द्वारा इस दौरान अन्य साक्षियों से जिरह भी की गयी। किसी भी पक्षकार को इस हेतु अनुमन्य नहीं किया जा सकता कि वे वाद या विचारण की कार्यवाही अनन्त काल तक लम्बित रख सके। उन्हें इस हेतु भी अनुमति प्रदान नहीं की जा सकती कि अपनी स्वेच्छानुसार जब चाहे अपनी मर्जी अनुसार साक्षी को जिरह हेतु तलब करवा ले। प्रार्थी / अभियुक्त के विद्वान अधिवक्ता द्वारा प्रस्तुत माननीय उच्चतम न्यायालय द्वारा निर्णीत विधि व्यवस्थाओं का ससम्मान अवलोकन के पश्चात न्यायालय यह पाता है कि उक्त विधि व्यवस्थाओं में दर्शित तथ्य एवं परिस्थितियां प्रस्तुत मामले के तथ्य एवं परिस्थितियों से भिन्न हैं। उक्त विधि व्यवस्थाओं का लाभ अभियुक्त / प्रार्थी न्यायालय के विचारपूर्वक किये गये अभिमत में पाने का अधिकारी नहीं है। पत्रावली में पी०डब्लू०-8 की मुख्य परीक्षा और जिरह अंकित की जा चुकी है। प्रकरण / विचारण हत्या एवं लूट जैसे गम्भीर अपराध का है। ऐसा प्रतीत होता है कि मात्र मुकदमें की कार्यवाही लंबित करने के उद्देश्य से प्रार्थना पत्र प्रस्तुत किया गया है। अतः प्रार्थना पत्र अन्तर्गत धारा-311 दं०प्र०सं० निरस्त किये जाने योग्य है।

आदेश

प्रार्थी/अभियुक्त विनय यादव उर्फ बब्लू की ओर से प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा 311 दं०प्र०सं० दिनांकित-01.06.2023 निरस्त किया जाता है। पत्रावली वास्ते साक्ष्य दिनांक- 13.08.2024 को पेश हो।"

It would be apt to indicate at this stage that statements of above named witnesses of fact have not been brought on record, though, the same ought to have been brought on record.

From the material available on record, it is apparent that the applicant engaged an Advocate for conducting his case before the Court concerned and on 18.09.2015 on account of non-presence of the Counsel the Court concerned closed the opportunity to cross-examine PW-1.

PW-2 was cross-examined by the Amicus Curiae on 03.08.2018 and on this date the applicant was present and from the order of the Trial Court drawn on 03.08.2018 it is not clear that who preferred the application for appointment of Amicus Curiae.

On 09.05.2019 accused Sangeeta was present and other accused including the applicant were not present. The accused was represented by a Counsel, who preferred the exemption application and taking note of the facts of the case, the Court concerned closed the opportunity to cross-examine PW-4.

On 25.11.2022 the applicant preferred an application seeking adjournment which was rejected and opportunity to cross-examine PW-5 was closed by the Court concerned.

On 19.01.2023 the applicant was present and an application seeking adjournment was moved by the applicant and taking note of the facts of the case, the trial Court closed the opportunity to cross-examine PW-7.

In the aforesaid background of the case, present application under Section 482 Cr.P.C. has been filed before this Court.

Learned counsel for the applicant impeaching the order dated 18.07.2024 passed by the Trial Court stated that as per settled principle of law, the application ought to have been allowed and 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.

Learned AGA opposed the present application. He stated that the application 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.

Considered the submissions advanced by the learned counsel for the parties and perused the record including the observations made by the trial Court in the order dated 18.07.2024 and the principles related to recall the witnesses under Section 311 Cr.P.C. settled by the Hon'ble Apex Court in the case(s) of *Mohd. Khalid vs. 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, *State of Haryana vs. Ram Mehar and others*; (2016) 8 SCC 762, *Swapn 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)***.

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.

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.

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)***.

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."

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".

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 9 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) The proceedings in issue are pending since 2015 and PW-1 was cross examined on 25.08.2015 and after elapse of about eight year, the application under Section 311 CrPC was preferred to recall the witnesses, named above.

(ii) PW-4, PW-5 and PW-7 were examined and cross-examined in the year 2019, 2022 and 2023, respectively, and despite opportunity given by the Court concerned these witnesses were not cross-examined.

For the reasons aforesaid, the instant application is hereby ***dismissed***. No orders as to costs.

Order Date :- 19.9.2024

Vinay/-