

Neutral Citation No. - 2024:AHC-LKO:67497

Court No. - 13

Case :- APPLICATION U/S 482 No. - 8805 of 2024

Applicant :- Babu

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

Counsel for Applicant :- Akhlaq Ali, Shabana Akhlaq

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania, J.

Heard.

Present application has been filed by the applicant the following main relief:-

"That in view of the facts and circumstances stated in the accompanying affidavit, it is respectfully prayed that the order dated 07.08.2024 passed by Additional Sessions Judge/Fast Track Court-II, Bahraich in S.T. No. 119/2019 (State Versus Faiz Khan and others) thereby rejecting the application under section-311 Cr. P.C. B-60 for summoning of PW-1 Meraj, PW-2 Abdul Qadir, PW-3 Mahfooz Ahmad and PW-4 Nadeem, Annexure No. 1 may be quashed and the application under section-311 Cr. P.C. B-60 Annexure No. 7 may be allowed in order to secure the ends of justice, or any other suitable order which this Hon'ble Court may deem fit in the circumstances of the case may also be passed."

The order dated 07.08.2024, impugned herein, has been passed by the Additional Sessions Judge, FTC-II, Bahraich (in short "trial Court") in S.T. No. 119 of 2019 (State vs. Faiz Khan and Others), Case Crime No. 73/2013 under Section 302, 307, 34, 323, 504, 506 IPC & 7 of Criminal Law Amendment Act, Police Station-Dargah Sharif, District-Bahraich.

Vide order dated 07.08.2024, under challenge, the trial Court has rejected the application dated 30.07.2024 preferred by the accused-applicant namely Babu S/o Shakil Khan under Section 311 CrPC. This application was moved with a prayer to recall Meraj (PW-1), Abdul Qadir (PW-2), Mahfooz Ahmad (PW-3) and Nadeem (PW-4). The application dated 30.07.2024, being relevant, is extracted hereinunder:-

"श्रीमान जी,

निवेदन है कि सायल मुस्लिम ने पिछली ता०पेशी दिनांक 25.07.24 ई० को ही अपना अधिवक्ता नियुक्त किया है प्रार्थी अभियुक्त के पूर्व अधिवक्ता महोदय ने पी०डब्लू० 1 मेराज व पी०डब्लू० 2 अब्दुल कादिर व पी०डब्लू० 3 महफूज अहमद व पी०डब्लू० 4 नदीम से घटना के सम्बन्ध में जिरह नहीं किया है और अब उपरोक्त साक्षीगण खुलेआम कर रहे हैं कि उन्होंने कोई घटना नहीं देखी थी बल्कि पुलिस के दबाव में आकर न्यायालय पर बयान दिया है जिस वजह से प्रार्थी को न्याय नहीं मिल पायेगा, इसलिए न्यायालय के समक्ष सही तथ्य लाने हेतु व वास्ते न्यायहित में उपरोक्त साक्षीगण को परीक्षा हेतु न्यायालय पर तलब किया जाना आवश्यक है।

अतः श्रीमान जी से प्रार्थना है कि न्यायहित में प्रार्थनापत्र मंजूर करके उपरोक्त साक्षीगण को परीक्षा हेतु न्यायालय पर तलब करने की कृपा करें।

The trial Court, after considering the averments made in the application dated 30.07.2024, quoted above, as also the facts of the case including the objections raised by the prosecution, rejected the said application vide order dated 07.08.2024. The relevant portion of the order dated 07.08.2024, reads as under:-

"उभयपक्ष के प्रार्थनापत्र के परिप्रेक्ष्य में पत्रावली के अवलोकन से विदित होता है कि प्रस्तुत मामले में अभियोजन की ओर से वादी मुकदमा साक्षी पी०डब्लू०-1 मेराज, साक्षी पी०डब्लू०-2 अब्दुल कादिर, साक्षी पी०डब्लू०-3 महफूज, साक्षी पी०डब्लू०-4 मो० नदीम, साक्षी पी०डब्लू०-5 का० मो० हफीज, साक्षी पी०डब्लू०-6 सलीम, साक्षी पी०डब्लू०-7 देवेश चन्द पाण्डेय (पोस्टमार्टमकर्ता), साक्षी पी०डब्लू०-8 का० उमेश चन्द्र, साक्षी पी०डब्लू०-9 बतौर द्वितीयक साक्षी उमेश चन्द्र, साक्षी पी०डब्लू०-10, एस०आई० उमाकांत मिश्रा, साक्षी पी०डब्लू०-11 विवेक प्रेम प्रकाश पाण्डेय, साक्षी पी०डब्लू०-12 अफर परवेज, साक्षी पी०डब्लू०-13 उप निरीक्षक सुशील कुमार, साक्षी पी०डब्लू०-14 उप-निरीक्षक सौरभ सिंह, साक्षी पी०डब्लू०-15 एस०आई० संतोष कुमार सिंह को परीक्षित कराया गया है।

दिनांक 23.02.2023 को विद्वान सहायक अभियोजन अधिकारी द्वारा आदेश पत्रक पर अभियोजन को अब साक्ष्य नहीं प्रस्तुत करने का लिखित कथन पर न्यायालय द्वारा पत्रावली वास्ते बयान अन्तर्गत धारा 313 दं०प्र०सं० नियत की गयी है। इसके अग्रिम नौवीं तारीख पेशी पर अभियुक्तगण उपरोक्त का **बयान अन्तर्गत धारा-313 दं०प्र०सं० दिनांक 19.05.2023** को अंकित किया गया, जिसमें अभियुक्त/आवेदक फैज खान ने अपना बयान उपरोक्त अंकित कराते हुए सफाई साक्ष्य देने का कथन कर, गवाही लिस्ट बाद में देने का लिखित कथन किया।

इसके बाद पत्रावली सफाई साक्ष्य हेतु नियत की गयी। अगली तिथि पर सफाई साक्ष्य प्रस्तुत न करने पर न्यायालय द्वारा सफाई साक्ष्य हेतु अंतिम अवसर भी दिया गया। न्यायालय द्वारा दिनांक 19.06.2023 को अभियुक्त बाबू उर्फ राजू तथा फैज खां उर्फ जियाउल को सफाई साक्ष्य हेतु पुनः अंतिम अवसर दिया गया। तदोपरान्त दिनांक 04.08.2023 को अभियुक्त फैज खां उर्फ जियाउल द्वारा प्रार्थनापत्र अ-46 वास्ते फैज खां की माता कनीज फातिमा बतौर सफाई साक्षी प्रस्तुत करने पर न्यायालय ने उक्त प्रार्थनापत्र को आंशिक रूप से स्वीकार करते हुए अभियुक्त बाबू व फैज को सफाई साक्ष्य प्रस्तुत करने की अनुमति देते हुए अग्रिम तिथि पर सफाई साक्ष्य प्रस्तुत करने का निर्देश दिया तथा दिनांक 10.10.2023 को अभियुक्त बाबू अली उर्फ राजू द्वारा प्रस्तुत प्रार्थनापत्र ब-45 पर माननीय उच्च न्यायालय इलाहाबाद के दिशा निर्देश पर पुनः सुनवाई करते हुए प्रार्थनापत्र ब-45, स्वीकार करते हुए जिला अस्पताल से दिनांक 05.02.2019 का मेडिकोलीगल रजिस्टर तलब किया गया तथा इस तिथि पर अभियुक्त फैज खां द्वारा अभी तक सफाई साक्ष्य प्रस्तुत न करने का उल्लेख किया गया। अग्रिम तिथि 23.10.2023 व 01.11.2023 को भी अभियुक्त की ओर से सफाई साक्ष्य/लिस्ट प्रस्तुत नहीं किया गया एवं अग्रिम दिनांक 10.11.2023 को डी0डब्लू01 साक्षी महीप कुमार गुप्ता फार्मसिस्ट, महर्षि वाल्मिकी चिकित्सालय बहराइच का साक्ष्य अंकित किया गया तथा इसके अग्रिम तिथि 22.11.2023 को अभियुक्त जियाउल उर्फ फैज खां की ओर से सफाई साक्ष्य के रूप में डी0डब्लू0 2 श्रीमती फातिमा खां को प्रस्तुत किया एवं उक्त तिथि के आदेश पत्रक पर अभियुक्त/आवेदक के विद्वान अधिवक्ता द्वारा अन्य कोई साक्ष्य नहीं प्रस्तुत करने का लिखित अंकन किया गया। तदनुसार पत्रावली प्रार्थनापत्र ए-49 हेतु नियत की गयी, जो सह-अभियुक्त बाबू की ओर से के0जी0एम0सी0 के डाक्टर आवेदक के मेडिकल सम्बन्धित रिपोर्ट तलब करने की याचना हेतु प्रस्तुत की गयी थी, को न्यायालय द्वारा स्वीकार कर, उक्त साक्षी को तलब किया गया। दिनांक 22.11.2023 को फैज खां उर्फ जियाउल की ओर से अन्तर्गत धारा-311 दं0प्र0सं0 प्रार्थनापत्र ए/48 प्रस्तुत किया गया, जिसे आवेदक के विद्वान अधिवक्ता द्वारा दिनांक 01.04.2024 को बल न दिये जाने के कारण तदनुसार निरस्त कर दिया गया।

इस प्रकार स्पष्ट है अभियुक्त/आवेदक फैज खां की ओर से प्रस्तुत प्रार्थनापत्र के द्वारा उपरोक्त याचित अभियोजन साक्षियों को एवं सम्बन्धित याचित चिकित्सक को तलब किये जाने की याचना की गयी है, जिनमें से साक्षी मेराज, अब्दुल कादिर व मैफूज क्रमशः पी0डब्लू0 1, पी0डब्लू0 2 व पी0डब्लू0 3 के रूप में अभियोजन द्वारा क्रमशः दिनांक 11.12.2021, 24.02.2021 व 17.08.2021 को पूर्ण रूप से अंकित कराया गया है एवं पी0डब्लू0 7 देवेश चन्द्र पाण्डये, जिन्होंने मृतक अनीस के शव का पोस्टमार्टम कर रिपोर्ट तैयार किया था, को भी अभियोजन द्वारा परीक्षित कराया जा चुका है तथा सफाई साक्ष्य के रूप में सहअभियुक्त बाबू अली उर्फ राजू के प्रार्थनापत्र पर डी0डब्लू0 1 साक्षी महीप कुमार गुप्ता, फार्मसिस्ट भी प्रस्तुत हुआ है। दिनांक 19.05.2023 को अभियुक्तगण का बयान अन्तर्गत धारा-313 दं0प्र0सं0 अंकित होने के उपरान्त सफाई साक्ष्य हेतु पर्याप्त अवसर दिये जाने एवं कई बार अंतिम अवसर दिये जाने के उपरान्त डी0डब्लू0 1, डी0डब्लू0 2 प्रस्तुत किये गये हैं। यद्यपि आवेदक/अभियुक्त द्वारा सफाई साक्ष्य में लिस्ट सफाई साक्षी प्रस्तुत करने का भी कथन किया गया एवं इसी क्रम में आवेदक बाबू की ओर से याचित साक्षी अंतर्गत सफाई साक्ष्य डा0 अभिजीत वर्मा का साक्ष्य जरिये वीडियो कान्फ्रेंसिंग डी0डब्लू0 3 के रूप में दिनांक 25.04.2024 को अंकित किया गया है। तदोपरान्त आवेदक फैज की ओर से उनके विद्वान अधिवक्ता श्री अब्दुल अजीज खां द्वारा दिनांक 02.08.2024 को प्रार्थनापत्र अ-58 के माध्यम से साक्षीगण पी0डब्लू0-1 मेराज, व साक्षी पी0डब्लू0-10 एस0आई0 उमाकांत मिश्रा को पुनः जिरह हेतु न्यायालय में तलब करने के लिये व आवेदक बाबू के विद्वान अधिवक्ता श्री अब्दुल अजीज खां की ओर से दिनांक 30.07.2024 को ब-60 प्रार्थनापत्र उपरोक्त प्रस्तुत कर साक्षीगण पी0डब्लू0 1 मेराज, पी0डब्लू0 2 अब्दुल कादिर, पी0डब्लू0 3 महफूज अहमद, पी0डब्लू0 4 नदीम को तलब कर जिरह करने की याचना की गयी है। प्रस्तुत प्रकरण में माननीय उच्च न्यायालय द्वारा प्रकरण को त्वरित निस्तारित करने के लिए कई बार दिशा निर्देश जारी किये गये हैं, किन्तु अभियुक्तगण की ओर से बार-बार प्रार्थनापत्र अंतर्गत धारा 311 दं0प्र0सं0 प्रस्तुत कर, इस प्रकारण के त्वरित निस्तारण में विलम्ब कारित कर रहे हैं।

उपरोक्त सम्मानित विधि व्यवस्था का ससम्मान अवलोकन उपरान्त यह न्यायालय उपरोक्त विधि व्यवस्था में अवधारित सिद्धांतों से सहमत है। चूंकि प्रस्तुत प्रकरण में अभियोजन द्वारा साक्षी पी0डब्लू0 1 लगायत पी0डब्लू0 15 परीक्षित कराया जा चुका है तथा वर्तमान में पत्रावली सफाई साक्ष्य के रूप में डी0डब्लू0 3

का साक्ष्य भी अंकित हो चुका है। अभियुक्तगण/आवेदकगण की ओर से अभी तक सफाई साक्ष्य हेतु लिस्ट गवाह प्रस्तुत नहीं किया गया है।

याचित साक्षियों के परिप्रेक्ष्य में उपरोक्त विवेचन से स्पष्ट है कि तथ्य के उपरोक्त साक्षी पी0डब्लू0 1,2,3 व 4 जिन्हें आवेदक तलब कराना चाहता है, का साक्ष्य पूर्ण हो चुका है एवं आवेदक/अभियुक्तगण के पूर्व विद्वान वरिष्ठ अधिवक्ता श्री वृजपाल सिंह द्वारा प्रतिपरीक्षा पूर्ण की जा चुकी है। साक्षी पी0डब्लू0 10 जिसे प्रतिपरीक्षा हेतु पुनः तलब कराना चाहा गया है, वह साक्षी एस0आई0 उमाकांत मिश्रा औपचारिक साक्षी है, दिनांक 20.05.2022 को आवेदकगण को जिरह हेतु पर्याप्त अवसर देने पर भी इनकी ओर से जिरह न किये जाने पर जिरह का अवसर समाप्त किया गया है। आवेदक फ़ैज की ओर से प्रस्तुत प्रार्थनापत्र अ-52 अंतर्गत धारा 311 दं0प्र0सं0 दिनांक 08.04.2024 को निरस्त किया जा चुका है, जिसके विरुद्ध आवेदकगण की ओर से माननीय उच्च न्यायालय में प्रार्थनापत्र अंतर्गत धारा 482 दं0प्र0सं0 नं0 4045/2024, फ़ैज खां उर्फ़ जियाउल द्वारा फातिमा खान (माता) बनाम स्टेट आफ यू0पी0 द्वारा प्रधान सचिव, गृह व अन्य प्रस्तुत करने पर माननीय उच्च न्यायालय ने उक्त प्रार्थनापत्र को दिनांक 02.05.2024 को खारिज करते हुए विचारण न्यायालय को प्रकरण को त्वरित निस्तारित करने का निर्देश दिया गया।

उपरोक्त तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए प्रार्थनापत्र पोषणीय नहीं है। तदनुसार उभय प्रार्थनापत्र अ-58 व ब-60, निरस्त किये जाने योग्य हैं।

आदेश

आवेदकगण/अभियुक्तगण की ओर से प्रस्तुत प्रार्थनापत्र अ-58 एवं ब-60, अन्तर्गत धारा-311 दं0प्र0सं0, निरस्त किया जाता है। तदनुसार आपत्ति निस्तारित की जाती है। पत्रावली वास्ते बहस/सफाई साक्ष्य 08.08.2024 को पेश हो।"

It would be apt to indicate that earlier an application was preferred by another accused-applicant namely Faiz Khan @ Ziaul through Fatima Khan (Mother) under Section 311 CrPC and the same was rejected vide order dated 08.04.2024 by the trial Court and challenging the same, the said accused approached this Court by means of APPLICATION U/S 482 No. - 4045 of 2024. This Court, after considering the facts of the case, vide order dated 02.05.2024 dismissed the application with observations that the trial Court may conclude the trial expeditiously. The order dated 02.05.2024 reads as under:-

"Heard Sri Jyotiresh Pandey, the learned counsel for the applicant and Sri Ashok Kumar Singh, learned A.G.A.-I for the State and perused the record.

This application under Section 482 Cr.P.C. has been filed to set-aside the order dated 08.04.2024; to issue direction to respondent No.2-the Additional District Judge (F.T.C.-II), District Bahraich for not proceeding the final arguments in the Criminal trial, during the pendency of the instant application before this Court; to issue directions to the respondent No.2-the

Additional District Judge (F.T.C.-II), District Bahraich for summoning the witnesses prayed by the applicant and permit the examination by the applicant's counsel and to issue directions to the respondent No.2-the Additional District Judge (F.T.C.-II), District Bahraich to adhere with the Precedent and proposition of law decided by the Hon'ble Supreme Court of India and the Hon'ble High Courts.

Learned counsel for the applicant submits that the applicant has been falsely implicated in Crime No. 73 of 2019, Police Station Dargah Shareef, Bahraich under Sections 302, 307, 323, 504, 506, 34 I.P.C. and Criminal Law Amendment Act and is in Jail Since 07.02.2019.

Learned counsel for the applicant further submits that the applicant had filed an Application under Section 311 Cr.P.C. before the learned trial court and the trial court vide impugned order dated 08.04.2024 rejected the application of the applicant.

Learned counsel for the applicant further submits that the earlier Advocate, who was engaged by the applicant could not pursue the matter promptly and could not examine the important witnesses of case, thus for better adjudication of the case, the witnesses (the list of witnesses given in the application) are necessary to be cross-examined in the present case.

Sri Ajay Singh, learned A.G.A. for the State-opposite party No.1 whereas opposed the argument of learned counsel for the applicant and submits that the application moved by the applicant under Section 311 Cr.P.C. is nothing, but a ploy to delay the trial of the present case. The accused are facing trial under Section 302, 307, 323, 504, 506, 34 I.P.C. and Criminal Law Amendment Act. All the important witnesses have already been examined and the statement of the accused under 313 Cr.P.C. has already been recorded and were given final chance to cross-examine defence witnesses on several dates and several opportunities were given by the trial court, but the applicant did not avail the same in time and further adjournments and dates were sought and ultimately on 22.11.2023 the accused Mohd. Faiz Khan produced DW-2 Smt. Fatima Khan and no other witnesses were produced, thus it was submitted that the list given by the present applicant for their witnesses are not necessary witnesses and now he has changed his Advocates, which is nothing but a tactics adopted to delay the trial. The application lacks merit and is liable to be dismissed.

Learned A.G.A. further submits that this Hon'ble Court has already given a direction to the trial Court to expedite the trial, but the order has not been annexed by the applicant in the present application.

After hearing learned counsel for the parties and after perusal of record, this Court finds that more than 15 witnesses have already been examined by the trial court, who was important for adjudication of the case and even the statement of the accused under Section 313 Cr.P.C. and the statement of defence witnesses were also recorded by the trial Court in spite of the several opportunities given to the accused, now the application which was moved by the applicant at this stage that the earlier counsel did not examine all the important witnesses is not a ground to entertain the application under Section 311 Cr.P.C.. Merely, changing the Advocate will not justify the case of the accused and is not a ground to allow him to cross-examine further witnesses, whereas 15 witnesses have already been examined in the present case, thus there appears force in the argument of learned A.G.A. for the State that the applicant is adopting a tactics to delay the trial of the present case, thus the relief sought by the applicant cannot be granted by this Court and the instant application lacks merit and is liable to be dismissed.

Dismissed accordingly.

The Trial Court may conclude the trial expeditiously, as per the time granted by the High Court, without granting any unnecessary adjournment to either of the parties, unless there is some legal impediment or unless there is any order passed by the higher court staying the proceedings of the case."

In the aforesaid background of the case, present application has been filed challenging the order dated 07.08.2024.

Learned counsel for the applicant impeaching the order dated 07.08.2024 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 07.08.2024 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*, *State (NCT of Delhi) vs. Shiv Kumar Yadav and Another, (2016) 2 SCC 402*; *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)*.

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 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 witnesses of the prosecution, in relation to whom the application under Section 311 CrPC was moved by applicant(s) namely Meraj (PW-1), Abdul Qadir (PW-2),

Mahfooz Ahmad (PW-3) and Nadeem (PW-4), were duly cross examined by Sri Brij Pal Singh, Advocate, Counsel engaged by the accused-applicant.

(ii) The application preferred by the co-accused Faiz Khan @ Ziaul under Section 311 CrPC was rejected vide order dated 08.04.2024 by the trial Court and challenging the same, an APPLICATION U/S 482 No. - 4045 of 2024 has been filed, which was dismissed by this Court vide order dated 02.05.2024 with direction/observation to trial Court to conclude the trial expeditiously.

(iii) The application under Section 311 CrPC in issue was moved by the Counsel engaged subsequently by the applicant and as per judgment passed in the case of *State (NCT of Delhi) (Supra)*, mere change of counsel cannot be a ground to recall the witness.

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

Order Date :- 30.9.2024

Vinay/-