

Court No. - 12**Case :-** APPLICATION U/S 482 No. - 11598 of 2024**Applicant :-** Amrendra Kumar Rawat @ Arvind Kumar**Opposite Party :-** State Of U.P. Thru. Prin. Secy. Home Lko.**Counsel for Applicant :-** Satish Kumar Mishra, Shubham 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 reliefs:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the order dated 20.11.2024 passed by passed by Additional District & Sessions Judge / Special Judge, POCSO Act-II, Ayodhya (Faizabad) in Criminal Case No. 233/2020 (State Vs Amrendra Kumar Rawat @ Arvind Kumar) under S. 302, 201 IPC, PS Rudauli, Ayodhya (Faizabad), as contained in Annexure No. 01 to this petition.

It is further prayed that the learned Trial Court may kindly be directed to recall the prosecution witness P.W. 1 Sh. Sahabdin and the petitioner may kindly be permitted to her cross examination.

It is also prayed that the further proceedings of S.T. No. 88/2020 (State Vs Amrendra Kumar Rawat @ Arvind Kumar) in Criminal Case No. 233/2020 under S. 302, 201 IPC, PS Rudauli, Ayodhya (Faizabad) pending before Additional District & Sessions Judge / Special Judge, POCSO Act-II, Ayodhya (Faizabad) may kindly be stayed during the pendency of present petition.

It is also prayed that operation and implementation of order dated 20.11.2024 passed by passed by Additional District & Sessions Judge / Special Judge, POCSO Act-II, Ayodhya (Faizabad) in Criminal Case No. 233/2020 (State Vs Amrendra Kumar Rawat @ Arvind Kumar) under S. 302, 201 IPC, PS Rudauli, Ayodhya (Faizabad) may kindly be stayed during the pendency of present petition."

3. The present application has been filed by the applicant challenging the order dated 20.11.2024, passed by Additional District and Sessions Judge/Special Judge, POCSO Act-II, Ayodhya (Faizabad) (in short 'trial court') on an application preferred by the applicant under Section 311 Cr.P.C. praying therein to recall P.W.-1.

4. The relevant facts of the case have been narrated in sub-paragraphs I to VIII of the paragraph No. 5 of this application, which are extracted hereunder:-

"I. That Complainant/ PW-1 Sahabdin lodged FIR no. 233/2020 at Police Station Kotwali Rudauli on 6.07.2020 at 8.30 am under

Sections 302/201 IPC. It was alleged that on 25/6/20, the complainant and his family members had gone to a marriage ceremony in village Halimnagar and his handicapped daughter Gudiya, aged about 14 years, was at home. When they returned home at about 8:30 in the evening, they the dead body of Gudiya hanging from the roof with her feet on the ground. Thereafter, he informed the police station that my daughter Gudiya had died by hanging. Later the complainant learnt that on 19/6/2020, when he with his wife had gone to a relative's house, and his daughters Sunita @ Sümitra and Gudiya were at home that day. The accused Arvind came to his house and misbehaved with his daughter Sumitra which was opposed by both of his daughters. Gudiya told Arvind that she will complain to his family members, on this Arvind threatened to kidnap Gudiya and dishonour her. It was further alleged by the complainant that on the day of the incident at 8:30 in the evening when they reached near the house, Arvind was standing near his house but at that time they were not able to notice. As the complainant believe that Arvind killed his daughter Gudiya by strangulating her and hung the body in the roof with the intention to conceal the evidence. True Copy of FIR no. 233/2020 at Police Station: Kotwali Rudauli is annexed herewith as Annexure No. 2.

II. That incidence had happened on 25.06.2020 but the FIR implicating the accused was lodged after 11 days on 6.07.2020 simply on the ground that the complainant came to know about some incidence that happened with his daughters on 19.06.2020 when he alongwith his wife went to his relatives place and on 25.06.2020 also they saw the accused near his house.

III. Thus complainant / PW-1 Sahabdin is an important prosecution witness and he was cross-examined on 2.05.2022, 13.05.2022, 27.06.2022 and on 1.10.2022. True / Certified copy of Examination-in-chief and cross-examination of PW-1 Sh. Sahabdin is annexed herewith as Annexure No. 3.

IV. That after some cross-examination on 1.10.2022, the cross-examination of the Complainant was deferred for want of time for 13.10.2022.

V. That as there was strike of advocates on 13.10.2022, the advocate of the accused was not able to enter the court room on that day and for that reason, he could not move adjournment application before the Court on 13.10.2022 and right of the accused to cross-examine the Complainant/PW-1 Sahabdin was closed on 13.10.2022 and matter was fixed for 27.10.2022 for evidence of remaining prosecution witnesses. True/Certified copy of order dated 13.10.2024 is annexed herewith as Annexure No. 4.

VI. That when advocate of the accused sought permission to further cross-examine PW-1 Sahabdin after end of strike, he was told that after close of evidence of any witness, he can move application for recall of witness under S. 311 Cr.P.C. for further cross-examination of the witness after evidence is closed.

VII. That after closure of prosecution evidence, the applicant/accused has moved application for recall of PW-1 Sahabdin for further cross-examination on 20.09.2024 through his advocate. The true copy of application dated 20.09.2024 is being annexed herewith as Annexure No. 5 to this petition.

VIII. That the application of the petitioner / accused was dismissed vide order dated 20.11.2024 on the ground that several opportunities were given to the petitioner for cross-examination which were not availed by the defence and it appears that the petitioner has been moving application for adjournment only in order to delay the proceedings."

5. 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.-1 for further cross-examination vide impugned order dated 20.11.2024. The order dated 20.11.2024 is extracted hereinunder:-

"22.11.2024

1. पत्रावली पेश हुई। पुकार करायी गयी। अभियुक्त मय विद्वान अधिवक्ता उपस्थित। पत्रावली पर अभियुक्त अमरेन्द्र कुमार की ओर से प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा 311 द.प्र.स. दिनांकित 20.09.2024 पर पक्षकारों को सुना तथा पत्रावली का अवलोकन किया।

2. अभियुक्त की ओर से प्रार्थनापत्र अन्तर्गत धारा 311 द.प्र.सं. पर पर बल देते हुए कथन किया गया है कि बाद उपरोक्त में साक्षी पी०डब्लू०-1 से जिरह चल रही थी, दिनांक 27.06.2022 को जिरह करते समय शाम 05:00 बजे के बादसमय अभाव के कारण जिरह पूरी नहीं हो सकी, जिससे न्यायालय ने आदेश किया की समय अभाव के कारण जिरह पूरी नहीं की जा सकती है, जिससे जिरह जारी का आदेश करते हुए दिनांक 11.07.2022 को सुनिश्चित किया गया, परन्तु उस दिन अधिवक्ता संघ में साधारण सभा को एक अधिका की मृत्यु होने पर शोक प्रस्ताव पारित हुआ था। श्रीमान् जी ने आदेश किया की शाम को जब हड़ताल समाप्त होगी तब आकर जिरह कर लेना, जिससे प्रार्थी के अधिवक्ता ने मौका प्रार्थना पत्र नहीं दिया और जब हड़ताल समाप्त हुआ तब प्रार्थी के अधिवक्त हाजिर अदालत आए। वाद उपरोक्त के बारे में पेशकार से पता किया तो उन्होंने बताया कि जिरह का अवसर समाप्त कर दिया गया है। अगली पेशी दिनांक 11.07.2022 को अदालत से जिरह करने की अनुमति चाहा गया तो श्रीमान जी ने कहा कि गवाही समाप्त हो जाने के बाद धारा-311 दं०प्र०सं० का प्रार्थना पत्र देने पर जिरह का अवसर मिलेगा। न्यायहित में साक्षी पी०डब्लू०-1 साहबदीन से जिरह का अवसर प्रदान किए जाने की याचना की गयी है।

3. विद्वान सहायक जिला शासकीय अधिवक्ता फौजदारी द्वारा प्रार्थना पत्र का घोर विरोध करते हुए कथन किया गया कि बचाव पक्ष को जिरह हेतु अवसर दिया जा चुका है। बचाव पक्ष द्वारा जानबूझ कर पत्रावली को विलम्ब करने के नियत से, प्रार्थना पत्र प्रस्तुत किया गया है। प्रार्थना पत्र को खारिज करने की याचना की गयी।

4. सुना तथा पत्रावली का परिशीलन किया। पत्रावली के अवलोकन से विदित होता है कि गवाह पी०डब्लू०-1 की मुख्य परीक्षा अभियोजन द्वारा अंकित करायी गयी, तत्पश्चात बचाव पक्ष को जिरह हेतु मौका दिया गया। बचाव पक्ष द्वारा साक्षी पी०डब्लू०-1 से दिनांक 02.05.2022, 13.05.2022, 27.06.2022 को विस्तारपूर्वक जिरह की गयी। पत्रावली आगे जिरह हेतु पुन कई तिथिया नियत की गयी, किन्तु अभियुक्त के की ओर से उक्त गवाह से प्रतिपरीक्षा कराने हेतु कोई उपस्थित नहीं आया। कई तिथियों के पश्चात दिनांक 01.10.2022 को पुनः साक्षी पी०डब्लू०-1 से बचाव पक्ष द्वारा आंशिक जिरह की गयी, किन्तु पुनः अगली नियत तिथि पर उक्त गवाह से जिरह करने हेतु बचाव पक्ष की ओर से कोई उपस्थित नहीं आया और न ही कोई स्थगन प्रार्थना पत्र दिया गया,

जिस कारण न्यायालय द्वारा जिरह का अवसर समाप्त कर दिया गया। धारा-311 दं०प्र०सं० प्रावधानित करता है कि-

"कोई न्यायालय इस संहिता के अधीन किसी जांच, विचारण या अन्य कार्यवाही के किसी प्रक्रम में किसी व्यक्ति को साक्षी के तौर पर समन कर सकता है या किसी ऐसे व्यक्ति की, जो हाजिर हो, यद्यपि वह साक्षी के रूप में समन न किया गया हो, परीक्षा कर सकता है, किसी व्यक्ति को, जिसकी पहले परीक्षा की जा चुकी है पुनः बुला सकता है और उसकी पुनः परीक्षा कर सकता है, और यदि न्यायालय को मामले के न्यायसंगत विनिश्चय के लिए किसी ऐसे व्यक्ति का साक्ष्य आवश्यक प्रतीत होता है, तो वह ऐसे व्यक्ति को समन करेगा और उसकी परीक्षा करेगा या उसे पुनः बुलाएगा और उसकी पुन परीक्षा करेगा।"

5. अभियुक्त के विद्वान अधिवक्ता द्वारा प्रार्थनापत्र में अभियोजन साक्षी को पुनः तलब करने हेतु यह आधार लिया गया है कि मुकदमें के न्यायिक विनिश्चय हेतु उक्त गवाह से जिरह किया जाना आवश्यक है। उल्लेखनीय है कि धारा-311 दं०प्र०सं० का लाभ किसी भी पक्षकार को अपनी कमियां पूरी करने हेतु नहीं दिया जा सकता है। बचाव पक्ष को पूर्व में अवसर दिया जा चुका है जिसका लाभ उनके द्वारा नहीं लिया गया। ऐसा प्रतीत होता है कि अभियुक्त/बचाव पक्ष के विद्वान अधिवक्ता द्वारा पत्रावली को विलंबित करने के आशय से स्थगन प्रार्थना पत्र दिया जाता रहा है। जहाँ तक अभियुक्त के प्रार्थना पत्र में किया गया कथन बाबत "न्यायालय द्वारा यह कहा जाना कि आगे प्रार्थना पत्र देने पर अवसर मिलेगा ऐसा कोई आदेश पत्रावली पर नहीं पाया जाता है और न ही न्यायालय द्वारा ऐसा कोई मौखिक कथन किया गया है। प्रार्थना पत्र शपथपत्र से समर्थित नहीं है। अतः उपयुक्त परिचर्चा के आधार पर अभियुक्त की ओर से प्रस्तुत प्रार्थनापत्र अंतर्गत धारा-311 दं०प्र०सं० स्वीकार किए जाने हेतु आधार अपर्याप्त है। अतः प्रार्थनापत्र निरस्त किए जाने योग्य है।

आदेश

अभियुक्त/बचाव पक्ष की ओर से प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा 311 द.प्र.स. दिनांकित 20.09.2024 उपरोक्त विवेचनानुसार निरस्त किया जाता है। पत्रावली नियत तिथि दिनांक 25.11.24 को पेश हो।"

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

7. 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'. In this regard, he placed reliance on the judgment dated 30.07.2008 passed by the Hon'ble Apex Court in the case of **Godrej Pacific Tech. Ltd. vs. Computer Joint India Ltd.** reported in **2008 (11) SCC 108**. As such, interference of this Court is required in the matter.

8. 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 instant application.

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

10. Considered the aforesaid and the observations made by the trial court in the order dated 20.11.2024 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)*.

11. 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.

12. 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.

13. 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)*.

14. 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."

15. 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".

16. Upon due consideration of aforesaid facts as also the law settled on the issue, this Court does not find any illegality in the impugned order dated 20.11.2024. It is for the following reason(s):-

- (i) According to the case setup by the applicant, the counsel engaged by the applicant could not appear for cross-examination/further cross-examination of PW-1 on account of the fact that the advocates were abstaining from work. However, to establish the same, no evidence has been placed on record.
- (ii) In the application under Section 311 Cr.P.C., the specific question(s) were not indicated, as required in view of the judgment passed by the Hon'ble Apex Court in the case of ***State (NCT of Delhi) v. Shiv Kumar Yadav*** reported in **(2016) 2 SCC 402**.
- (iii) According to paragraph 4 of the order under challenge dated 20.11.2024, which has not been refuted in the instant application, the PW-1 was cross-

examined in detail on 02.05.2022, 13.05.2022 and 27.06.2022 and thereafter several dates were fixed but he was not cross-examined and thereafter on 01.10.2022, the PW-1 was again cross-examined.

17. In view of aforesaid, this Court finds that the application under Section 311 Cr.P.C. was preferred by the applicant only to delay the proceedings pending before the trial court.

18. For the aforesaid, this Court does not find any illegality in the impugned order dated 20.11.2024. The instant application is hereby **dismissed**. Costs made easy.

Order Date :- 18.12.2024/Arun/-