

Criminal Petition No.10453 of 2018

ORDER:

The petitioner is the A.4 among all the accused of S.C.No.214 of 2009 on the file of the Metropolitan Sessions Judge, Hyderabad-cum-Special Judge under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'), taken cognizance for the offences punishable u/ sec.9(A), 25(A) and 29 of the NDPS Act from the complaint of the Senior Intelligence Officer, Directorate of Revenue Intelligence, Hyderabad outcome of F.No.VIII.48/06/08 HRU. It is after framing of charges the accused persons were put to trial. The complaint running in 45 pages excluding memo of evidence shows in all 48 witnesses cited including L.Ws. 39 to 48 official witnesses and 119 documents which include statements of the witnesses, search authorization panchanama, Registers and bill books of the Gayatri Lodge, the Club View Hotel, Shirdi Sai Deluxe Lodge, Attendance Register of A.4-P.Venkateshwarlu and RGI Registers etc.

3. Coming to the present petition under Section 482 CrPC, it is impugning the order of the learned Metropolitan Sessions Judge, in CrI.M.P.No.2953 of 2018, dt.10.09.2018 in Sessions Case dismissing the application for recall of P.W.15 and 24 sought by A.4 for further cross-examination. The grounds urged in the petition against the dismissal order are that the trial Court erred in dismissing the petition instead of permitting further cross-examination of P.W.15 and 24 is necessary that the court failed to appreciate the letter of advise of P.Ws.15 and 24 for analysis under Ex.P.84 asked for testing the sample for Ephedrine which itself is without any basis as seen from the Panchanama -Ex.P.42 conducted by P.W.10, that the trial Court failed to appreciate that the sample and tested it and did not report presence of ephedrine and the said fact is mentioned in para-4 of the petition, the report of P.W.15 under Ex.P.69 discloses the

sample as ephedrine+pseudo ephedrine described as Isomers of Pseudo Ephedrine in Organic Chemistry/ DL-Pseudo ephedrine which is a mixture of D-Pseudo ephedrine and L-Pseudo ephedrine mentioned in para-6 of the petition as to it is material in nature could not be put in cross-examination of the witnesses and actual questions proposed to be put to them cannot be mentioned to alert the witnesses. The trial Court erred in observing inordinate delay in filing petition and sufficient opportunity given for cross-examination of P.Ws. 15 and 24 by A.4. It is averred that though the Sessions Case is of the year 2009 when cognizance taken, trial commenced only in April, 2015. The dismissal of the petition causes irreparable loss to the defence of the petitioner/ A.4. The recall of the witness for further cross-examination is necessary for a just decision of the case. The witnesses to be recalled pertaining to the analysis of chemicals by Expert concerning organic chemistry and there is always a possibility to skip some important aspects regarding analysis. Therefore further cross-examination on technical aspects is required, to allow the petition by setting aside the dismissal order of the trial Court.

4. In the petition (CrI.M.P.No.2953 of 2018) for recall of the witnesses it is averred as follows:

1. Petitioners above named humbly submit that the above case is coming up for arguments.

2. It is submitted that a Panchanama is conducted at premises of the factory of Krebs Bio-chemicals Industries Limited on 16.09.2008 and during the course of Panchanama, it is alleged that 14 HDPE bags weighing 700kgs containing Ephedrine is seized. It is also alleged that 17HDPE drums containing acetic anhydride weighing 850 kgs, is seized. It is also alleged that 37000 kgs. Of DL Pseudo ephedrine found in 890 black coloured bags is seized. It is also alleged that three samples from Ephedrine weighing 25gms each were drawn and three samples weighing 50gms in drawn from Acetic anhydride and 3 samples weighing 100gms in drawn from DL Pseudo ephedrine for sending the same for chemical analysis.

3. It is submitted that the case of the Prosecution as narraged at Page 7 of the complaint is that "The officers also found certain black coloured poly sacks containing semi liquid material and on enquiry, Shri Ravindar informed that the said bags contain DL Pseudo ephedrine base and also informed that the details of the said DL Pseudo ephedrine were not reflected in their books of accounts and they did not inform about manufacture and storage of the said goods to the statutory authorities. Shri A.M.Kumar explained to the officers on enquiry that about 500kgs. Of DL Pseudo ephedrine base was sent to Hyderabad as per instructions of their Managing Director(A.5) and the description of the goods dispatched was indicated as Sodium Acetate as per the instructions of their Managing Director. The officers tested the white coloured crystalline powder and the material said to be DL Pseudo ephedrine base with the test kit and they were tested positive for presence of ephedrine/ Pseudo ephedrine' and the 890 bags of DL Pseudo ephedrine base weighing 37000 kgs which tested positive for Pseudo ephedrine is seized and representative sample from DL Pseudo ephedrine were drawn in triplicate and they were kept in polyethylene pouches and were heat sealed.

4. It is submitted that the sample from seized from DL Pseudo ephedrine marked as 3/20008/ DRI/ KBC is sent to Asst.Chemical examiner, customs House Chennai and a report is given by Asst. Chemical Examiner, Customs House Chennai under (D.85) to the effect that the sample bearing No.3/ 2008/ DRI/ KBC could not be identified whether it is Pseudo ephedrine or not due to lack suitable literature over certified reference controlled standard and the said sample is not identified as ephedrine also through the said lab has capacity identify ephedrine.

5. It is submitted that a duplicate sample from DL Pseudo ephedrine allegedly seized from Krebs Bio-Chemicals and Industries Ltd, is sent by P.W.24 to CFSL Ramanthapur under his covering letter(Ezx.P.84) referring to the report of Asst.Chemical Examiner(Document No.85) requesting to analysis the sample bearing No.3/ 2008/ DRI/ KBC for presence of Ephedrine Pseudo ephedrine and their Isomers and if the percentage also can be analysed it may also be given. It is submitted that Priyankan Ghosh(PW 15) gave a report under Ex.P.69 to the effect that 'the sample was found to contain ephedrine and (+) Pseudo ephedrine. Therefore cross-examination of PW24(Dr.Anil K.Nigam) and PW 15(Priyankan Ghosh) is necessary to falsify the Prosecution case and

project the defence of the Accused/ A.4 that DL Pseudo ephedrine is neither received by him nor any ephedrine is extracted by him and sold to A.1 to A.3 as alleged by the complainant.

6. It is submitted that certain aspects which are material in nature could not be put in cross-examination of PW15 and PW24 therefore the accused may be given an opportunity to further cross-examine the above witness in order to arrive at a just decision in the above case."

5. Counter filed in the above petition, opposing the same by the complainant which reads as follows:-

"It is submitted that the petition filed by the petitioner at the fag end of trial is devoid of any merits and it is filed just to drag on the case.

1. In reply to the averments of the recall petition, it is submitted that the chief examination of the P.W.15 was completed on 09.10.2015 on the same day the counsel for the accused requested to defer the cross-examination as it will take whole day and the said witness was again present for cross-examination on 31.10.2017 and after detail cross-examination again the defence counsel for same accused No.4, requested to defer the cross-examination for some other day, as he has some other engagement and on the request defence counsel, the said witness appeared once more on 16.11.2017, for further cross-examination and a detailed and lengthy cross-examination was conducted for the whole day, running into about 6 pages was conducted on all aspects of the said documents of the cross-examination and thus near about 2 times the PW15 appeared before this Hon'ble Court for cross-examination on different occasions, from out of station situated at a distant place on the cost of the complainant. Thus the complainant had extended maximum co-operation and facilitated presence of P.W.15 on every occasion requested by the counsel for the accused thereby affording every reasonable opportunity for the accused to subject the said witness to cross-examination. Thus, the cross-examination of the P.W.15 was completed near about two years after the chief examination, the significant delay solely attributable to the accused and his counsel.

2. It is further submitted that, chief examination of PW24 was conducted on 07.10.2015 and on that day the cross-examination was differed on the request of the counsel for the accused and the said witness was present for cross-examination on 18.11.2016 and again cross-examination in part was conducted and again the cross-examination of the said witness was deferred on the request of the same accused No.4 and finally the cross-examination the said witness could be completed only on 08.08.2017. Thus, the complainant had extended every co-operation for facilitation of cross-examination on all aspects of the case despite which the counsel for the accused took near about two years to complete the cross-examination of the witness.

3. It is submitted that, the same accused No.4, after passing of about 10 months after the final detailed cross-examination of PW15 and after passing of one year after the detailed cross-examination of PW24 had again filed the subject petition seeking recall of the same witnesses. The purpose of the accused and his

counsel, as seen from the attendant circumstances as above, can only be to delay proceedings of the case and to harass the official witness on one or other grounds. It is submitted that the petition filed by the Accused No.4 at this belated stage, when the matter is posted for final arguments after 313 examination, cannot have any other inference. It is of import to note that the accused No.4 and his counsel, before the Section 313 examination, had remained silent for one year and never made any representation nor filed any petition immediately after the cross-examination of the above said witnesses. It is only after a long unexplained and very significant gap, this recall petition is filed, only to further delay and drag on the matter only with an intention to avoid conclusion of the proceedings at present and did not want to complete the case proceedings.

4. It is submitted that it is not out of place to mention here that the trial of this case is pending since 2009 and more than 9 years have already passed and it is clearly borne out by the record of this very proceedings that the delay is attributable to the dilatory tactics adopted by the accused from time to time in the trial, on one or other pretext. In view of the above, it is respectfully submitted that further delay in the proceedings of the case and recalling the same witnesses would tantamount to an attempt to seek re-trial by the accused, which is not permissible under the law. It is to submit that for these very reason, allowing the application of the accused at this juncture after the ample opportunity already afforded to the accused to cross-examine the witness in detail and as per the convenience of the accused, would cause serious prejudice to the case of the complainant and the society at large.”

6. The observation of the lower Court in dismissal of the petition reads from para-2 to 11 as follows:-

“This petition is filed seeking recall of PW15 and PW24 for further cross-examination on behalf of A4.

2 Counter is filed by the other side opposing the recall.

3 In para Nos.1 to 5, certain facts relating to the case are narrated. It is stated that cross-examination of PW15 and PW24 is necessary to prove the defence of A4 that pseudo ephedrine is neither received by him nor any ephedrine is extracted by him and sold to A1 to A3 as alleged by the complainant. In para no.6 it is stated that certain facts which are material in nature could not be put in cross-examination of PW15 and PW24 and therefore the accused may be given an opportunity to further cross-examine the above.

4 Counter shows that the chief examination of PW15 was completed on 9.10.2015, that cross-examination was deferred on that day, that witness was again present on 31.10.2017 and after detailed cross-examination counsel for A4 requested to defer cross-examination and detailed cross-examination was conducted for the whole day running into six pages and that cross-examination PW15 was conducted after two years of chief-examination solely due to the accused and their counsel.

Regarding PW24, it is stated that chief-examination was conducted on 7.10.2015, that on that day cross-examination was deferred and the witness was present on 18.11.2016, on which day cross-examination was conducted part, and finally cross-

examination was completed only on 8.8.2017. Therefore this belated petition to further cross-examine the witnesses is filed only to drag on the case and thus the petition may be dismissed.

5. Counsel for respondent cited two decisions:

1) State of Haryana v. Ram Mahar, Decided on 24.8.2016 rendered by Supreme Court of India;

2) Shivnarayan Shajkya v. State of Madhya Pradesh, decided on 30.1.2017, judgment of the Madhya Pradesh High Court.

6 Both sides have been heard.

7 Now the point for consideration is:

"Whether there are grounds to allow the petition?"

POINT :-

8 The first decision cited on behalf of respondent, is with regard to the power of the court to recall witnesses and proper exercise of the power. In par of the said decision, another decision between Rajaram Prasad Yadav Vs. State of Bihar and another Vs. State of Bihar was referred to. The guidelines laid down in that decision were extracted in para no.32 of the judgment.

9. In the decision of the Madhya Pradesh High Court, one witness was not cross-examined by the senior Advocate as he was not present and Junior Lawyer was compelled to cross-examine the witness. Under these circumstances, the recall of witness was considered. Ultimately, the silence on the part of applicant for more than a year in filing the application under section 311 crpc was taken into consideration and it was held that there are no bona fides.

10. The most important aspect to be noted in this petition is that except stating that some facts have to be put to PW15 and PW24, there is no clarity as to on what aspects the cross-examination is to be conducted. As rightly pointed out on behalf of respondent, there is inordinate delay in filing this petition and sufficient opportunity was given to A4 to cross-examine the above witnesses. The point is answered accordingly.

11. In the result, the petition is dismissed."

7. Heard both sides and perused the material on record.

8. There is no quarrel on the proposition that the Court got discretion for a just decision of the case if necessary for recall of any witness to put any questions by the Court to do so from the use of words 'shall' under Second part of Sec.311 CrPC and so far as the first part any use of the word 'may' if any application filed for recall it is not either routine or a matter of course but for a case should be made out. Here it is the application comes

under first part of Section 311 CrPC and not under second part of the Section that too when the trial Court dismissed under first part and not consider coming in second part having fresh in mind of the facts, including recorded the evidence of witnesses mostly in conducting the trial. Thereby this Court is not able to exercise any discretion by taking under second part of the Section but for to consider how far the dismissal order is just and requires interference by this Court by sitting against it.

9. It is the settled law that the scope is very limited for interference with the orders of the trial Court unless the order is shown unsustainable and per se illegal or absurd or with no reasons. The evidence of P.W.15 was completed admittedly long back. It is to say the chief-examination was completed by 09.10.2015 itself. The cross-examination conducted having taken long time and by several adjournments for its continuation for two years till 31.10.2017 and the para-4 of the impugned order of the lower Court clearly shows particularly from the last lines of searching further cross-examination of the whole day on 31.10.2017 running in 6 pages of P.W.1 conducted in saying the cross-examination as a whole of P.W.15 in several adjournments taken for about two years. Is it believable that the case among the 7 accused particularly the petitioner-A.4 failed to put relevant questions in taking several adjournments by conducting cross-examination for two years for not a case of the cross-examination completed on Monday on the date of chief-examination. Thereby he could not properly go through and it necessitated even coming to P.W.24 as observed in the same para-4 by the Court particularly the chief-examination was conducted on 07.10.2015 and he was cross-examined later and completed the same filing on 08.08.2017 by taken nearly two years there also and in between cross-examination including on 18.11.2016. No doubt, it is observed in para-10 of the order of the Court below except stating

some facts put to P.W.15 and 24, there is no clarity on what aspects cross-examination to be conducted. Besides there is inordinate delay in filing petition long after completion of their cross-examination referred supra. In the petition grounds before this Court, it is stated para-6 of the petition mentioned certain aspects which are material in nature on which cross-examination to be done. Same was reproduced above from the petition averments quoting relevant paras. In fact what is stated in para-6 running in three lines is certain aspects material in nature could not be put to the witness, therefore to give an opportunity in further cross-examine them. That is not sufficient so to say thereby rightly observed by the Court below in para-10 of the order of no clarity even as to area of cross-examination. The contention in the grounds that if disclose, the witnesses being alerted cannot be accepted of the area of cross-examination concerned but for specific questions could not be mentioned to alert the witnesses. In the course of hearing the counsel for the petitioner-A.4 given the questions to be put to the witnesses in a sealed cover viz; for P.W.15, 13 questions and for P.W.24, 9 questions. In fact, a perusal of the questions with the cross-examination of the witnesses is crystal clear of those aspects already covered in their evidence mostly. Thus there are no grounds to permit further cross-examination even to put questions given in the sealed cover.

10. The Apex Court in Nagashankar Vs. CBI in CrI.A.No.709 of 2013 categorically observed that the recall of a witness is not a mere asking nor fill up lacunae. Though the Court is empowered to summon any witness or examine any person present at any stage of any enquiry or trial or any other proceedings under CrPC or to summon any person or witness or to recall or re-examine any person who has already been examined whether his evidence appears to it to be essential to arrive a just decision of a case and the judicial discretion to be exercised is for sound reasons and once there

is the power given with very width the caution is also there to exercise whether it is highly essential with circumspection that too if it is essential for just decision of a case neither the defence nor the prosecution can take any advantage the evidence already let in to fill up the lacunae and the order of the Court but for to the just decision neither disadvantageous nor prejudicial or to the prosecution or to the accused. It is also observed that there cannot be any doubt whatsoever the accused shall not be allowed to unnecessarily protract trial by filing petition either to call a witness or recall a witness even it is not relevant. A recall of witness or further examination of any new witness to be allowed is only to unfurl the case whether it is so essential for a just decision of a case on the probability of best evidence available should be brought before the Court and not otherwise.

11. Undisputedly, from May 2018 onwards the matter was coming for defence evidence and reported no defence evidence in July, 2018 and then also no application filed for recall of any witness which is subsequent to the Section 313 CrPC examination of the accused from the prosecution evidence already placed on record including tested by cross-examination in detail. Even from July, 2018 the matter is coming for arguments.

12. In the result, the Criminal Petition is dismissed. Consequently, miscellaneous petitions, if any, shall stand closed.

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Dr. B.SIVA SANKARA RAO J,

Date:13.11.2018

b/o.vvr