HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SINGLE BENCH

BEFORE JUSTICE S.K.AWASTHI

Criminal Revision No 416/2016

Gaurav Agarwal

Versus

State of MP and another

Shri Sunil Kumar Jain, Advocate for the applicant.
Shri R.K.Awasthi, Government Advocate for the non-applicant No.1/State.
Shri Brijesh Tyagi, Advocate for the non-applicant No.2.

O R D E R
(27.01.2017)

This revision application takes exception to portion of the order dated 21.3.2016 passed by Third Additional Sessions Judge, Guna, whereby the application moved by the prosecutrix while assisting the prosecution for bringing on record certain documents and articles which are not part of the charge sheet but are necessary for just and proper adjudication of the case, has been allowed.

2. The facts relevant for deciding the instant revision application are that the applicant is accused of the offence punishable under Section 376 of Indian Penal Code, 1860 (for brevity, the 'IPC') on the report filed by the prosecutrix. The trial is under progress before the Court of Third Additional Sessions Judge, Guna in which at the stage of recording of evidence, the prosecutrix who was assisting the prosecution in terms of Section 301 of the Code of Criminal Procedure (CrPC), moved an application for taking documents and articles on record

for just and proper adjudication of the case. The response was invited from the accused/applicant on this application, who submitted that such documents cannot be taken on record as the rights of the prosecutrix are limited to only assist the prosecution and not to conduct the trial. Further, it was stated that the documents and articles are unverified as the same were not before the Investigating Officer, due to which the possibility that the documents are concocted, cannot be ruled out. The trial Court allowed the application while extending opportunity to the applicant to controvert these documents when the applicant is afforded opportunity to lead defence evidence.

3. The applicant has challenged the said order on the ground that the trial Court did not consider the scope of Section 301, CrPC while erroneously allowing the application for taking documents on record. Further, the documents which are brought on record are forged and ulterior motive of the prosecutrix is to fill in lacunae of the prosecution case, the same is causing prejudice to the applicant. Therefore, it was prayed that the impugned order deserves to be set aside.

4. Per Contra, learned counsel for the non-applicants submitted that objective of the trial Court is to find out the ring of truth in the prosecution case and in order to achieve the objective, the court below has been conferred with adequate discretion to take on record any document or article. With regard to the contention of the applicant that the same is causing prejudice to him, it was submitted that the trial Court has reserved liberty in favour of the applicant to controvert these documents

while leading defence evidence.

5. I have considered the contentions of the parties and the documents on record. This Court is of the considered opinion that the impugned order is just, proper and deserves no interference by this Court. The reasons for arriving at this conclusion are based on judicial pronouncements by this Court and by the Hon'ble Apex Court. While dealing with the scope of Section 301 CrPC and maintainability of the application filed by the complainant instead of prosecution, the Hon'ble Supreme Court in the case of **Anant Prakash Sinha vs. State of Haryana, (2016) 6 SCC 105,** has stated the position of law in the following manner :-

> *"21. Presently to the second aspect. Submission of Mr. Sharan is that the learned Magistrate could not have entertained the application preferred by the informant, for such an application is incompetent because it has to be filed by the public prosecutor. In this regard, he has laid stress on the decision in Shiv Kumar v. Hukam Chand and another. In the said case, the grievance of the appellant was that counsel engaged by him was not allowed by the High Court to conduct the prosecution in spite of obtaining a consent from the concerned Public Prosecutor. The trial court had passed an order to the extent that the advocate engaged by the informant shall conduct the case under the supervision, guidance and control of the Public Prosecutor. He had further directed that the Public Prosecutor shall retain with himself the control over the proceedings. The said order was challenged before the High Court and the learned single Judge allowing the revision had directed that the lawyer appointed by the complainant or private person shall act under the directions from the Public Prosecutor and may with the permission of the court submit written arguments after evidence is closed*

and the Public Prosecutor in-charge of the case shall conduct the prosecution. This Court referred to Section 301, 302 (2), 225 CrPC and various other provisions and came to hold as follows:-

> *"13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.*
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> *14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in*

such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

22. Being of this view, this Court upheld the order passed by the High Court. The said decision is, in our opinion, is distinguishable on facts. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the informant to add a charge under Section 406 IPC as there were allegations against the husband about the criminal breach of trust as far as her stridhan is concerned. It was, in a way, bringing to the notice of the learned Magistrate about the defect in framing of the charge. The court could have done it suo motu. In such a situation, we do not find any fault on the part of learned Magistrate in entertaining the said application. It may be stated that the learned Magistrate has referred to the materials and recorded his prima facie satisfaction. There is no error in the said prima facie view. We also do not perceive any error in the revisional order by which it has set aside the charge framed against the mother-in-law. Accordingly, we affirm the order of the High Court in expressing its disinclination to interfere with the order passed in revision. We may clarify that the entire scrutiny is only for the purpose of framing of charge and nothing else. The

learned Magistrate will proceed with the trial and decide the matter as per the evidence brought on record and shall not be influenced by any observations made as the same have to be restricted for the purpose of testing the legal defensibility of the impugned order."

6. Before examining the facts of the case in the context of excerpt of the judgment reproduced herein above, it would be appropriate to discuss another decision of the Hon'ble Supreme Court in the case of **Mina Lalita Baruwa vs. State of Orissa, (2013) 16 SCC 173,** wherein the Hon'ble Apex Court discussed the duty of the Criminal Court and the powers available under Section 165 of the Evidence Act, in the following manner:-

"19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution

failed to note the situation at that moment or later when it was brought to light and whereafter also the prosecution remained silent, the Court should have acted promptly and taken necessary steps to rectify the situation appropriately. The whole scheme of the Code of Criminal Procedure envisages foolproof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and innocent is not punished. It is with the above background, we feel that the present issue involved in the case on hand should be dealt with.

31. Having noted the various decisions relied upon by the learned counsel for the appellant referred to above on the interpretation of Sections 301 and 311 of Cr.P.C, as well as Section 165 of the Evidence Act, it will have to be held that the various propositions laid down in the said decisions support our conclusion that a Criminal Court, while trying an offence, acts in the interest of the society and in public interest. As has been held by this Court in Zahira Habibullah H. Sheikh (supra), a Criminal Court cannot remain a silent spectator. It has got a participatory role to play and having been invested with enormous powers under Section 311 of Cr.P.C, as well as Section 165 of the Evidence Act, a trial Court in a situation like the present one where it was brought to the notice of the Court that a flagrant contradiction in the evidence of PW-18 who was a statutory authority and in whose presence the test identification parade was held, who is also a Judicial Magistrate, ought to have risen to the occasion in public interest and remedied the situation by invoking Section 311 of Cr.P.C, by recalling the said witness with the further direction to the public prosecutor for putting across the appropriate question or court question to the said witness and thereby set right the glaring error accordingly. It is unfortunate to state that the trial Court miserably failed to come alive to the realities as to the nature of evidence that was being recorded and miserably failed in its duty to note the serious flaw and error in the

> *recording of evidence of PW-18. In this context, it must be stated that the prosecutor also unfortunately failed in his duty in not noting the deficiency in the evidence. The observation of the High Court while disposing of the revision by making a casual statement that the appellant can always file the written argument equally in our considered opinion, was not the proper approach to a situation like the present one. What this court wishes to ultimately convey to the courts below is that while dealing with a litigation, in particular while conducting a criminal proceeding, maintain a belligerent approach instead of a wooden one."*

7. On cumulative reading of the judgments referred to above, it is safe to deduce that the trial Court is empowered to call for any witness or to take any document on record, which appears to be necessary for arriving at the truth. In the context of the present case, the observations by the Hon'ble Supreme Court apply because the prosecutrix even though was only assisting the prosecution but by making an application, she is bringing into notice of the trial Court certain necessary features of the case which are in the form of documents, which can be taken on record by the Court suo motu by exercising the power available under Section 165 of Evidence Act. This Court in the case of **Raju @ Rajendra Prasad vs. State of MP, 2002 (3) MPLJ 277,** has discussed the latitude given under Section 165 of Evidence Act in following terms :-

> *"Under these provisions the learned Trial Court had ample power and discretion to interfere and control conduction of trial properly, effectively and in manner as prescribed by law. While conducting the trial, Court is not required to sit as a silent spectator or umpire but to take active part well within the boundaries of law. In the present case so many important*

documents were not got proved though filed along with charge-sheet, so many important documents as pointed hereinabove were not filed which all could be important and relevant for the just decision of a trial and the same could be got proved and directed to be produced by Trial Court under Section 165 of Evidence Act and 311 of Cr. P.C. The Supreme Court has observed in Ramchandra v. The State of Haryana, AIR 1981 SC 1036, as follows :

> *"The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume a role of a Referee on an Umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If Criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent motive interest by putting questions to witnesses in order to ascertain the truth. But this he must do, without unduly trespassing upon the functions of the Public Prosecutor and the defence Counsel without any hint of partnership and without appearing to frighten or bully witnesses. Any question put by the Judge must be so as not to frighten, coerce confuse or intimidate the witnesses."*

The aforesaid judgments establish the legal position that even though the documents are taken on record at the behest of prosecutrix by passing the impugned order, no illegality has been committed by the trial Court.

8. Before concluding the matter, the contention of the

applicant relating to prejudice which is being caused to him requires to be addressed. In this regard, the Hon'ble Supreme Court in the case of **Zahira Habibullla H. Sheikh and another vs. State of Gujarat and others, (2004) 4 SCC 158,** has highlighted the duty of the Court to arrive at a just decision and the same cannot be named as filling of lacunae or causing prejudice to the accused. The relevant portion of said judgment is reproduced as under :-

> *"51. Need for circumspection was dealt with by this Court in Mohanlal Shamji Soni's case (supra) and Ram Chander v. State of Haryana (1981 (3) SCC 191) which dealt with the corresponding Section 540 of Code of Criminal Procedure, 1898 (in short the 'Old Code') and also in Jamatraj's case (supra). While dealing with Section 311 this Court in Rajendra Prasad v. Narcotic Cell thr. Its officer in Charge, Delhi (1999 (6) SCC 110) held as follows:*
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> > *"7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.*

> *8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better".*

9. Taking the aforesaid view, the instant revision application is dismissed. However, before parting, it is necessary to answer another contention of the applicant that the documents, which are brought on record, may be forged or concocted, suffice it to say that in such contingencies, the trial Court is equipped to take recourse to the prosecutrix under Section 340 CrPC. It is also clarified that the decision of this Court should not be treated as bringing the contents of the documents or articles which are brought on record by the prosecutrix, which is obviously the discretion of the trial Ciourt to take such decision regarding admissibility by exercising its own wisdom.

(S.K.Awasthi)
Judge.

(yogesh)