THE HIGH COURT OF MADHYA PRADESH
MCRC No.5816/2018

(Kuldeep Singh Tomar vs. State of M.P.)

Gwalior, Dated : 08.03.2018

Shri V.K. Saxena Senior Advocate with Shri Pooran Kulshreshtha, Counsel for the applicant.

Shri Rohit Mishra, Counsel for the respondent/S.P.E. (Lokayukt).

Heard Finally.

This application under Section 482 of Cr.P.C. has been filed against the order dated 19-1-2018 passed by Shri Ramesh Kumar Shrivastava, 1st A.S.J./Special Judge (Prevention of Corruption Act), Morena in Special Sessions Trial No.11/2015, by which the application filed by the applicant under Section 311 of Cr.P.C. has been rejected.

The necessary facts for the disposal of the present application in short are that the applicant is facing trial for offence under Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act.

The applicant filed an application under Section 311 of Cr.P.C. seeking recall of Ram Gopal (P.W.5) on the ground that the witness could not be cross examined because of absence of the counsel and therefore, his right to cross examine the said witness has been closed. It was further mentioned that the cross examination of the said witness is necessary in the interest of justice, otherwise, the applicant would be deprived of his right to putforth his defence. The application filed under Section 311 of Cr.P.C., reads as under :

> ''आवेदन पत्र अंतर्गत धारा 311 द0प्र0संहिता
> श्रीमानजी,
> 1. निवेदन है कि प्रकरण मे अभियोजन साक्षी क्र. 5

के रूप मे रामगोपाल का कथन कराया गया है। उक्त साक्षी पर पूर्णरूप से प्रतिपरीक्षण नही हो पाया है। न्यायालय द्वारा प्रतिपरीक्षण का अभिभाषक के उपस्थित न रहने के कारण हक समाप्त कर दिया है।

2. यह कि उक्त साक्षी से पुनः प्रतिपरीक्षण किया जाना आवश्यक है इससे न्यायालय को न्यायदान में सुविधा मिलेगी और अभियुक्त अपना बचाव उचित रूप से प्रस्तुत कर सकेगा अन्यथा वह अपना बचाव उचित रूप से नही रख पायेगा तथा प्रार्थी न्यायदान से वंचित हो जावेगा।

अस्तु निवेदन है कि अभियोजन साक्षी क्र. 5 रामगोपाल को पुनःप्रतिपरीक्षण हेतु तलब किये जाने की कृपा की जावे।''

The said application was opposed by the Public Prosecutor.

The Trial Court, after considering the fact that in fact it was the counsel for the applicant, who had left the cross examination of the witness in the midway, rejected the application on the ground that in case, if it reconsiders the facts and incident which took place on 26-5-2017, then it would amount to review, which is not permissible and accordingly the witness cannot be recalled for cross examination.

Challenging the order dated 19-1-2018, it is submitted by the counsel for the applicant, that in fact the Trial Court was not dictating/ narrating the answers which were being given by the witness and it was objected by the counsel for the applicant and thus, a situation had arisen, under which it was not possible for the counsel for the applicant, to continue with the cross examination, therefore, he left the Court room. It is further submitted that even if it is presumed that the conduct of the Counsel

for the applicant was not correct, even then, the Trial Court should not have closed the right of the applicant to cross examine Ramgopal (P.W.5) and should have appointed an *amicus curiae* so that he could have cross examined Ramgopal (P.W.5). Thus, the Trial Court has committed a material illegality by closing the right of the applicant to cross examine Ramgopal (P.W.5). To buttress his contentions, the counsel for the applicant has relied upon judgment of Supreme Court passed in the case of **Md. Sukur Ali Versus State of Assam** reported in **(2011) 4 SCC 729**. It was further submitted that the Trial Court had recorded an incorrect fact in the order sheet dated 26-5-2017 to the effect that the counsel for the applicant, after leaving the Court room, had again visited the Court and when it was requested by the Court, that the counsel may cross examine the witness in question answer form, then it was declined by him. It is submitted that in fact the counsel for the applicant had never visited the Court room of the Trial Court again and he was never given an option to cross examine the witness in question and answer form. On 4-3-2018, the applicant has filed an affidavit of Shri Harswaroop Maheshwari, the counsel for the applicant and of Ramjilal Pachauri, the Associate Counsel of Harswaroop Maheshwari. Harswaroop Maheshwari has given the following affidavit :

''शपथ पत्र

मै हरस्वरूप माहेश्वरी पुत्र स्व. श्री पन्नालाल माहेश्वरी उम्र 82 वर्ष, व्यवसाय वकालात निवासी दत्तपुरा मुरैना शपथपूवर्क सही सही कथन करता हूं कि :–

1. यह कि उक्त प्रकरण (विचारण न्यायालय का विशेष प्र. क्र. 11/2015) मे विचारण न्यायालय के समक्ष आवेदक की ओर से अभियोजन साक्षी क्र. 5 रामगोपाल से प्रतिपरीक्षण करते समय, यह साक्षी जो कह रहा था, उसके कथन को

उसी रूप मे न लिखे जाने से मैने मौखिक आपत्ति की थी।
2. यह कि उक्त साक्षी के कथन के दौरान मुझे विचारण न्यायालय द्वारा यह अवसर प्रदान नही किया कि मै उक्त साक्षी से प्रश्न उत्तर के फॉर्म मे प्रतिपरीक्षण करूं तथा न ही इस प्रक्रिया के लिये मेरे द्वारा इन्कार किया गया है।''

Thus, for the first time, the applicant has confronted that part of the order sheet of the Trial Court, dated 26-5-2017, in which the Trial Court had mentioned that the counsel for the applicant, again visited the Court of the Trial Court and he was given an opportunity to cross examination Ramgopal (P.W.5) in question answer form. Whether the contention made by the applicant is correct or not, shall be considered at the later part of this order.

It is further submitted by the counsel for the applicant that the application under Section 311 of Cr.P.C. cannot be rejected merely on the ground that it was filed belatedly. To buttress his contentions, has relied upon the judgment passed by the Supreme Court in the case of **P. Sanjeeva Rao Vs. State of Andhra Pradesh,** reported in **(2012) 7 SCC 56**.

Per contra, it is submitted by the counsel for the State that in fact full opportunity of cross examining the witness was given by the Trial Court but, it was the counsel for the applicant, who himself left the Court room after levelling baseless allegations against the Court. The applicant has not pointed out that what question was put by his Counsel and what was the reply of the witness and what was narrated/dictated by the Trial Court and how, the dictation of the Trial Court was contrary to the reply given by the witness. It is further submitted that the applicant cannot take advantage of his own wrong and cannot claim that the

cross examination of the witness may be allowed in the interest of justice. The word "Interest of Justice", has to be interpreted from the accused as well as from the complainant/prosecution and society point of view. It is further submitted that the Trial Court has rightly rejected the application filed by the applicant. To buttress his contentions, the counsel for the State has relied upon the judgments of Supreme Court, passed in the case of **Umar Mohammad Vs. State of Rajasthan** reported in **(2007) 14 SCC 711, Ratanlal VS. Prahlad Jat** reported in **(2017) 9 SCC 340, and Nisar Khan Vs. State of Uttaranchal** reported in **(2006) 9 SCC 386.**

Heard the learned counsel for the parties.

The deposition sheet of evidence of Ramgopal (P.W.5) dated 26-5-2017 reads as under :

> **''प्रति परीक्षण द्वारा अधिवक्ता श्री हरस्वरूप वास्ते आरोपी**
> 09. दिनांक 13.5.2015 से मै इस प्रकरण मे संबंधित हो गया और मुरैना मे मै इस अपराध मे दिनांक 18.5.2015 को आया हूं और मेरा पुलिस दिनांक 12.6.15 को हुआ है । दिनांक 18.5.15 से 12.6.15 के बीच मे मै आज यह नही बता सकता कि किस तारीख को, किस सीान पर, किस कार्य हेतु गया। मुझे आज यह भी घ्यान नही है कि दिनांक 18.5.15 से 12.6.15 के बीच मे कोई अन्य दे्प हुआ हो उस टे्प मे मेरे सामने कोई कार्यवाही हुई हो। दिनांक 13.5. 15 एवं 15.5.15 और 18.5.15 को इस अपराध के संबंध मे जो भी कार्यवाही हुई उसका विवरण मैने अपने पास नोट करके रखा है। यह जानकारी मेरे पास एक कागज मे नोट है जो कि मैने अपने पास लिख रही है। यह बात सही है कि वह बात मैनें इसलिय लिख रही है कि यदि बयान देने जाए तो बयान के समय उक्त बात को ध्यान रखूं। स्वतः कहा कि फरियादी एवं आरोपी का नाम मेरे पास नोट है। आज तक मै लगभग 50 टे्प दलों मे शामिल रहा हूं।
> 10. इस आरोपी के टे्प कार्यवाही के पश्चात् दूसरे मामले के आरोपी के संबंध मे की गई कार्यवाही मे शामिल रहे पंचसाक्षीयों के नाम मै नही बता सकता हू्। मै यह नही बता सकता कि मै इस प्रकरण मे अतिरिक्त किस टे्पदल मे

शामिल रहा हूं और किसमे नही । मैं दूसरे प्रकरणों मे ट्रेप की कार्यवाहियों मे शामिल रहे पंचसाक्षियों के नाम नही बता सकता।

नोट :– इसी प्रकम पर अधिवक्ता श्री महेश्वरी ने यह कहते हुए चले गये कि साक्षी जो बोल रहा है उसकी बात नही लिखी जा रही। इसी प्रकम पर अधिवक्ता पचौरी ने उपस्थित होकर बोला कि न्यायालय साक्षी के कथनों को तोड मोड कर लिखवा देती हैं । इसलिए वे साक्षी से आगे प्रतिपरीक्षण नही करेगे।

नोट :– इसी के बारें मे साक्षी ने बताया कि जो साक्षी बोल रही है वही डिक्टेशन दिया जा रहा है और विद्वान ए डी पी ओ श्री भूपेंन्द्र सिंह ने भी बताया कि जो बात साक्षी बोल रहा है वही बात लिखाई जा रही है।

न्यायालय :– चूंकि साक्षी जो बोल रहा है वही बात न्यायालय के द्वारा डिक्टेट की जा रही है, इसलिये विद्वान अधिवक्ता के द्वारा आगे प्रतिपरीक्षण न करना न्यायालय की अवमानना का द्योतक है । अंतः इस बयानशीट की एक प्रति माननीय जिला जज महोदय के माध्यम से माननीय रजिस्ट्रार जनरल महोदय जबलपुर म.प्र. के पास सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित की जाए।

नोटः– आरोपी से पूछा गया कि क्या वह उपस्थित साक्षी से शेष प्रतिपरीक्षण करना चाहता है जिस पर उसने बताया कि उसके वही अधिवक्ता ही आगे प्रतिपरीक्षण करेगे।

अतः आरोपी का इस साक्षी से शेष प्रतिपरीक्षण का अवसर समाप्त किया जाता है।''

Thus, from the deposition sheet, it is clear that the cross examination of Ramgopal (P.W.5) had just begun and the counsel for the applicant was asking questions with regard to different other traps. Whether the questions put by the counsel for the applicant to this witness were relevant or not is a question which is to be decided by the Trial Court, but one thing is clear that the counsel for the applicant had not put much questions with regard to the trap in question, therefore, it was necessary for the applicant to point out specifically, that what was question

put by his counsel and what reply was given by the witness, and what was dictated by the Trial Court and how, such dictation was contrary to the answer given by the witness.

In application filed under Section 311 of Cr.P.C., the applicant has merely disclosed the reason for not completing the cross examination, is the absence of the counsel, but he could not dare to come forward and say before the Trial Court, that in fact his counsel on his own had left the cross examination in the mid way.

Even in this application filed under Section 482 of Cr.P.C., the applicant has not clarified that which question was put by his counsel and what was the reply given by the witness and what was dictated by the Trial Court and how such dictation was contrary to the reply given by the witness. On the contrary, it appears that the counsel for the applicant left the cross examination in the midway by levelling allegations against the Trial Court. If the contention made by the applicant is considered, then in order to find out the truth in the same, this Court will be required to consider the options which were available to the applicant and whether those options were availed by the applicant or not?

Even assuming for the sake of argument, that the counsel for the applicant was not satisfied with the dictation/narration of answer by the Court, then at the very same moment, the applicant could have filed an application before the Trial Court itself, pointing out his grievance, but that was not done. The applicant could have filed an application under Section 311 of Cr.P.C. immediately after

his right was closed, but even that was not done. The right of the applicant was closed to examine Ramgopal (P.W.5) on 26-5-2017 however, the application under Section 311 of Cr.P.C. was filed on 9-1-2018. The counsel for the applicant has submitted that the application filed under Section 311 of Cr.P.C. cannot be rejected, merely on the ground that it was filed belatedly and to buttress his contentions, has relied upon the judgment passed by the Supreme Court in the case of **P. Sanjeeva Rao Vs. State of Andhra Pradesh,** reported in **(2012) 7 SCC 56**.

The delay in filing the application under Section 311 of Cr.P.C. would certainly of importance under the facts and circumstances of the case. The Supreme Court in the case of **Ratanlal v. Prahlad Jat,** reported in **(2017) 9 SCC 340** has held as under **:**

> "21. The delay in filing the application is one of the important factors which has to be explained in the application."

The next question for determination is that whether the reasons, for which the counsel for the applicant had left the cross examination in the mid way, can be held to be just and proper cause and whether a witness should be recalled under the facts and circumstances of the case ?

In order to consider the above mentioned question, it would be necessary to consider the Role of a Lawyer, inside the Court and outside the Court.

The Supreme Court in the case of **R.K. Anand Vs. Delhi High Court**, reported in **(2009) 8 SCC 106** has held as under :

"Role of the Lawyer

331. The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Public Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.

332. We have viewed with disbelief Senior Advocates freely taking part in TV debates or giving interviews to a TV reporter/anchor of the show on issues that are directly the subject-matter of cases pending before the court and in which they are appearing for one of the sides or taking up the brief of one of the sides soon after the TV show. Such conduct reminds us of the fictional barrister, Rumpole, "the Old Hack of Bailey", who self-deprecatingly described himself as an "old taxi plying for hire". He at least was not bereft of professional values. When a young and enthusiastic journalist invited him to a drink of Dom Perignon, vastly superior and far more expensive than his usual "plonk", "Château Fleet Street", he joined him with alacrity but when in the course of the drink the journalist offered

him a large sum of money for giving him a story on the case; "why he was defending the most hated woman in England", Rumpole ended the meeting simply saying

"In the circumstance I think it is best if I pay for the Dom Perignon."

333. We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for the administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a Bar that enjoys the unqualified trust and confidence of the people, that shares the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

334. We are glad to note that Mr Gopal Subramanium, the amicus fully shared our concern and realised the gravity of the issue. In course of his submissions he eloquently addressed us on the elevated position enjoyed by a lawyer in our system of justice and the responsibilities cast upon him in consequence. His written submissions begin with this issue and he quotes extensively from the address of Shri M.C. Setalvad at the Diamond Jubilee Celebrations of the Bangalore Bar Association, 1961, and from the decisions of this Court in *Pritam Pal* v. *High Court of M.P. [1993 Supp (1) SCC 529]* (observations of Ratnavel Pandian, J.) and *Sanjiv Datta, In Re [(1995) 3 SCC 619]* (observations of Sawant, J. at pp. 634-35, para 20). We respectfully endorse the views and sentiments expressed by Mr M.C. Setalvad, Pandian, J. and Sawant, J.

335. Here we must also observe that the

> Bar Council of India and the Bar Councils of the different States cannot escape their responsibility in this regard. Indeed the Bar Council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society."

The Supreme Court in the case of **Amit Chanchal Jha v. High Court of Delhi,** reported in **(2015) 13 SCC 288** has held as under :

> **"17.** This Court has earlier acknowledged the falling standards of certain members of the Bar and it has become necessary to reiterate the said view on account of repeated instances which are being highlighted. In *R.K. Anand* v. *Delhi High Court*, this Court expressed its grave concern and dismay on the decline of ethical and professional standards among lawyers as follows: (SCC pp. 205-06, paras 331, 333 & 335)
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> "*331*. The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal

contempt of court and the other found guilty of misconduct as Special Public Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.

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333. We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for the administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a Bar that enjoys the unqualified trust and confidence of the people, that shares the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

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has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society."

18. We may also recall the observations of this Court in *Ministry of Information & Broadcasting, In re*, that the legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. The honour as a legal profession has to be maintained by its members by their exemplary conduct both in and outside the court. The lawyer has to conduct himself as a model for others in his profession as well as in private and public life. Society has the right to expect from him ideal behaviour. This Court observed: (SCC pp. 634-35, para 20)

"*20*. The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised

society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before it is wrecked from outside. It is for the members of the profession to introspect and take the corrective steps in time and also spare the courts the unpleasant duty. We say no more."

19. In *Bar Council of Maharashtra* v. *M.V. Dabholkar*, it was observed: (SCC p. 298, para 15)

"*15*. Now to the legal issue bearing on canons of professional conduct. The rule of law cannot be built on the ruins of democracy, for where law ends tyranny begins. If such be the keynote thought for the very survival of our Republic, the integral bond between the lawyer and the public is unbreakable. And the vital role of the lawyer depends upon his probity and professional lifestyle. Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice—social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallised into rigid rules but *felt* by the collective conscience of the practitioners as right:

`It must be a conscience alive to the proprieties and the improprieties incident to the discharge of a sacred public trust. It must be a conscience governed by the rejection of self-interest and selfish ambition. It must be a conscience propelled by a consuming desire to play a leading role in the fair and impartial administration of justice, to the end that public confidence may be kept undiminished at all times in the belief that we shall always seek truth and justice in the preservation of the rule of law. It must be a conscience, not shaped by rigid rules of doubtful validity, but answerable only to a moral code which would drive irresponsible Judges from the profession. Without such a conscience, there should be

> no Judge' [Hastings, Hon John S. : Judicial Ethics as it Relates to Participation in Money-Making Activities — Conference on Judicial Ethics, p. 8. The School of Law, University of Chicago (1964)].
>
> —and, we may add, no lawyer. Such is the high, standard set for professional conduct as expounded by courts in this country and elsewhere."
>
> (emphasis in original)

The Supreme Court in the case **of P.D. Gupta Vs. Ram Murti** reported in **(1997) 7 SCC 147** has held as under :

> "A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well. The Bar is the principal ground for recruiting Judges. No one should be able to raise a finger about the conduct of a lawyer. While conducting the case he functions as an officer of the court."

The Supreme Court in the case of **D.P. Chadhu Vs. Triyugi Narain Mishra** reported in **(2001) 2 SCC 221** has held as under :

> **"24.** It has been a saying as old as the profession itself that the court and counsel are two wheels of the chariot of justice. In the adversarial system, it will be more appropriate to say that while the Judge holds the reigns, the two opponent counsel are the wheels of the chariot. While the direction of the movement is controlled by the Judge holding the reigns, the

movement itself is facilitated by the wheels without which the chariot of justice may not move and may even collapse. Mutual confidence in the discharge of duties and cordial relations between Bench and Bar smoothen the movement of the chariot. As responsible officers of the court, as they are called — and rightly, the counsel have an overall obligation of assisting the courts in a just and proper manner in the just and proper administration of justice. Zeal and enthusiasm are the traits of success in profession but overzealousness and misguided enthusiasm have no place in the personality of a professional.

25. An advocate while discharging duty to his client, has a right to do everything fearlessly and boldly that would advance the cause of his client. After all he has been engaged by his client to secure justice for him. A counsel need not make a concession merely because it would please the Judge. Yet a counsel, in his zeal to earn success for a client, need not step over the well-defined limits or propriety, repute and justness. Independence and fearlessness are not licences of liberty to do anything in the court and to earn success to a client whatever be the cost and whatever be the sacrifice of professional norms."

The Supreme Court in the case of **O.P. Sharma Vs. High Court of Punjab & Haryana** reported in **(2011) 6 SCC 86** has held as under :

"17. The role and status of lawyers at the beginning of sovereign and democratic India is accounted as extremely vital in deciding that the nation's administration was to be governed by the rule of law. They were considered intellectuals amongst the elites of the country and

social activists amongst the downtrodden. These include the names of a galaxy of lawyers like Mahatma Gandhi, Motilal Nehru, Jawaharlal Nehru, Bhulabhai Desai, C. Rajagopalachari, Dr. Rajendra Prasad and Dr. B.R. Ambedkar, to name a few. The role of lawyers in the framing of the Constitution needs no special mention. In a profession with such a vivid history it is regretful, to say the least, to witness instances of the nature of the present kind. Lawyers are the officers of the court in the administration of justice.

* * * *

20. In *R.D. Saxena* v. *Balram Prasad Sharma* this Court held as under: (SCC p. 281, para 42)

"*42*. In our country, admittedly, a social duty is cast upon the legal profession to show the people beckon (sic beacon) light by their conduct and actions. The poor, uneducated and exploited mass of the people need a helping hand from the legal profession, admittedly, acknowledged as a most respectable profession. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional, by an advocate only on account of the exalted position conferred upon him under the judicial system prevalent in the country."

* * * *

24. Advocacy touches and asserts the primary value of freedom of expression. It is a practical manifestation of the principle of freedom of speech. Freedom of expression in arguments encourages the development of judicial dignity, forensic skills of advocacy and enables protection of fraternity, equality and justice. It plays its part in helping to secure the protection of other fundamental human rights,

freedom of expression, therefore, is one of the basic conditions for the progress of advocacy and for the development of every man including legal fraternity practising the profession of law. Freedom of expression, therefore, is vital to the maintenance of free society. It is essential to the rule of law and liberty of the citizens. The advocate or the party appearing in person, therefore, is given liberty of expression. But they equally owe countervailing duty to maintain dignity, decorum and order in the court proceedings or judicial processes. Any adverse opinion about the judiciary should only be expressed in a detached manner and respectful language. The liberty of free expression is not to be confounded or confused with licence to make unfounded allegations against any institution, much less the judiciary [vide *D.C. Saxena (Dr.)* v. *Chief Justice of India*].

38. An advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. In all professional functions, an advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public

justice system.

39. An advocate should be dignified in his dealings to the court, to his fellow lawyers and to the litigants. He should have integrity in abundance and should never do anything that erodes his credibility. An advocate has a duty to enlighten and encourage the juniors in the profession. An ideal advocate should believe that the legal profession has an element of service also and associates with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by the Bar Council of India in Chapter II, Part VI of the Bar Council of India Rules.

40. As a rule, an advocate being a member of the legal profession has a social duty to show the people a beacon of light by his conduct and actions rather than being adamant on an unwarranted and uncalled for issue."

Thus, it is clear that for smooth functioning of the legal system, support by Bar is essential and a Bar enjoys the unqualified trust and confidence of the people. Thus, the conduct of the Lawyer inside the Court should be of high traditions. It is made clear that since, a motion for contempt of Court has also been initiated by the Trial Court, and as, the same is not the subject matter of this application, therefore, this Court has constrained itself, to consider the role of the counsel for the applicant, because any observation may have some effect on the other proceedings, therefore, the facts of the case are being considered only with a view to find out that whether there was any valid reason for the counsel for the applicant to

leave the Court room in the mid of cross examination or not?

The applicant, has not clarified, either in his application under Section 311 of Cr.P.C., nor in this application under Section 482 of Cr.P.C. that what question was put by the counsel and what was the answer given by the witness and what was dictated by the Trial Court and how the said dictation was contrary to the reply given by the witness. Thus, in absence of any factual foundation, it would not be possible for this Court to consider that whether the conduct of the counsel for the applicant was proper or not, therefore, in absence of any factual foundation, it is held that without there being any basis, as the counsel for the applicant had left the Court, therefore, refusal to further cross examine the witness, cannot be said to be proper.

The next question for determination would be that where the counsel for the applicant had left the Court, then whether the Trial Court should have given an option to the applicant to appoint another lawyer or should have appointed an *amicus curiae* or was right in closing the right of the applicant to cross examine Ramgopal (P.W.5), after giving an opportunity to the applicant to cross examine the witness.

The Supreme Court in the case of **Mohd. Ajmal Amir Kasab Vs. State of Maharashtra** reported in **(2012) 9 SCC 1** has held as under :

> **"477.** Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to

> represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see *Suk Das* v. *UT of Arunachal Pradesh*)."

Thus, where the accused is given an option, but if the same is not availed by him, then it cannot be said that in every circumstance, it is the duty of the Court to appoint *amicus curiae*. In the present case, after the counsel for the applicant had left the Court room, an option was given to the applicant to cross examine the witness, but that was refused by him and it was replied by him, that the cross examination shall be done by the same lawyer. Once, the applicant had expressed specifically that he wants to be represented by the counsel of his choice, then under this circumstance, the Trial Court could not have appointed any other lawyer as *amius curiae*. In view of the specific reply given by the applicant i.e., आरोपी से पूछा गया कि क्या वह उपस्थित साक्षी से शेष प्रतिपरीक्षण करना चाहता है जिस पर उसने बताया कि उसके वही अधिवक्ता ही आगे प्रतिपरीक्षण करेगे।, the Trial Court was left with no other option, but to close the right of the applicant to cross examine Ramgopal (P.W.5).

Another important question arises at this stage that when the lawyer has refused to cross examine the witness, then whether the Trial Court was under obligation to adjourn the case or was right in closing the right of the applicant to cross examine the particular witness.

Section 309 of Cr.P.C. reads as under :

> **"309. Power to postpone or adjourn proceedings**.—(1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:
>
> Provided that when the inquiry or trial relates to an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible be completed within a period of two months from the date of filing of the charge sheet.]
>
> (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:
>
> Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:
>
> Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special

reasons to be recorded in writing:

[Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:]

[Provided also that—

(*a*) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(*b*) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(*c*) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.]

Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

Thus, it is clear that day to day proceedings in a Criminal Trial is a Rule and adjournment is an exception.

The Supreme Court in the case of **Vinod Kumar Vs. State of Punjab** reported in **(2015) 3 SCC 220** has held as under :

"3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognise "the felt necessities of time" and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracising the concept that a civilised and orderly society thrives on the rule of law which includes "fair trial" for the accused as well as the prosecution?

4. In the aforesaid context, we may recapitulate a passage from *Gurnaib Singh* v. *State of Punjab*: (SCC p. 121, para 26)

"*26*. … we are compelled to proceed to reiterate the law and express our anguish pertaining to the manner in which the trial was conducted as it depicts a very disturbing scenario. As is demonstrable from the record, the trial was conducted in an extremely haphazard and piecemeal manner. Adjournments were granted on a mere asking. The cross-examination of the witnesses were deferred without recording any special reason and dates were given after a long gap. The mandate of the law and the views expressed by this Court from time to time appears to have been totally kept at bay. The learned trial Judge, as is perceptible, seems to have ostracised from his memory that a criminal trial has its own gravity and sanctity. In this regard, we may refer with profit to the pronouncement in *Talab Haji Hussain* v. *Madhukar Purshottam Mondkar* wherein it has been stated that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed

and trials are allowed to proceed smoothly without any interruption or obstruction."

5. Be it noted, in the said case, the following passage from *Swaran Singh* v. *State of Punjab*, was reproduced: (*Gurnaib Singh case*, SCC pp. 121-22, para 28)

"*28*. … '*36*. … It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice.'" (*Swaran Singh case* SCC p. 678, para 36.)

6. In this regard, it is also fruitful to refer to the authority in *State of U.P.* v. *Shambhu Nath Singh*, wherein this Court deprecating the practice of a Sessions Court adjourning a case in spite of the presence of the witnesses willing to be examined fully, opined thus: (*Shambhu Nath Singh case*, SCC pp. 671-72, para 9)

"*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 sad plight in the trial courts that witnesses who are called through summons or other processes stand at the

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 the Presiding Officers of the trial courts and it can be reformed by everyone provided the Presiding Officer concerned has a commitment towards duty." (*Gurnaib Singh case*, SCC p. 123, para 31)

57. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish for the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts:

57.1. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics.

57.3. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial is to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it

cannot be countenanced. The court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of the rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-

examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

The Supreme Court in the case of **Akil Vs. State (NCT of Delhi)** reported in **(2013) 7 SCC 125** has held as under :

> **"35.** In this context it will also be worthwhile to refer to a circular issued by the High Court of Delhi in Circular No. 1/87 dated 12-1-1987. Clause 24-A of the said circular reads as under:
>
> "**24-A**. A disturbing trend of trial of sessions cases being adjourned, in some cases to suit convenience of counsel and in some others because the prosecution is not fully ready, has come to the notice of the High Court. Such adjournments delay disposal of sessions cases.
>
> The High Court considers it necessary to draw the attention of all the Sessions Judges and Assistant Sessions Judges once again to the following provisions of the Code of Criminal Procedure, 1973, Criminal Rules of Practice, Kerala, 1982 and Circulars and instructions on the list system issued earlier, in order to ensure the speedy disposal of sessions cases.
>
> **1. (*a*)** In every enquiry or trial, the proceedings shall be held as expeditiously as possible, and, in particular, when the examination of witnesses has once begun, the same shall be continued *from day to day* until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. [Section 309(1)

CrPC]

(*b*) After the commencement of the trial, if the court finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable. If witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded, in writing. [Section 309(2) CrPC]

2. Whenever more than three months have elapsed between the date of apprehension of the accused and the close of the trial in the Court of Session, an explanation of the cause of delay, (in whatever court it may have occurred) shall be furnished, while transmitting the copy of the judgment. (Rule 147, Criminal Rules of Practice)

3. Sessions cases should be disposed of within six weeks of their institution, the date of commitment being taken as the date of institution in sessions cases. Cases pending for longer periods should be regarded as old cases in respect of which explanations should be furnished in the calendar statements and in the periodical returns. (High Court Circular No. 25/61 dated 26-10-1961)

4. Sessions cases should be given precedence over all other work and no other work should be taken up on sessions days until the sessions work for the day is completed. A sessions case once posted should not be postponed unless that is unavoidable, and once the trial has begun, it should proceed continuously from day to day till it is completed. If for any reason, a case has to be adjourned or postponed,

> intimation should be given forthwith to both sides and immediate steps be taken to stop the witnesses and secure their presence on the adjourned date."

The Supreme Court in the case of **Krishnan Vs. Krishnaveni** reported in **(1997) 4 SCC 241** has held that the object behind the criminal law is to maintain law, public order, stability as also peace and progress in the society. The object of the criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The Court further proceeded to state that the recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement and these malpractices need to be curbed.

The Supreme Court in the case of **Swaran Singh Vs. State of Punjab** reported in **(2000) 5 SCC 668** has held as under :

> "*36.* … It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice."

The Supreme Court in the case of **Gurnaib Singh Vs. State of Punjab** reported in **(2013) 7 SCC 108** has held as under :

> **"35.** We have expressed our anguish, agony and concern about the manner in which the trial has been conducted. We hope and trust that the trial courts shall keep in mind the statutory provisions and the interpretation placed by this Court and not be guided by their own thinking or should not become mute spectators when a trial is being conducted by allowing the control to the counsel for the parties. They have their roles to perform. They are required to monitor. They cannot abandon their responsibility. It should be borne in mind that the whole dispensation of criminal justice at the ground level rests on how a trial is conducted. It needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar. The administration of justice reflects its purity when the Bench and the Bar perform their duties with utmost sincerity. An advocate cannot afford to bring any kind of disrespect to fairness of trial by taking recourse to subterfuges for procrastinating the same."

The Supreme Court in the case of **State of U.P. Vs. Shambhu Nath Singh** reported in **(2001) 4 SCC 667** has held as under :

> **"10.** Section 309 of the Code of Criminal Procedure (for short "the Code") is the only provision which confers power on the trial court for granting adjournments in criminal proceedings. The conditions laid down by the legislature for granting such adjournments have been clearly incorporated in the section. It reads thus:
>
> "309. *Power to postpone or adjourn proceedings*.—(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in

particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous

stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,

> "provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, *except for special reasons to be recorded in writing*".
>
> (emphasis supplied)

12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said

course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.

13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code.

14. If any court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel the court can adopt any of the measures indicated in the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to

examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case).

15. The time-frame suggested by a three-Judge Bench of this Court in *Raj Deo Sharma* v. *State of Bihar* is partly in consideration of the legislative mandate contained in Section 309(1) of the Code. This is what the Bench said on that score: (SCC p. 516, para 16)

> "*16*. The Code of Criminal Procedure is comprehensive enough to enable the Magistrate to close the prosecution if the prosecution is unable to produce its witnesses in spite of repeated opportunities. Section 309(1) CrPC supports the above view as it enjoins expeditious holding of the proceedings and continuous examination of witnesses from day to day. The section also provides for recording reasons for adjourning the case beyond the following day."

16. In *Raj Deo Sharma (II)* v. *State of Bihar* this Court pointed out that the trial court cannot be permitted to flout the mandate of Parliament unless the court has very cogent and strong reasons and no court has permission to adjourn examination of witnesses who are in attendance beyond the next working day. A request has been made by this Court to all the High Courts to remind all the trial Judges of the need to comply with Section 309 of the Code. The request is in the following terms: (SCC p. 614, para 14)

> "*14*. We request every High Court to remind the trial Judges through a circular of the need to comply with Section 309 of the Code in letter and spirit. We also request the High Court

> concerned to take note of the conduct of any particular trial Judge who violates the above legislative mandate and to adopt such administrative action against the delinquent judicial officer as the law permits."
>
> 17. We believe, hopefully, that the High Courts would have issued the circular desired by the Apex Court as per the said judgment. If the insistence made by Parliament through Section 309 of the Code can be adhered to by the trial courts there is every chance of the parties cooperating with the courts for achieving the desired objects and it would relieve the agony which witnesses summoned are now suffering on account of their non-examination for days."

The Supreme Court in the case of **Mohd. Khalid Vs. State of W.B.** Reported in **(2002) 7 SCC 334** has held as under :

> **"54.** 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 *N.G. Dastane* v. *Shrikant S. Shivde*. In *Shambhu Nath Singh case* this Court deprecated the

practice of courts adjourning cases without examination of witnesses when they are in attendance with the following observations: (SCC pp. 671-72, para 9)

> "*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 sad plight in the trial courts that witnesses who are called through summons or other processes stand at the 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 the presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are stranded 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."

55. In *N.G. Dastane case* the position was reiterated. The following observations in the said case amply demonstrate the anxiety of this Court in the matter: (SCC p. 143, para 20)

> "*20*. An advocate abusing the process of court is guilty of misconduct. When witnesses are present in the court for examination the advocate concerned

> has a duty to see that their examination is conducted. We remind that witnesses who come to the court, on being called by the court, do so as they have no other option, and such witnesses are also responsible citizens who have other work to attend to for eking out a livelihood. They cannot be treated as less respectable to be told to come again and again just to suit the convenience of the advocate concerned. If the advocate has any unavoidable inconvenience it is his duty to make other arrangements for examining the witnesses who are present in the court. Seeking adjournments for postponing the examination of witnesses who are present in court even without making other arrangements for examining such witnesses is a dereliction of an advocate's duty to the court as that would cause much harassment and hardship to the witnesses. Such dereliction if repeated would amount to misconduct of the advocate concerned. Legal profession must be purified from such abuses of the court procedures. Tactics of filibuster, if adopted by an advocate, is also a professional misconduct."

The next question for determination is that whether under the facts and circumstances of the case, an opportunity can be given to the applicant to cross examine one witness or not?

The Supreme Court in the case of **Rajaram Prasad Yadav Vs. State of Bihar,** reported in **(2013) 14 SCC 461** has held as under :

> **"14.** A conspicuous reading of Section 311 CrPC would show that widest of the

powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "*any*" has been used as a prefix to "*court*", "*inquiry*", "*trial*", "*other proceeding*", "*person as a witness*", "*person in attendance though not summoned as a witness*", and "*person already examined*". By using the said expression "*any*" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or

re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 CrPC where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 CrPC.

15.1. In the decision in *Jamatraj Kewalji Govani* v. *State of Maharashtra [AIR 1968 SC 178]*, this Court held as under in para 14: (AIR pp. 182-83)

> "*14*. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, *and makes this the duty and obligation of the court provided the just decision of the case demands it*. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking

that the new evidence is needed by it for a just decision of the case. *If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction*."

(emphasis supplied)

15.2. In the decision in *Mohanlal Shamji Soni* v. *Union of India [1991 Supp (1) SCC 271]*, this Court again highlighted the importance of the power to be exercised under Section 311 CrPC as under in para 10: (SCC p. 277)

"*10*. … In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15.3. In the decision in *Raj Deo Sharma (2)* v. *State of Bihar [(1999) 7 SCC 604]*, the proposition has been reiterated as under in para 9: (SCC p. 613)

"*9*. We may observe that the power of the court as envisaged in Section 311

of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *A.R. Antulay case [(1992) 1 SCC 225]* nor in *Kartar Singh case [(1994) 3 SCC 569]* such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. *We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person*."

(emphasis in original)

15.4. In *UT of Dadra and Nagar Haveli* v. *Fatehsinh Mohansinh Chauhan [(2006) 7 SCC 529]*, the decision has been further elucidated as under in para 15: (SCC p. 538)

"*15*. A conspectus of authorities referred to above would show that the principle *is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case*, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of *finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as 'filling in a lacuna in the prosecution case'* unless the facts and circumstances

of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice."

(emphasis supplied)

15.5. In *Iddar* v. *Aabida [(2007) 11 SCC 211]*, the object underlying under Section 311 CrPC, has been stated as under in para 9: (SCC pp. 213-14)

"*9*. … '*27*. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. *The determinative factor is whether it is essential to the just decision of the case*. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of any inquiry or trial or other proceeding under this Code'. *It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind*.'*—"

(emphasis supplied)

15.6. In *P. Sanjeeva Rao* v. *State of A.P. [(2012) 7 SCC 56]* the scope of Section 311 CrPC has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paras 20 and 23, which are as under: (SCC pp. 63-64)

"*20*. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in *Hoffman Andreas* v. *Inspector of Customs [(2000) 10 SCC 430]*. The following passage is in this regard apposite: (SCC p. 432, para 6)

'*6*. … In such circumstances, if the new counsel thought to have the material witnesses further examined *the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible*.'

* * *

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the

consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. *Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself*[**]."

(emphasis in original)

15.7. In a recent decision of this Court in *Sk. Jumman* v. *State of Maharashtra [(2012) 12 SCC 486]*, the above referred to decisions were followed.

16. Again, in an unreported decision rendered by this Court dated 8-5-2013 in *Natasha Singh* v. *CBI [(2013) 5 SCC 741]*, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paras 15 and 16: (SCC pp. 748-49)

"*15*. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to *cause serious prejudice* to the defence of the accused, or to give an *unfair advantage to the opposite party*. Further, the additional evidence must not be

received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the

denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. [Vide *Talab Haji Hussain* v. *Madhukar Purshottam Mondkar [AIR 1958 SC 376]*, *Zahira Habibulla H. Sheikh* v. *State of Gujarat [(2004) 4 SCC 158]*, *Zahira Habibullah Sheikh (5)* v. *State of Gujarat [(2006) 3 SCC 374]*, *Kalyani Baskar* v. *M.S. Sampoornam [(2007) 2 SCC 258]*, *Vijay Kumar* v. *State of U.P. [(2011) 8 SCC 136]* and *Sudevanand* v. *State [(2012) 3 SCC 387]*.]"

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts,

which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity

> of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.
>
> **17.12.** The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
>
> **17.13.** The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
>
> **17.14.** The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. 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."

The Supreme Court in the case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav** reported in **(2016) 2 SCC 402** has held as under:

> "27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to

how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled

for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

The Supreme Court in the case of **State of Haryana Vs. Ram Mehar** reported in **(2016) 8 SCC 762** has held as under :

> **"39.** There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can

never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.

* * * * *

42. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC 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."

It is next contended by the counsel for the applicant, that the Trial Court has incorrectly mentioned in its order dated 26-5-2017, that the counsel for the applicant, came back to the Court, and he was asked to cross examine the witness in the question and answer form, but it was also refused by the counsel. It is submitted that this observation in order dated 26-5-2017 is incorrect, for the simple reason, that this fact is not mentioned in the deposition sheet of evidence of Ramgopal (P.W.5). Further more, Harswaroop Maheshwari has also given an affidavit in this regard.

The submission made by the counsel for the applicant cannot be accepted and hence rejected. It is a matter of common knowledge that the ordersheets are written after the recording of evidence of a witness is over. In the present case, it is clear that after the counsel for the applicant, left the Court room, the Trial Court enquired from the witness as well as from the Public Prosecutor who confirmed that the evidence of the witness is being recorded properly. Immediately thereafter, the accused/applicant was asked by the Court that whether he wants to cross examine the witness or not? The applicant simply replied that the cross examination shall be done by his same counsel and thereafter, the right of the applicant to cross examine the witness was closed.

From the order sheet dated 26-5-2017, it is clear that the counsel for the applicant, came back to the Court after some time of closer of right to cross examine the witness. The direction to close the right of the applicant to cross

examine the witness is the last line in the deposition sheet of the evidence of the witness. Thus, it is clear that the counsel for the applicant might have gone back to the Court when the ordersheet was being written, probably because of the fact that the Trial Court had already mentioned in the deposition sheet to send the recommendation for initiating Contempt of Court proceedings against the concerning lawyer. Thus, the contention of the applicant that since, in the deposition sheet, it was not mentioned by the Trial Court, that the counsel for the applicant had again came to the Court, therefore, the observation made by the Trial Court in the ordersheet was false, cannot be accepted. Even in the application under Section 311 of Cr.P.C., no such contention was made by the applicant before the Trial Court. Even in the present application filed under Section 482 of Cr.P.C., no such contention was made. However, during the pendency of this application, an affidavit in this regard has been filed, therefore, under the facts and circumstances of the case, the affidavit appears to be after thought and hence, it is rejected.

Thus, the prayer for recall of a witness cannot be allowed merely on the saying of the accused. There must be strong reasons and the same are to be exercised with great caution and circumspection. Magnanimity cannot be shown in favor of the accused, by applying the principle of "Interest of Justice". The reason for seeking recall of a witness must be bonafide and the accused himself should not be responsible for creating a situation where the Court is left with no other option but to close his right to cross

examine the witness. If the facts and circumstances of the present case are considered, then this Court is of the considered opinion that the applicant has failed to make out a case, pointing out that the cross examination of the witness was left in the mid way for the reasons beyond his control or beyond the control of his lawyer. In fact, this Court is of the view that it is the applicant, who himself is responsible for closer of his right to cross examine Ramgopal (P.W.5) and thus, the application filed by him under Section 311 of Cr.P.C. cannot be allowed.

Accordingly, this Court is of the considered opinion, that the Trial Court did not commit any mistake in rejecting the application filed under Section 311 of Cr.P.C. Consequently, the order dated 19-1-2018 passed by Shri Ramesh Kumar Shrivastava, 1st A.S.J./Special Judge (Prevention of Corruption Act), Morena in Special Sessions Trial No. 11/2015, is hereby affirmed.

This application fails and is hereby **dismissed.**

Let a copy of this order be sent to the Trial Court immediately.

(G.S. Ahluwalia)
Judge

(alok)