

THE HIGH COURT OF MADHYA PRADESH**M.Cr.C. No.15756/2019****Ballu Khan alias Ballu Kha alias Jahoor Shah Vs. State of M.P.****Gwalior, Dated :16/04/2019**

Shri Sushil Goswami, Advocate for applicant.

Shri Purshottam Pandey, Public Prosecutor for respondent/State.

This application under Section 482 of Cr.P.C. has been filed against the order dated 4/4/2019 passed by the Special Judge (MPDVPK, Act) Shivpuri in Special Sessions Trial No.35/2016, by which the application filed by the applicant under Section 311 of Cr.P.C. for recall of witness has been rejected.

2. The necessary facts for disposal of the present application in short are that the applicant is facing trial for offences under Sections 392 and 395 of IPC read with Section 11/13 of the MPDVPK Act. The applicant is being represented by his counsel. It is the case of the applicant that his counsel did not cross-examine the witnesses at all and even important questions were not put to prosecution witnesses Alakhram and Padam Singh Dhakad. When the applicant contacted his counsel at Gwalior alongwith the deposition-sheets of the witnesses, then he was told that no cross-examination much less effective cross-examination has been done by the counsel for the applicant, accordingly, an application under Section 311 of Cr.P.C. was filed for recall of the prosecution

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witnesses, namely, Padam Singh, Alakhram, Manoj Gupta, Subham Gupta, Manju Gupta, Mohan Singh, Roshan Singh, Praveen Kumar, Parvez Khan. The trial court by order dated 4/4/2019 has rejected the application.

3. Challenging the order passed by the court below, it is submitted by the counsel for the applicant that it is well established principle of law that a party must not suffer because of the fault of his counsel. No effective cross-examination was done by his earlier counsel, as a result of which, the applicant would suffer irreparable loss.

4. *Per contra*, the submissions made by the counsel for the applicant are opposed by the counsel for the State and it is submitted that once an opportunity was granted to the applicant, then the applicant cannot be permitted to recall the witnesses as per his luxury.

5. Heard learned counsel for the parties.

6. The only submission made by the counsel for the applicant for challenging the correctness of the impugned order dated 4/4/2019 is that the counsel for the applicant had not cross-examined the witnesses and, therefore, he would suffer irreparable loss.

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7. This Court cannot presume incompetency of a lawyer, on the contrary, any law graduate, who has been registered with the Bar Council and is practicing on legal side, has to be presumed to be a competent lawyer. The witnesses cannot be recalled merely because the subsequently engaged lawyer is of the view that the previous lawyer has not performed his duties efficiently or the previous lawyer was an inefficient lawyer. The Supreme Court in the case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav and another** reported in **(2016) 2 SCC 402** has held as under:-

“16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the authorities concerned including the Law Commission and the Bar Council of India.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also.

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The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial Court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

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8. So far as the contention of the counsel for the applicant that the applicant must not suffer because of the fault of the counsel is concerned, the same cannot be accepted in absence of any action by the applicant against his previously engaged lawyer. If the applicant is of the view that his earlier lawyer had deliberately not performed his duties and is guilty of professional misconduct, then he has a remedy of approaching the Bar Council. Similarly, if the applicant is of the view that he would suffer irreparable loss because of the professional misconduct of his previously engaged lawyer, then the applicant has a remedy of seeking compensation against his lawyer, who has failed in discharging his duties and is guilty of professional misconduct. This Court cannot recall the witnesses merely on the ground that the previously engaged lawyer is guilty of professional misconduct. Under these circumstances, where full opportunity of hearing was given to the applicant and if he has failed to avail the same, then the witnesses cannot be recalled only on the said ground.

9. Resultantly, this application fails and is hereby **dismissed**.

Arun*

(G.S. Ahluwalia)
Judge