IN THE HIGH COURT OF MADHYA PRADESH

AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 24th OF APRIL, 2025

MISC. CRIMINAL CASE No. 38555 of 2024

RINKU BARAIYA

Versus

THE STATE OF MADHYA PRADESH AND OTHERS

Appearance:

Shri Alok Dubey, Advocate for the applicant.

Shri Ajay Kumar Nirankari, Public Prosecutor for respondent No.1/State.

Shri Anil Kumar Mishra, Advocate for respondent No.2.

ORDER

This application, under Section 528 of BNSS, has been filed against the order dated 27/8/2024 passed by Additional Sessions Judge designated as Special Judge (under the Electricity Act) No.4, Gwalior in ST No. 500117 of 2015, by which application filed by the applicant for recall of Dr. U.S. Tiwari for cross-examination has been rejected.

2. It is submitted by counsel for applicant that earlier Shri Alok Dubey, Advocate was appearing on behalf of all the accused persons and Dr. U.S.

Tiwari was also cross-examined by him. Thereafter, Shri Rishabh Mishra was engaged as counsel by the applicant. It was found that certain important questions were not put by Shri Alok Dubey, Advocate. Therefore, an application under Section 311 of Cr.P.C was filed for recall of Dr. U.S. Tiwari. However, by the impugned order dated 27/8/2024, Court below has rejected the said application.

3. Challenging the order passed by the Court below, it is submitted by counsel for applicant that earlier counsel could not ask certain important questions to the witness and, therefore, prosecution witness Dr. U.S. Tiwari should have been recalled in order to avoid any irreparable loss to the applicant.

4. Heard learned counsel for the applicant.

5. The moot question for consideration is as to whether a witness can be recalled merely because of change of counsel or not ?

6. 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 :-

> "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. 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."

7. Furthermore, unnecessary adjournments and harassment of witnesses should also be avoided. 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."

8. 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."

9. 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."

10. 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."

11. Thus, it is clear that only change of counsel cannot be a ground to recall a witness. Even otherwise, convenience of witnesses cannot be ignored and the accused cannot be allowed to hijack the proceedings of the trial Court as per his own convenience. Furthermore, applicant has also not filed copy of the deposition sheets of Dr. U.S. Tiwari to show that which important questions were not put to him. This Court cannot presume that the lawyer who was engaged by applicant voluntarily was incompetent.

12. Accordingly, this Court is of considered opinion that the trial Court did not commit any mistake by rejecting the application for recall of Dr. U.S. Tiwari.

13. Application fails and is hereby dismissed.

(Justice G.S.Ahluwalia)

Judge

(and)