



JUDGMENT & ORDER

1. This criminal petition is filed challenging the impugned order dated 09.08.2023 passed by the Judicial Magistrate First Class, Sohra Sub-Division, East Khasi Hills District in GR Case No. 1(1) of 2015 (renumbered as GR. No. 1(A) 2021) under Section 403/406/409/420 IPC whereby the application filed by the respondent under Section 311 Cr.PC for recalling the PW-2 was allowed.

2. The respondent as accused is facing trial in GR Case No. 1(1) of 2015 under Section 403/406/409/420 IPC pending before the Court of the Judicial Magistrate First Class, Sohra. In the said trial, as many as 18 prosecution witnesses were examined. Before the recording of the statement of the respondent under Section 313 Cr.PC, an application under Section 311 Cr.PC was filed on behalf of the respondent seeking recall of PW 2 for re-examination which was allowed by the Trial Court by order dated 09.08.2023. Assailing the said order of the Trial Court, the State has filed the present criminal petition.

3. Mr. N.D. Chullai , learned AAG appearing for the petitioners submits that recalling of PW-2 on the ground that the previous counsel did not put certain question to the said witness cannot be a valid ground under Section 311 Cr.PC. He submits that mere change of counsel or incompetence of counsel cannot be a legally justifiable ground for recalling of witness in a criminal trial. He further submits that the reason



cited in the application for recall and the observation made by the learned Trial Court in the impugned order dated 09.08.2023 do not project existence of any strong and valid reason for allowing the application. He contends that the PW-2 was thoroughly examined by the prosecution as well as the defence and hence there was no justifiable reason for the Trial Court to allow the application of the respondent. The learned AAG places reliance on the decisions of the Apex Court reported in (2016) 2 SSC 402, *State (NCT of Delhi) Vs. Shiv Kumar Yadav and Anr.* (para 15, 17 and 27) to contend that recall of witness on the ground that cross examination was not proper for reasons attributable to a counsel is not a valid ground and there cannot be a rule that a re-trial must follow on every change of counsel. He submits that the impugned order is passed in defiance of the settled principle of law and is liable to be set aside and quashed.

4. Mr. T.L. Jyrwa, learned counsel for the respondent, on the other hand submits that recall has not been sought only on the ground of change of counsel but also for correcting some bonafide error which was committed by not putting question on certain factual aspect of the case to the PW-2. He submits that PW-2 is a vital witness in the matter and in absence of disclosure of certain factual aspect by him, the trial cannot come to a correct conclusion. He further submits that the respondent No.2 was not represented by a counsel of his choice at the time when the PW-2 was examined by the Trial Court. He also submits that the Trial Court has allowed the application for recall by passing a detailed and well-reasoned order by taking into consideration all the relevant aspect of the matter. The learned counsel submits that the accused in a criminal trial deserves



to get fairest opportunity to prove his innocence in the trial. To buttress his argument, the learned counsel has referred to a decision of the Apex Court reported in (2013) 14 SCC 461, *Rajaram Prasad Yadav Vs. State of Bihar and Anr.*, (para 15.6) and submits that the impugned order does not suffer from any illegality or infirmity requiring interference by this Court.

5. The materials on record reveals that the PW-2 was the Secretary of the village as well as of the Village Water & Sanitation Committee (VWSC) of Laitmawsiang village, which was the implementing agency of scheme for Individual Household Latrines (IHHLs) and being the Secretary had played vital role in withdrawal and disbursement of the sanctioned amount of money along with the accused who was the then Chairman of the Committee. The evidence of the said witness, as such, is of utmost importance for determination of truth in the case. Although the said witness was cross examined on behalf of the accused/respondent herein by a legal aid counsel, but not by a counsel of his choice. The reason stated by the respondent in his application of recall is that certain question of facts, which are of vital importance, was not put to the PW-2 by the previous counsel and denial of opportunity to put such pertinent questions on facts would greatly affect the outcome of the trial. It was also asserted that no repetitive question would be put to the said witness and the re-examination is sought for the purpose of gathering fresh materials on facts strictly based on the knowledge of the witness. Thus, the reasons cited therein appears to be for correction of bonafide error not related to mere convenience.



6. The learned Trial Court while passing the impugned order dated 09.08.2023, has taken into consideration the fact of the case as well as the importance of the evidence of PW-2 in the matter. The Trial Court has also taken into consideration relevant laws pertaining to recall of witness and scope and ambit of power under Section 311 Cr.PC and thereafter, by a reasoned order held that re-examination is required to shed more light to the case and will help the court to arrive at a just decision to avoid injustice and miscarriage of justice. There can be no doubt that at the stage of trial, the trying court is best suited to judge the factual aspect of a criminal trial and importance of each and every witness examined or to be examined during the course of trial. Until and unless the Trial Court commits a manifest error of fact or law, the decision taken by it in an application under Section 311 Cr.PC should not be interfered with.

7. The decision of *State (NCT of Delhi) Vs. Shiv Kumar Yadav and Anr*(supra) relied on by the learned AAG does not put an absolute bar on recalling of a witness just because the application for recalling has been preferred after the change of counsel. The proposition laid down therein, says that a witness shall not be recalled on mere asking or on the ground of change of counsel by citing reason attributable to previous counsel. It is provided therein that a party is also permitted to correct its bonafide 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 bonafide and has to be balanced carefully with other relevant consideration including uncalled for hardship to the witness and uncalled for delay in the trial. It is also



provided that it has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. In the instant, matter there is no dispute that the respondent was represented by a legal aid counsel at the time when the PW-2 was examined before the Trial Court and not by a counsel of his choice, hence the presumption of competency of the Counsel is not automatic.

8. The petitioners in this case have not challenged the impugned order by contending that the recalling of witness will result in uncalled for delay in the trial. It is also not the case of the petitioners that the passing of impugned order has resulted in causing hardship to the witness. Furthermore, in the facts and circumstances of the present case, it cannot be said that the impugned order has the effect of extending undue advantage to the respondent by causing prejudice to the case of the prosecution.

9. The paramount requirement for consideration to exercise jurisdiction under Section 311 Cr.PC is whether calling of a witness is necessary for the just decision of a case. The learned Trial Court in its order dated 09.08.2023 has held that re-examination of PW-2 by the accused person is a valid reason to enable the accused person to shed more light to the case and to also prove his innocence and in other words, it will help the court to arrive at a just decision and to avoid injustice and miscarriage of justice. Since there exist a categorical finding that the re-examination of the PW-2 would help the Trial Court to arrive at a just decision and there is no apparent reason to doubt the said finding, the decision of the Trial Court cannot be faulted.



10. In view of the above, no case has been made out by the petitioners for interfering with the impugned order dated 09.08.2023 and hence, the criminal petition stands dismissed.

Judge

Meghalaya
01.07.2024
" N. Swer, Stenographer, Gr-II "