HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Case: Cr. Rev. No.14/2010

Date :21 .12.2010

Mukhtar Ahmed and ors. Vs. State of Jammu & Kashmir

Coram:

Hon'ble Mr. Justice Virender Singh, Judge

Appearing counsel:

For petitioner(s) : Mr. P. N. Goja, Advocate.
For respondent(s): Mr. B. R. Chandan, Dy. AG.

i) Whether approved for reporting in Press/Journal/Media : Yes

ii) Whether to be reported in Digest/Journal : Yes

All the four petitioners (to be referred as 'accused') are facing trial in case F.I.R. No. 250/2006 registered at Police Station Banihal under Sections 8/20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short to be referred to as 'NDPS Act') for allegedly found to be in possession of 10 kg., (ten kilograms) of Charas. They are stated to be in custody since November, 2006.

Since the prosecution after availing many opportunities could not conclude its evidence, the learned trial Court vide order dated 04.11.2008 (Annexure-A) closed the evidence of prosecution and put the trial to next step i.e. recording the statement of the accused under Section 342 Cr.P.C., which was also done and after that accused were given an opportunity to lead evidence. When the case was amidst hearing arguments and the matter was being argued by the Public Prosecutor, an

application under Section 540 Cr.P.C. was filed by the State for calling Investigating Officer and SDPO Banihal, which was opposed by the accused vehemently, but ultimately allowed by the learned Sessions Judge, Ramban vide impugned order dated 23.02.2010. A fixed particular date for recording the statement of the aforesaid two witnesses was fixed. Aggrieved of the said order, the accused have knocked the door of this Court through the instant criminal revision petition in which while issuing notice, further proceedings before the trial Court are stayed.

Pursuant to the notice, Mr. B. R. Chandan, Dy. AG has put in appearance. Trial Court record is also attached with the instant petition.

Heard Mr. P. N. Goja, Advocate, learned counsel for all the accused and Mr. B. R. Chandan, learned State counsel. Record also perused and the judgment reserved.

At the very outset, Mr. Chandan, learned State counsel submitted that the instant revision petition is not maintainable, as calling or refusing to call a witness during the trial is an interlocutory order. He cited Division Bench judgment of this Court in case '**S. K. Mahajan Vs. Municipality, Jammu and ors.**' reported in **1982 Kashmir Law Journal 1**, wherein in para 15, it is observed thus:-

> **"15. No party has a right to have a witness examined under Section 540. It can only draw the attention of the Court by making a prayer to that effect. Whether or not a witness is to be examined under this section, the discretion entirely lies with the**

court, though it may be obligatory on its part to summon the witness in case his evidence appears to it to be essential for the just decision of the case. Nevertheless, it is the requirement of the court and not that of the party to see whether or not a witness is to be examined. Viewed thus, an order granting or refusing the prayer of the party to have a witness examined under section 540 cannot be said to have determined any right of the parties and consequently fails to acquire the flavour of a final order. It is an interlocutory order, pure and simple. I am not prepared to accept the proposition, which to me too narrowly stated, that unless the order brings an end to the proceeding in which it is made, it cannot be said to be a final order. This, in fact, was the connotation placed upon the expression "final order" in Kuppaswami's case (supra) . But it was not accepted by the Supreme Court in Madhu Limay's and V.C.Shukla's cases (supra). The apparent conflict was, however, sought to be avoided by creating a third category of orders to be known as "intermediate orders" as would appear from the following observations made by his Lordships S.M.F Ali J, expressing the majority view in V. C. Shukla's case (supra):

> ***"To sum up, the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order***

is one which is made between the commencement of an action and the entry of the judgment, Untwalia J. in the case of Madhy Limaye vs. State of Maharashtra clearly meant to convey that an order framing charge is not an interlocutory order but is an intermediate order as defined in the passage, extracted above, in Corpus Juris Secundum, Vol. 60. We find ourselves in complete agreement with the observations made in Corpus Juris Secundum. It is obvious that an order of framing the charge being an intermediate order falls squarely within the ordinary and natural meaning of the term "interlocutory order" as used in S. 11 (1) of the Act."

Mr. Chandan then submitted that while following the ratio of S.K. Mahajan' case (supra), this Court (Single Bench) in another case titled '**Hem Raj Vs. State'** reported in **2006 (1) SLJ 96** has dismissed the revision petition of an accused whose application for recalling witnesses was rejected holding it to be interlocutory order.

Mr. Goja was not able to show any law contrary to it.

In view of the above, on this short ground alone, the instant revision petition merits dismissal.

The other aspect of the case is, whether the impugned order is liable to be quashed being abuse of the process of the Court or to secure the ends of justice under inherent powers of

this Court enshrined under Section 561-A Cr.P.C. (corresponding to Section 482 of Central Code), despite revision petition being not maintainable, because of the statutory bar.

Section 540 Cr.P.C. (corresponding to Section 311 of Central Code) is in two parts. The first part deals with the discretionary power of the Court, whereas the second part imposes upon the Court an obligation for summoning or recalling or examining any witness. So far as first part is concerned, the Court can exercise its discretion at any stage during the trial till the judgment is pronounced, whereas according to the second part, the need of recalling or summoning the witness would arise when the Court feels that the evidence of a particular witness is essential to the just decision of the case. While dealing with this aspect in case, '**Mohan Lal Shamji Soni v. Union of India and another**' reported in **1991 supp. (1) SCC 271**, their Lordships of Apex Court in para 16 of the judgment observed thus:

> **"16. The second part of section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any part to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision-either discretionary or mandatory-depending on the facts and circumstances of each case, having in view**

> **that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice. In this connection, we would like to quote with approval the following views of Lumpkin, J. in Epps v. S., 19 Ga 118 (Am), which reads thus:**
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> ***"..it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly...Counsel seek only for their client's success; but the judge must watch that justice triumphs."***

Crux of the ratio of the aforesaid judgment is that the only test of exercising discretion under Section 540 Cr.P.C. is the exigency of service and fair play. Legally there cannot be any limitation on the power of the Court arising from the stage to which trial may have reached for examination of a particular witness under this Section. The note of caution is that examination of a particular witness should be for a just decision of the case. It is also well settled and accepted principle that a Court must discharge its statutory function whether discretionary or obligatory according to law in dispensing justice. A judge is neither pro prosecution, nor pro accused. He is always pro justice.

Let us advert to the case at hand. Undoubtedly, the prosecution after availing many opportunities could not exhaust

the list of witnesses inasmuch as, even the Investigating Officer and SDPO, who in the present case, were very important witnesses could not step into witness box because of certain lapses on the part of prosecution, which ultimately constrained the trial Judge to close the evidence of the prosecution by the order of the Court. This is how the discretion was once used by the Court at one stage considering that the prosecution did not deserve any more opportunity. It is also apparent on record that thereafter no application for examining any of the left over prosecution witness was moved by the prosecution till the trial reached the stage of arguments and during the course of arguments, the Public Prosecutor moved an application under Section 540 Cr.P.C. for the examination of aforesaid witnesses. The delay in filing the said application for one or other reason, is apparent on record, but the casual approach shown by the official handling the State case should not stand in the way of substantial justice. After all justice is not to be made casualty at the hands of the prosecution. Therefore, a corresponding duty is cast upon the presiding officer to see that the cause of justice is advanced. However, this depends upon the facts of each case and in the present case, the trial Court has rightly adopted the correct approach.

The accused have been charged under Sections 8/20 of NDPS Act for having in their possession a huge quantity (Commercial Quantity) of Charas weighing 10 K.G. In such type of case, the Investigating Officer is the most important witness as he is one, who starts with the investigation, prepares recovery

memo(s) and other important documents at the spot while following the provisions of the Act. Therefore, his examination in the Court was very necessary. The other witness (SDPO Banihal) was also not less important witness to unfold the prosecution case. Seeing it from that angle, evidence of both these witnesses is essential for the just decision of the case. At the same time, their examination would not cause any injustice to the accused side as the prosecution does not want to bring any fresh material on record against them, which can be termed as filling up lacunae in its case. Role of both these witnesses was made known to the accused in the challan itself submitted against them. No doubt, calling these two witnesses in the witness box would certainly cause some delay in the conclusion of the trial and the right of speedy trial is available to the accused as enshrined under Article 21 of the Constitution of India, but considering the entirety of facts of the present case, in my considered view, the evidence of the aforesaid two witnesses when compared with delay, becomes more essential to serve the ends of justice, which is paramount. Provisions of Section 561-A Cr.P.C. are devised to advance justice and not to frustrate it. Therefore, I do not find any good ground for quashing the impugned order under inherent powers of this Court.

As all the four accused are languishing in jail since November, 2006, the trial of the case deserves to be wrapped up at the earliest as it has been delayed considerably for one reason or the other. Therefore, the Prosecution is granted only one opportunity to produce the aforesaid two witnesses in the Court.

The prosecution agency will be at liberty to seek dasti summons also in this regard. Trial Court record be sent back immediately so that the trial is put on track without any further delay by fixing the calendar.

The net result is that the instant petition is dismissed having no merit in it.

Before parting with the order, I would like to observe here that the cases falling under NDPS Act are not to be taken lightly/casually neither by the prosecution nor by the Court. Such type of cases are required to be put on fast track by the Court, may be by disturbing its regular calendar. In such type of cases, the number of witnesses are very few, mainly the witnesses of recovery, which includes the Investigating Officer also. Therefore, trial Court should ensure that the witnesses to the recovery, which are hardly 3/ 4 in number are examined in one set on one particular date at least, that too by fixing a short date after charge(s) are framed against the accused. The investigating officer of the case can be called by the Public Prosecutor in advance to ensure the presence of witnesses on the date(s) fixed by the trial Court. By doing so, in my view, within a short span, the prosecution can exhaust its list and thereafter by giving a reasonable opportunity to the accused for producing his evidence in defence, if he so chooses, certainly after recording statement under Section 342 Cr.P.C., the entire trial process can culminate within four to six months.

At the same time, cases under N.D.P.S. Act should be handled only by those police officer(s), who has been imparted

special training in this regard and are in know of the provisions of the Act. Mishandling of the case of this type has far reaching effect, which in turn, can disturb the entire social fabric. Therefore, a sincere effort is required in this direction so that real culprit involved in the nefarious activity does not have any escape, simply on account of procedural flaws at the end of the prosecution.

I have been informed that Narcotic Central Bureau (J&K Zone) is already functional in the State. Therefore, it would be most appropriate, if the cases registered under N.D.P.S. Act are investigated by specialized hands.

Let copy of the order be sent to all District & Sessions Judges, Chief Secretary/ Director General of Police (DGP), State of Jammu and Kashmir, and also to Incharge Narcotic Central Bureau (J&K Zone) for immediate attention and appropriate action.

Registrar Judicial to comply with the order at once.

(Virender Singh)
Judge

Jammu
21.12.2010
Narinder