

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

...
CRR No.18/2011

Reserved on: 27.09.2022

Pronounced on: 29.10.2022

State of J&K through police station Zainapora

.....Petitioner(s)

Through: Mr. Asif Maqbool, Dy. AG

Versus

Zia Mustafa and others

.....Respondent(s)

Through: Mr. I. Sofi, Advocate for
respondents 2 to 6.

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Through the medium of this criminal revision petition, the petitioner is seeking setting-aside of the order dated 09.02.2011, passed by the court of the learned Principal Sessions Judge, Shopian (for short "*court below*") in a case-FIR No.24/2003 u/s 302, 450, 395, 120-B, 307, 326, 427 RPC, 7/27 Arms Act & 30 P.Act, titled State through Police Station Zainapora vs. Zia Mustafa Alias Ubaz Alias Abdullah Umar and others, whereby the court below has application of the petitioner for recording the statement of witnesses on commission has been dismissed and the evidence of the prosecution has been closed.

2. It is stated in this revision petition that a case FIR no.24/2003 was registered in police station Zainapora in connection with the brutal killing of

24 individuals at Village Nadimarg in the year 2003 and all the assassinated persons were belonging to the minority community and that the brutal killings of the minority community members resulted in mass migration of the remaining people of the minority community from the said village and are reported to be living at Purkhoo Camp, Muthi Camp and Mishriwala Jammu. It is also submitted that after completing the investigation in the case, the concerned police filed a challan before the trial court at Pulwama wherefrom the case was committed to the court of Sessions at Pulwama and as many as 38 witnesses were cited in the calendar of witnesses and after creation of Shopian District, the case was transferred to the court below for further trial. It is contended that the prosecution was able to have got recorded depositions of 13 witnesses and the prosecution despite the strenuous efforts has not been successful in securing the presence of the other witnesses and even the learned court below issued notices and warrants for securing the presence of the witnesses, but they did not chose to appear and record their depositions and therefore, the prosecution filed an application before the court below so that the commission is to ensure the examination of the witnesses, list of whom was also provided along with the application, who are presently residing at Purkhoo Camp, Muthi Camp and Mishriwala, Jammu. It is also submitted that after calling objections from the defence, in which the defence objected to the application and after hearing the matter, the court below opined that the application has been filed at a belated stage just to avoid the disposal of the case with further observation that since all the witnesses are very important and their statements cannot be taken on commission.

3. I have heard the learned counsel for the parties and considered the matter.

4. The learned counsel for the petitioner has stated that the court below has not appreciated in its right perspective the ultimate goal of the criminal trial, which is not only to comply the procedural requirements of the Code of Criminal Procedure but also to find out the truth and subject all the concerned to the process of law and that the basic purpose of the criminal justice administration system is defeated if the true facts are not revealed before the court and for that purpose it is the duty of the court to exhaust all the means at its disposal to ensure that the relevant evidence is brought on record and it is with this view that the prosecution has resorted to the section 503 Cr.P.C. but the application of the prosecution has been rejected, which has caused miscarriage of justice.

5. The learned counsel for respondents 2 to 6 has stated that the delay tactics of the prosecution has resulted miscarriage of justice and prejudice has been caused to the accused. He has also stated that accused no.1 has been charged for the commission of offence under Section 302 RPC whereas rest of the accused have been charged for the offence under section 30 of the Police Act. It is submitted that the prosecution has admitted that the witnesses have migrated to Jammu and are residing at Jammu and the prosecution ought to have filed the application when the case was in its infancy and that the prosecution has deliberately delayed the case just to harass the accused persons and as per the evidence on record, the prosecution has failed to establish the guilt against them and till date the

prosecution has not brought to the knowledge of this court that the witnesses are not ready to appear or any of the witnesses desire that they may be examined on commission.

6. It is pertinent to mention here that Chapter XL of the Code of Criminal Procedure pertains to the commission of the examination of the witnesses. Section 503 Cr.P.C. is reproduced as under:

“503. When attendance of witness may be dispensed with and commission issued.— (1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to the High Court, Court of Session, or any Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable such Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter :

Provided that where the examination of the President or the Vice-President or the Governor of a State in India or the Governor of this State as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) The Court may when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fee, be paid by the prosecution.”

7. Section 503 Cr.P.C., which is almost *parimateria* to Section 284 of the Central Cr.P.C., provides that whenever, in the course of any inquiry, trial or other proceedings, it appears to the High Court, Court of Sessions or any Magistrate that the examination of witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense of inconvenience which under the circumstances of the case would be unreasonable such court or magistrate may dispense with the attendance and may issue a commission for the examination of the witness.

8. The Supreme Court in ***State of Maharashtra vs. Dr. Praful B. Desai***, (2003) 4 SCC 601, has held that recording of evidence by way of video-conferencing is permissible. The Supreme Court has said that in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the court may dispense with such attendance and issue a commission for examination of the witnesses. The Supreme Court has also said that where attendance of witness cannot be procured, the court could consider issuing a commission to record the evidence by way of videoconferencing.

9. Section 504 Cr.P.C., which is almost *parimateria* to Section 284 of the Central Cr.P.C., *inter alia*, provides that if the witness is within the territories to which the Code extends, the commission shall be directed to the District Magistrate within the local limits of whose jurisdiction the witness is to be found.

10. The Supreme Court in the aforesaid case of ***Dr. Praful B. Desai*** has also held that new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence and that where a witness is willing to give evidence an official of the Court can be deputed to record evidence on commission by way of video-conferencing and the evidence will be recorded in the studio/hall where the video-conferencing takes place.

The present case can also be dealt with on the same lines as has been adopted and directed by the Supreme Court in the aforesaid case of **Dr. Praful B. Desai**. So, the court below, in the present case, could have allowed the application of the prosecution-petitioner and could have recorded the statement of witnesses on commission or through video-conferencing.

11. In the case of **Manju Devi vs. State of Rajasthan and another, (2019) 6 SCC 2093**, the Supreme Court has held that the age of a case cannot be decisive of the matter when a prayer is made for examination of material witness and that issuing of commission and recording evidence through videoconferencing appears to be a viable alternative and directed the trial court to take all requisite steps so as to ensure that evidence comes on record with least inconvenience and/or burden to the parties and the witness.

12. It has been rightly stated by counsel for the petitioner that the court below has not appreciated the difficulty of the prosecution in procuring the presence of the witnesses and that endeavour of the court below in a case of heinous nature like one on hand should be to examine all the witnesses on commission so as to unveil the truth.

13. In view of above well settled legal position laid down by the Supreme Court, I am of the view that the court below has dismissed the application of the prosecution-State for examining the witness on commission on the irrelevant consideration while overlooking the material and relevant aspects of the case. The said application of the prosecution for recording statement of witnesses on commission deserved to be allowed.

14. Accordingly, this revision petition is **allowed** and order dated 09.02.2011, passed by the court below is set-aside, and the application for issuance of commission for examination of witnesses moved by the prosecution-State/petitioner is allowed. The court below shall now take all the necessary measures for ensuring the examination of the witnesses concerned by issuing commission and/or recording their statement videoconferencing and shall ensure expeditious proceedings so as to conclude the matter at the earliest.

15. Disposed of.

16. Copy of this judgment be sent to the Trial Court for compliance.

(Vinod Chatterji Koul)
Judge

Srinagar
29.10.2022
Paramjeet, PS

Whether approved for reporting? Yes/No.

