

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT SRINAGAR

Reserved on: 22.08.2022

Pronounced on: 24.08.2022

CrlM No.4395/2022

STATE THROUGH P/S ZAINAPORA ... PETITIONER(S)

*Through: - Mr. Asif Maqbool, Dy. AG.*

Vs.

ZIA MUSTAFFA & ORS ...RESPONDENT(S)

*Through: - Mr. I. Sofi, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) This is an application filed by the prosecution seeking recall of order dated 21.12.2011 passed by this Court in Criminal Revision No.18/2011, whereby the aforesaid criminal revision petition has been dismissed.

2) It appears that FIR No.24/2003 for offences under Sections 302, 450, 395, 307, 120-B, 326, 427 RPC, 7/27 Arms Act and Section 30 Police Act came to be registered with Police Station, Zainapora in connection with brutal killing of 24 persons belonging to minority community at Village Nadimarg in the year 2003. After investigation of the case, the challan came to be filed against as many as seven

accused persons initially before the Court of Principal Sessions Judge, Pulwama, that was later on transferred to the Court of Principal Sessions Judge, Shopian, upon the creation of the said court.

3) It seems that during the pendency of the trial, the prosecution moved an application before the trial court seeking permission to examine material prosecution witnesses on commission, as according to the prosecution, these witnesses had migrated out of Kashmir Valley and they were reluctant to depose before the trial court at Shopian in view of the threat perception. The aforesaid application came to be dismissed by the Principal Sessions Judge, Shopian, vide his order dated 09.02.2011. The said order was challenged by the prosecution by way of Criminal Revision Petition No.18/2011. On 21.12.2011, the aforesaid revision petition came to be dismissed by this Court. It is this order which is sought to be recalled by the petitioner by way of the instant application.

3) I have heard learned counsel for the parties and perused the material on record.

4) Learned counsel for the petitioner has contended that the order sought to be recalled has been passed without

hearing the petitioner and without adverting to the merits of the case. According to the learned counsel, the said order is non-est in the eyes of law as a criminal revision petition cannot be dismissed for non-prosecution.

5) On the other hand, learned counsel for the respondents has contended that a criminal court has no jurisdiction to review its own order in view of the specific bar contained in Section 369 of the J&K Cr.P.C, which is applicable to the instant case.

6) Before adverting to the rival contentions of the learned counsel for the parties, it would be apt to notice certain other developments that have taken place after the passing of order dated 21.12.2011.

7) It appears that the petitioner-State filed a petition seeking Special Leave to Appeal against the judgment and order dated 26.02.2014 passed by this Court in a petition bearing 561-A No.243/2012. The said petition was filed by the petitioner-State before this Court to challenge the proceedings from the date of framing of charge by the trial court and a direction was sought for fresh trial of the case or in the alternative to transfer the case to any court of competent jurisdiction at Jammu so that statements of all

the migrated witnesses available at Jammu are recorded in the said case without any fear. The said petition came to be dismissed by this Court in terms of order dated 26.02.2014 and the said order, as already noted was challenged by the State before the Supreme Court by way of a Special Leave to Appeal.

8) On 16.07.2015, the Supreme Court disposed of the Special Leave to Appeal by observing as under:

*“Looking at the facts of the case, in our opinion, it would be proper if an application for recall is filed before the High Court so that the order dated 21.12.2011 may be recalled.*

*Needless to say, if an application is filed for recall of the order, the observations made in the impugned order shall not be taken into account while deciding the application.*

*In view of the above, the Special Leave Petition is disposed of.”*

9) As is clear from the afore-quoted order of the Supreme Court, the petitioner-State has been given liberty to file a recall application before this Court so that order dated 21.12.2011 may be recalled.

10) The contention of the learned counsel for the respondents is that the impugned order cannot be recalled as a Criminal Court including the High Court, in exercise of its criminal jurisdiction, does not have power to review its own order. There can be no dispute to the proposition of

law canvassed by learned counsel for the respondents but it is equally a settled proposition of law that a criminal revision petition cannot be dismissed for non-prosecution. Though this Court, while dismissing the Criminal Revision Petition No.18/2011, has observed that the order of the trial court is well-reasoned and the same does not call for interference but the fact of the matter remains that the Court was persuaded to dismiss the revision petition, primarily, because nobody had appeared on behalf of the petitioner-State. The order dated 21.12.2011 does not specify the reasons as to why the revision petition lacks merit.

11) The Supreme Court in the case of **Madan Lal Kapoor vs. Rajiv Thapar and others**, (2007) 7 SCC 623, has held that a criminal matter cannot be dismissed for default and that it must be decided on merits because such matters relate to administration of criminal justice. In the same judgment, the Supreme Court has categorically held that a criminal revision petition cannot be dismissed for non-prosecution.

12) In **State of Punjab vs. Davinder Pal Singh Bhullar and others**, (2011) 14 SCC 770, the Supreme Court has, while examining the bar to review/alteration of a judgment

in view of the provisions contained in Section 362 of the Central Cr. P. C, which is in *pari materia* with Section 369 of the J&K Cr. P. C, observed as under:

*“ If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. (Vide Chitawan & Ors. v. Mahboob Ilahi,; Deepak Thanwardas Balwani v. State of Maharashtra, Habu v. State of Rajasthan; Swarth Mahto v. Dharmdeo Narain Singh; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, Asit Kumar Kar v. State of West Bengal & Ors., and Vishnu Agarwal v. State of U.P. & Anr.”*

13) From the foregoing enunciation of law on the subject, it is clear that the power of recall is different from the power of review of the judgment. Therefore, this Court does have jurisdiction to recall an order which is a nullity in the eyes of law.

14) As already noted, the criminal revision petition against the impugned order passed by the learned Sessions Judge, Shopian, has been dismissed by this Court without hearing the petitioner and without giving reasons for its dismissal. Therefore, the same can be recalled by this Court by

treating the said order as a nullity being against the settled law that a criminal revision petition cannot be dismissed for non-prosecution. Even otherwise, the observations of the Supreme Court in the order dated 16.07.2015, as quoted hereinbefore, clearly indicate that the order dismissing the revision petition deserves to be recalled so that the legality of the impugned order passed by the Principal Sessions Judge, Shopian, are determined after hearing both the parties.

15) For the foregoing reasons, the application is allowed and order dated 21.12.2011 passed by this Court is recalled. The Registry is directed to post the revision petition for rehearing on **15.09.2022**.

16) Instant application (CrIM No.4395/2022) stands disposed of.

(SANJAY DHAR)  
JUDGE

Srinagar,  
24.08.2022  
"Bhat Altaf, PS"

*Whether the order is speaking: Yes/No*  
*Whether the order is reportable: Yes/No*