**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 28TH OF SEPTEMBER, 2022

MISCELLANEOUS CRIMINAL CASE NO.45036 OF 2022

Between:-

SHAMBHU ALIAS SHIMBHU LODHI S/O SHRI CHINTU LODHI, AGED 22 YEARS, R/O VILLAGE THATHI, DISTRICT SHIVPURI (MADHYA PRADESH)

……..APPLICANT

(BY SHRI D.R. SHARMA - ADVOCATE)

AND

STATE OF MADHYA PRADESH THROUGH POLICE STATION INDAR, DISTRICT SHIVPURI (MADHYA PRADESH)

……..RESPONDENT

(BY SHRI C.P. SINGH – PANEL LAWYER)

This petition coming on for hearing this day, the Court passed the following:

ORDER

Case diary is available.

This second application under Section 439 of Cr.P.C. has been filed for grant of bail. The first application was dismissed by order dated 5.5.2022 passed in M.Cr.C.No.22080/2022.

The applicant has been arrested on 16.11.2021 in connection with Crime No.204/2021 registered at Police Station Indar, District Shivpuri for offence under Sections 302, 201, 147, 148, 149 of IPC.

This application has been filed mainly on the ground that the witnesses who were cited as eyewitnesses are not being examined by the prosecution. Accordingly, by order dated 26.9.2022, the State Counsel was directed to verify as to why Rakesh Kevat is not being summoned as witness.

Today, a statement was made by the counsel for the State that the Public Prosecutor conducting the trial has informed him that since he was interested to get other witness examined first, therefore, he did not include the name of Shivendra and Rakesh Kevat in the list of witnesses. However, now the case is fixed for 13.10.2022 and on the said date he would include the names of above-mentioned two eyewitnesses in the list of witnesses.

In view of the statement made by the counsel for the State, the counsel for the applicant seeks permission of this Court to withdraw this application.

Before considering the prayer of the counsel for the applicant, this Court would like to observe that the role of the Court is not merely a mute spectator. Its duty is to seek truth. The Court should be alert during criminal trial. An offence is against the society and the Court cannot sit

idol and cannot act merely at the pleasure of the Public Prosecutor. It is true that the Sessions Trial is to be conducted by the Public Prosecutor but the Court must be vigilant enough to issue instructions to the Public Prosecutor in case if it is found that the Public Prosecutor is not acting in accordance with law.

Eyewitnesses are the ears and eyes of the Court. Nowadays it is being observed that the examination of eyewitnesses are being delayed for certain reasons. The delay in examination of eyewitness is not in the interest of criminal justice dispensation system. This Court was unable to understand as to why the Public Prosecutor adopted the method of withholding eyewitnesses and why he gave preference to those witnesses whose evidence can at the most be said to be corroborative in nature.

The Supreme Court in the case of **Mina Lalita Baruwa vs. State of Orissa and others** reported in **(2013) 16 SCC 173** has held as under:

> **18.** We are convinced that the grievances as projected by the appellant as a victim, who was a victim of an offence of such a grotesque nature, in our considered view, the trial court as well as the High Court instead of rejecting the application of the appellant by simply making a reference to Section 301 CrPC in a blindfolded manner, ought to have examined as to how the oral evidence of PW 18 which did not tally with Ext. 8, the author of whom was PW 18 himself, to be appropriately set right by either calling upon the Special Public Prosecutor himself to take necessary steps or for that matter there was nothing lacking in the court to have remedied the situation by recalling the said witness and by putting appropriate court question. It is well settled that any crime is against the society and, therefore, if any witness and in

the case on hand a statutory witness happened to make a blatantly wrong statement not borne out from the records of his own, we fail to understand why at all the trial court, as well as the High Court, should have hesitated or adopted a casual approach instead of taking appropriate measures to keep the record straight and clear any ambiguity insofar as the evidence part was concerned and also ensure that no prejudice was caused to anyone. In our considered view, the courts below should have made an attempt to reconcile Sections 301 and 311 CrPC in such peculiar situations and ensured that the trial proceeded in the right direction.

19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, duty and responsibility of the court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect upon every bit of vital information placed before it. It can also be said that in that process the court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the court should remain a silent spectator in such situations. Like in the present case where there is a wrong statement made by a witness contrary to his own record and the prosecution failed to note the situation at that moment or later when it was

brought to light and whereafter also the prosecution remained silent, the court should have acted promptly and taken necessary steps to rectify the situation appropriately. The whole scheme of the Code of Criminal Procedure envisages foolproof system in dealing with a crime alleged against the accused and thereby ensure that the guilty does not escape and the innocent is not punished. It is with the above background, we feel that the present issue involved in the case on hand should be dealt with.

20. Keeping the said perspective in mind, we refer to Sections 301 and 311 CrPC:

"**301.** ***Appearance by Public Prosecutors***.—(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in the case.

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311. ***Power to summon material witness, or examine person present***.—Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine

> any such person if his evidence appears to it to be essential to the just decision of the case."
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> **21.** Having referred to the above statutory provisions, we could discern that while under Section 301(2) the right of a private person to participate in the criminal proceedings has got its own limitations, in the conduct of the proceedings, the ingredients of Section 311 empower the trial court in order to arrive at a just decision to resort to an appropriate measure befitting the situation in the matter of examination of witnesses. Therefore, a reading of Sections 301 and 311 together keeping in mind a situation like the one on hand, it will have to be stated that the trial court should have examined whether invocation of Section 311 was required to arrive at a just decision. In other words even if in the consideration of the trial court invocation of Section 301(2) was not permissible, the anomalous evidence deposed by PW 18 having been brought to its knowledge should have examined the scope for invoking Section 311 and set right the position. Unfortunately, as stated earlier, the trial court was in a great hurry in rejecting the appellant's application without actually relying on the wide powers conferred on it under Section 311 CrPC for recalling PW 18 and ensuring in what other manner, the grievance expressed by the victim of a serious crime could be remedied. In this context, a reference to some of the decisions relied upon by the counsel for the appellant can be usefully made.

The Supreme court in the case of **Mahendra Chawla & Ors. vs. Union of India** reported in **(2018) 15 SCALE 497** has formulated the witness protection scheme, therefore, the protection to a witness is a paramount consideration and the Court should be aware of the fact that there may be various factors compelling the witnesses to turn hostile.

The Supreme Court in the case of **Ramesh and others vs. State of Haryana** reported in **(2017) 1 SCC 529** has held as under:

> **39.** We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the investigating officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.
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> **40.** In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In *Krishna Mochi* v. *State of Bihar* [*Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81 : 2002 SCC (Cri) 1220] , this Court observed as under : (SCC p. 104, para 31)
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> "*31*. It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose

against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

41. Likewise, in *Zahira Habibullah Sheikh (5)* v. *State of Gujarat* [*Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , this Court highlighted the problem with the following observations : (SCC pp. 396-98, paras 40-41)

"*40*. "Witnesses" as Bentham said:"are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface. … Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer.… There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth

presented before the court and justice triumphs and that the trial is not reduced to a mockery. …

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies."

42. Likewise, in *Sakshi* v. *Union of India* [*Sakshi* v. *Union of India*, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645] , the menace of witnesses turning hostile was again described in the following words : (SCC pp. 544-45, para 32)

"*32*. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC."

43. In *State* v. *Sanjeev Nanda* [*State* v. *Sanjeev Nanda*, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Civ) 899] , the Court felt constrained in reiterating the growing disturbing trend : (SCC pp. 486-87, paras 99-101)

"*99*. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which

undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

100. This Court in *State of U.P.* v. *Ramesh Prasad Misra* [*State of U.P.* v. *Ramesh Prasad Misra*, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278] held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In *K. Anbazhagan* v. *Supt. of Police* [*K. Anbazhagan* v. *Supt. of Police*, (2004) 3 SCC 767 : 2004 SCC (Cri) 882] , this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole, with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court [*Sanjeev Nanda* v. *State*, 2009 SCC OnLine Del 2039 : (2009) 160 DLT 775] and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma* v. *State (NCT of Delhi)* [*Manu Sharma* v. *State (NCT of Delhi)*, (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and in *Zahira Habibullah Sheikh (5)* v. *State of Gujarat* [*Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by

the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

(*i*) Threat/Intimidation.

(*ii*) Inducement by various means.

(*iii*) Use of muscle and money power by the accused.

(*iv*) Use of stock witnesses.

(*v*) Protracted trials.

(*vi*) Hassles faced by the witnesses during investigation and trial.

(*vii*) Non-existence of any clear-cut legislation to check hostility of witness.

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said:"*witnesses are the eyes and ears of justice*". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and

could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in *Zahira Habibullah case* [*Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

"11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. … Time has come for a comprehensive law being enacted for protection of the witness and members of his family."

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report [Report on "witness identity protection and witness protection programmes".] , as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives

or lives of their relations or to their property. It is obvious that in the case of serious offences under the Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection."

48. Apart from the above, another significant reason for witnesses turning hostile may be what is described as "culture of compromise". Commenting upon such culture in rape trials, *Pratiksha Bakshi* ["Justice is a Secret : Compromise in Rape Trials" (2010) 44, Issue 3, Contributions to Indian Sociology, pp. 207-233.] has highlighted this problem in the following manner:

"During the trial, compromise acts as a tool in the hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. Let us turn to a recent case from Agra wherein a young Dalit woman was gang-raped and the rapist let off on bail. The accused threatened to rape the victim again if she did not compromise. Nearly a year after she was raped, she committed suicide. While we find that the judgment records that the victim

committed suicide following the pressure to compromise, the judgment does not criminalise the pressure to compromise as criminal intimidation of the victim and her family. The normalising function of the socio-legal category of compromise converts terror into a bargain in a context where there is no witness protection programme. This often accounts for why prosecution witnesses routinely turn hostile by the time the case comes on trial, if the victim does not lose the will to live.

In other words, I have shown how legality is actually perceived as disruptive of sociality; in this instance, a sociality that is marked by caste based patriarchies, such that compromise is actively perceived, to put it in the words of a woman Judge of a District Court, as a mechanism for 'restoring social relations in society'."

49. In this regard, two articles by Daniela Berti delve into a sociological analysis of hostile witnesses, noting how village compromises (and possibly peer pressure) are a reason for witnesses turning hostile. In one of his articles [Daniela Berti, "Courts of Law and Legal Practice", pp. 6-7.] , he writes:

"For reasons that cannot be explained here, even the people who initiate a legal case may change their minds later on and pursue non-official forms of compromise or adjustment. Ethnographic observations of the cases that do make it to the criminal courtroom thus provide insight into the kinds of tensions that arise between local society and the State judicial administration. These tensions are particularly palpable when witnesses deny before the Judge what they allegedly said to the police during preliminary investigations. At this very moment they often become hostile. Here I must point out that the problem of what in common law terminology is called "hostile witnesses" is, in fact, general in India and has provoked many a

reaction from Judges and politicians, as well as countless debates in newspaper editorials. Although this problem assumes particular relevance at high-profile, well-publicised trials, where witnesses may be politically pressured or bribed, it is a recurring everyday situation with which Judges and prosecutors of any small district town are routinely faced. In many such cases, the hostile behaviour results from various dynamics that interfere with the trial's outcome — village or family solidarity, the sharing of the same illegal activity for which the accused has been incriminated (as in case of cannabis cultivation), political interests, family pressures, various forms of economic compensation, and so forth. Sometimes the witness becomes “hostile” simply because police records of his or her earlier testimony are plainly wrong. Judges themselves are well aware that the police do write false statements for the purpose of strengthening their cases. Though well known in judicial milieus, the dynamics just described have not yet been studied as they unfold over the course of a trial. My research suggests, however, that the witness's withdrawal from his or her previous statement is a crucial moment in the trial, one that clearly encapsulates the tensions arising between those involved in a trial and the court machinery itself.”

“In my fieldwork experiences, witnesses become “hostile” not only when they are directly implicated in a case filed by the police, but also when they are on the side of the plaintiff's party. During the often rather long period that elapses between the police investigation and the trial itself, I often observed, the party who has lodged the complaint (and who becomes the main witness) can irreparably compromise the case with the other party by means of compensation, threat or blackmail.”

The Trial Court must rise to the occasion to protect the witnesses from the culture of compromise. Withholding of eyewitnesses for no good reason, may compel the witnesses to become prey of the culture of compromise. When the Trial Court can exercise its power under Section 311 of Cr.P.C. to summon any witness, then it can also regulate the sequence in which the witnesses are to be examined. Thus the provision of Sections 225, 226 and 301 of Cr.P.C. would not eclipse the power of the Trial Court to make an attempt to find out the truth.

Accordingly, this application is **disposed of** with the following directions:

(i) The trial Court must ensure that the eyewitnesses are examined at the earliest and should be at the beginning of the trial.

(ii) No prayer of either Public Prosecutor or the defence, which is contrary to the above direction, should be accepted by the Trial Court.

(iii) If the Public Prosecutor has not prayed for examination of eyewitnesses at the first instance even then the Trial Court must call the eyewitnesses at the beginning of the trial and should not perpetuate the mistake of the Public Prosecutor because the Court must realize that the witnesses are eyes and ears of justice and if the system is permitted to close the eyes and ears of justice, then the entire justice dispensation system would fall.

(iv) Whenever the witnesses are present, their examination-in-chief must be recorded even if the defence counsel is not

ready to cross-examine.

With aforesaid observations, the application is **dismissed as withdrawn** under the hope and belief that the Public Prosecutor would certainly pray for issuance of summons/bailable warrants/warrants to the eyewitnesses and if no such prayer is made by the Public Prosecutor, then the Trial Court shall issue summons to the witnesses namely Shivendra and Rakesh Kevat.

(G.S. AHLUWALIA)
JUDGE

(alok)