REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 805-806 OF 2016
(@ S.L.P. (Crl.) Nos. 3278-79 of 2016)

State of Haryana ...Appellant(s)

Versus

Ram Mehar & Others Etc. Etc. ...Respondent(s)

J U D G M E N T

Dipak Misra, J.

Present appeals, by special leave, assail the order dated 09.03.2016 passed by the High Court of Punjab and Haryana at Chandigarh in CRM-M No. 482 of 2016 and CRM-M No. 484 of 2016 whereby the learned single Judge in exercise of the power under Section 482 of the Code of Criminal Procedure (for short "CrPC") has annulled the order of the learned First Additional Sessions Judge, Gurgaon passed on 16.12.2015 wherein he had rejected the prayer of the accused persons

seeking recall of the witnesses under Section 311 read with Section 231(2) CrPC.

2. To appreciate the controversy that has emanated in these appeals, it is obligatory to state the facts in brief. The prosecution case before the trial court is that on 18.07.2012 about 7 p.m. the accused persons being armed with door beams and shockers went upstairs inside M1 room of the Manesar Factory of Maruti Suzuki Limited, smashed the glass walls of the conference room and threw chairs and table tops towards the management officials, surrounded the conference hall from all sides and blocked both the staircases and gave threats of doing away with the lives of the officials present over there. As the allegations of the prosecution further unfurl, the exhortation continued for quite a length of time. All kind of attempts were made to burn alive the officials of the management. During this pandemonium, the entire office was set on fire by the accused persons and the effort by the officials to escape became an exercise in futility as the accused persons had blocked the staircases. The police officials who arrived at the spot to control the situation were assaulted by the workers and they were obstructed from going upstairs to save the

officials. Despite the obstruction, the officials were saved by the police and the fire was brought under control by the fire brigade. In the incident where chaos was the sovereign, Mr. Avnish Dev, General Manager, Human Resources of the Company was burnt alive. The said occurrence led to lodging of FIR No. 184/2012 at Police Station Manesar. After completion of the investigation, the police filed charge sheet against 148 workers in respect of various offences before the competent court which, in turn, committed the matter to the court of session and during trial the accused persons were charged for the offences punishable under Sections 147/ 148/ 149/ 452/ 302/ 307/ 436/ 323/ 332/ 353/ 427/ 114/ 201/ 120B/ 34/ 325/ 381 & 382 IPC.

3. The evidence of the prosecution commenced in August, 2013 and was concluded on 02.03.2015. Recording of statements of the accused persons under Section 313 CrPC was concluded by 13.04.2015. After the statements under Section 313 CrPC were recorded, the defence adduced its evidence by examining number of witnesses. Be it noted, when an application for bail was filed before the trial court and it was rejected upto the High Court, some accused persons moved

this Court by filing Special Leave Petition (Criminal) Nos. 9881-9882 of 2013 and this Court on 17.02.2014 passed the following order:-

> "On 3.2.2014, this Court had directed learned counsel for the State of Haryana to inform the Court as to how many witnesses, the State proposes to examine and approximately how much time it will take. Mr. K.T.S. Tulsi, learned senior counsel appearing on behalf of the State, has informed the Court that as of today, the prosecution wishes to examine total 186 witnesses, out of which 92 are eye-witnesses. However, as presently advised, the prosecution wants to examine only 23 eye witnesses. Two of the eye witnesses have already been examined. Therefore, 21 more eye-witnesses have to be examined. In view of this statement, we do not propose to pass any order on the bail application filed by the petitioner. We feel that it would be appropriate to give directions to the learned Sessions Judge to dispose of the trial as expeditiously as possible. We are informed that in a month, only one or two days are assigned by the learned Sessions Judge to this case. We are aware of the pressure under which the learned Sessions Judge is working. However, considering the peculiar nature of the offence and the number of persons involved in this case, we feel it would be in the interest of justice to expedite examination of eye witnesses and for that to take up the matter on day to day basis, if required. We direct the learned Sessions Judge to examine all the eye-witnesses by 30.4.2014. Needless to say that it will be open to the petitioner to prefer a bail application the after eye-witnesses are examined. We make it clear that on the merits of the petitioner's case, we have expressed no opinion."

4. To continue the narrative in chronology, on 13.02.2015, Salil Bihari Lal, PW-8, was recalled for further examination and on 20.02.2015, DSP Om Prakash, PW-99, was recalled. On the same day, the prosecution concluded its evidence. As has been indicated earlier, the statements of the accused persons under Section 313 CrPC were recorded and thereafter the defence examined fifteen witnesses.

5. When the matter stood thus, on 30.11.2015, two petitions under Section 311 CrPC were filed by different accused persons. In the first petition filed by Ram Mehar and others, recall was sought of Vikram Verma, PW-1, Vikram Khazanchi, PW-2, Pradeep Kumar Roy, PW-3, Birendra Prasad, PW-5, Salil Bihari Lal, PW-8, Vikram Sarin, PW-10, Deepak Anand, PW-29 and DSP Om Prakash, PW-99. In respect of Deepak Anand, PW-29, it was stated that he was required to be recalled to establish that he is not a reliable witness. As regards Vikram Verma, PW-1, Vikram Khazanchi, PW-2, Pradeep Kumar Roy, PW-3, Birendra Prasad, PW-5, Salil Bihari Lal, PW-8 and Vikram Sarin, PW-10, it was averred that they are required to be recalled in order to prove the manner and circumstances pertaining to how the incident took place. That apart, it was

stated, certain important questions and suggestions pertaining to the injuries received by the prosecution witness and other persons were also required to be put to them. With regard to DSP Om Prakash, PW-99, it was asserted that recalling of the said witness was required to enable the accused persons to put forth certain aspects of the investigation, particularly with regard to the type of weapons used and injuries allegedly caused to various prosecution witnesses and other persons. We think it appropriate to reproduce what further has been stated in the application:-

> "6. That the cross-examination proposed to be undertaken by the defence will be limited to the aspect of injuries sustained by different witnesses and other persons, as well as the weapons of offence used, besides suggestions that specifically refute the sequence of events and roles ascribed to the accused etc.
> 7. That the accused persons undertake to conclude the cross-examination of these witnesses on the dates on which they appear, or such further dates as decided by this Hon'ble Court.
> 8. That it may be worthwhile to mention here that due to the nature of the case and the lack of individual representation to the 148 accused persons, much of the cross-examination was composite in nature and in the process, certain important questions and suggestions with respect to their individual roles and allegations, could not be satisfactorily put to the prosecution witnesses in question.

> 9. That the trial was essentially conducted by Sh. R.S. Hooda, Advocate, who was suffering from a critical illness throughout the trial, and on numerous occasions, despite his valiant effort and intentions, the above aspects were inadvertently missed out. The final arguments will now be conducted by a fresh team of Senior Lawyers, who have had occasion to examine the record and are therefore desirous of correcting certain inadvertent errors that may have crept into the defence of the accused.
> 10. That these aspects are extremely relevant and germane to the defence of the accused, and a denial of opportunity to further cross-examine the witnesses on these aspects would amount to a denial of the right to a fair trial.
> 11. That vide the present application, the Applicants are not seeking to raise any fresh grounds in defence, but merely correct certain errors committed during cross-examination, and as such this does not amount to the filing up of any lacunae in the defence."

6. After making such assertions, the petitioners therein proceeded to state the law laid down by this Court in the context of Section 311 CrPC.

7. In the second application filed by Kishan Kumar and others for recalling of witnesses, namely, Shobhit Mittal, PW-7, Rajeev Kaul, PW-14, Sri Niwasan, PW-22 and Umakanta T.S., PW-28, the assertions were almost the same apart from some additional ground which we think appropriate to reproduce:-

> "7. That the trial was essentially conducted by Sh. R. S. Hooda, Advocate, who was suffering

> from a critical illness throughout the trial, and on numerous occasions, despite his valiant efforts and intentions, the above aspects were inadvertently missed out. The final arguments will now be conducted by a fresh team of senior lawyers, who have had occasions to examine the record, and are therefore, desirous of correcting certain inadvertent errors that may have crept into the defence of the accused.
> 8. That these aspects are extremely relevant and germane to the defence of the accused, and a denial of opportunity to further cross-examine the witnesses on these aspects would amount to a denial of the right to a fair trial.
> 9. That vide the present application, the Applicants are not seeking to raise any fresh grounds in defence, but merely correct certain errors committed during cross-examination, and as such this does not amount of filing up of any lacuna in the defence."

8. The learned trial Judge noted the contentions advanced by the learned counsel for the defence and the prosecution and observed that:-

> "7. The present application has been moved at a very belated stage at a time when 102 prosecution witnesses have already been examined during this trial in which larger number of 148 accused are involved and they have been examined way back as prosecution evidence was concluded on 2.3.15. Long time was consumed for recording the statements of the accused under section 313 Cr.P.C. and for the last more than six months, the case is being adjourned for recording the defence evidence and in this regard number of opportunities have been availed by the defence and 15 defence witnesses have been examined so far. At this juncture it

may be recalled that Hon'ble Supreme Court has directed this court to decide this trial expeditiously.

x x x x x x x

9. Nothing has been explained as to what are the left out questions and how the questions already put to the said witnesses created inroad into the defence of the said accused. In para 3 of the application, it is stated that the manner and circumstances as to how the incident took place and further the questions pertaining to weapons used and the injuries to the said witnesses and to others are certain other questions, which are to be put to them. A perusal of the statements of the aforesaid four witnesses clearly reveal that they have been cross examined at length and there is nothing that defence counsel faltered by not putting relevant questions to them. Putting it differently it is not a case of giving walk over by the defence to the prosecution witnesses by not properly conducting the cross examination. It is rightly argued by learned PP that if the present application is allowed then there will be no end of moving such applications and who knows that another changed defence counsel may come up with similar sort of application stating that the previous defence counsel inadvertently could not put material questions. It may be recalled that the present applicants are in custody but that does not mean that they cannot move the application to delay the trial which has already been delayed considerably. The defence has already availed numerous opportunities. This court in order to ensure the fair trial allowed the successive applications moved by the defence to examine the witnesses to support their respective pleas. An old adage of a fair trial to accused does not mean that this principle is to be applied in favour of accused alone but this concept will take in its fold the fairness of trial to the victim as well as to the society. The court being neutral agency is

> expected to be fair to both the parties and its duty is also to ensure that the process of law is not abused by either of them for extraneous reasons. The speedy trial is essence of justice but such like applications like the present one should not come in the way of delivery of doing complete and expeditious justice to both the parties."

9. After so stating, the learned trial Judge referred to the authorities in ***Hoffman Andreas v. Inspector of Customs Amritsar***[1], ***P. Chhaganlal Daga v. M. Sanjay Shaw***[2], ***P. Sanjeeva Rao v. State of Andhra Pradesh***[3], ***Natasha Singh v. Central Bureau of Investigation (State)***[4] and ***State (NCT of Delhi) v. Shiv Kumar Yadav and another***[5] and came to hold that when the material questions had already been put, there was no point to entertain the application and mere change of the counsel could not be considered as a ground to allow the application for recalling the witnesses for the purpose of further cross-examination. It is worthy to note that two separate orders were passed by the trial court but the analysis is almost the same.

[1] (2000) 10 SCC 430
[2] (2003) 11 SCC 486
[3] (2012) 7 SCC 56
[4] (2013) 5 SCC 741
[5] (2016) 2 SCC 402

10. Dissatisfied with the aforesaid orders, the accused persons preferred CRM-M No. 482 of 2016 and CRM-M No. 484 of 2016 before the High Court under Section 482 CrPC. The High Court took note of the common ground that the leading counsel for the defence was critically ill during the trial and due to inadvertence, certain important questions, suggestions with respect to the individual roles and allegations against the respective accused persons, the injuries sustained by the witnesses, as well as the alleged weapons of offence used, had not been put to the said witnesses. It also took note of the fact that the senior lawyer had been engaged at the final stage and such inadvertent errors were discovered by him and they needed to be rectified in order to have a meaningful defence and a fair trial.

11. The High Court thereafter adverted to the contentions raised by the learned counsel for the petitioners therein, analysed the grounds of rejection that formed the bedrock of the order passed by the trial Judge, referred to certain decisions by this Court including the recent decision in ***Shiv Kumar Yadav*** (supra) and came to hold that a case for recalling had been made out to ensure grant of fair opportunity

to defend and uphold the concept of fair trial. It further expressed the view that when 148 accused persons are facing trial together, wherein the prosecution has examined 102 witnesses regarding different roles, weapons and injuries attributed to various accused qua various victims on the day of occurrence stretched over a period of time within a huge area of factory premises, does raise a sustainable inference that there was confusion during the conduct of the trial leading to certain inadvertent omissions and putting proper suggestions on material aspects, which are crucial for the defence in a trial, *inter alia*, for an offence under Section 302 IPC, although the accused were represented by battery of lawyers with Sh. R.S. Hooda, Advocate being the lead lawyer. The High Court proceeded to opine that the accused-petitioners were charged with heinous offences including one under Section 302 IPC and recalling is not for the purpose of setting up a new case or make the witnesses turn hostile but only to have a proper defence as it is to be judicially noticed that for lack of proper suggestions by the defence to the prosecution witnesses, the trial courts at times tend to reject the raised defence on behalf of the accused. It was observed that some of such omissions

and suggestions by way of illustration had been spelt out in the body of the petitions and some had been stated to be withheld for avoiding any prejudice to the defence, nevertheless the stated purpose was not to render the prosecution witnesses hostile to the case of prosecution and, therefore, such inadvertent omissions and lack of suggestions deserve to be accepted to be bonafide and constituting a valid reason requiring the approach of the Court to be magnanimous in permitting such mistakes to be rectified, more so when the prosecution, concededly, were permitted twice to lead additional evidence by invoking the provisions under Section 311 Cr.PC on no objection of the defence, after the closure of the prosecution evidence. Thereafter, what the High Court expressed is seemly to reproduce:-

> "The accused-petitioners are in custody and having nothing to gain from delaying the trial. The reasons assumed for declining the recalling in the impugned order dated 16.11.2015 (P-1) are clearly is conceived and thus vitiated. It is apparent from the provisions of Section 311 Cr.PC as interpreted by the Courts that the exercise of the power to recall is not circumscribed by the stage at which such a request is made but is guided by what is essential for the just decision of the case. No doubt speedy trial is essential in cases involving heinous crimes, however, nothing has been shown on record that the Hon'ble Supreme Court has specifically laid down a date by which the trial is mandated to be

> concluded. The order at P-8 is only in the context of the right of the accused to seek bail. The reliance by the trial Court on *AG Vs. Shiv Kumar Yadav's case (supra*) and *Nisar Khan v. State case*, (2006) 9 SCC 386, is also misplaced in the facts of the present cases. In the first case, the trial was for offence of rape and the defence was seeking the recall of all the prosecution witnesses amounting almost to a denovo trial without any regard to the harassment and plight of the young victim. In the latter case, the defence had succeeded in its purpose of turning the already examined witnesses to be hostile to the case of prosecution by recalling them after a period of one year. In the present case the facts are clearly distinguishable as aforesaid."

12. On the basis of the aforesaid reasoning, the High Court allowed the petitions and set aside the impugned orders and directed as follows:-

> "... in case the learned trial Court during the cross examination of the such recalled witnesses is of the opinion that such opportunity is being misused to make the witnesses resile from their earlier testimonies, in that eventuality the trial Court would be at full liberty to put a stop to that effort."

13. We have referred to the contents of the applications, delineation by the trial court and the approach of the High Court under Section 482 CrPC in extenso so that we can appreciate whether the order passed by the High Court really requires to be unsettled or deserves to be assented to.

14. Mr. Tushar Mehta, learned Additional Solicitor General appearing for the appellant–State of Haryana, criticizing the order of the High Court, submits that Section 311 CrPC despite its width and broad compass can only be made applicable keeping in view the factual score of the case and not to be entertained in a routine manner. It is his contention that the High Court has been wholly misguided by the idea of fair trial and the concept of magnanimity of the court without really remaining alive to the factual matrix of the case at hand. The concept of "fair trial", submits Mr. Mehta, cannot be stretched too far to engulf situations which the said conception really does not envisage. Additionally, it is argued by him, neither the plea taken with regard to illness of earlier counsel nor the accused persons being in custody can constitute legitimate grounds for exercise of jurisdiction under Section 311 CrPC.

15. Mr. R.S. Cheema, learned senior counsel along with Mr. Sanjay Jain, learned counsel appearing for the respondents in his turn has emphasized basically on four aspects, namely, a fair trial is a facet of Article 21 of the Constitution and the principles of its applicability should not be marginalized; that Section 311 CrPC confers enormous powers on the court for

grant of permission for recalling of witnesses so that in the ultimate eventuality justice is done and injustice in any form is avoided and for the said purpose, the stage of the trial may be an aspect to be taken into consideration in certain cases but cannot be regarded as the sole governing factor to deny the prayer for recall; that when the prayer was confined for recalling of small number of witnesses because of critical illness of the defence counsel who was not in a position to put all relevant questions to the accused persons, there was no justification to refuse the prayer of recall of witnesses; and that when the accused persons are already in custody the question of prolonging and procrastinating the trial by adopting dilatory tactics does not arise. Learned senior counsel would further submit that the High Court has passed a guided order and the accused persons are bound by it and they do not intend to take more than a day or two for the purpose of further cross examination and thus, there is no warrant on the part of this Court in exercise of power under Article 136 of the Constitution of India to interfere with the impugn order.

16. Before we advert to the ambit and scope of Section 311 CrPC and its attractability to the existing factual matrix, we

think it imperative to dwell upon the concept of "fair trial". There is no denial of the fact that fair trial is an insegregable facet of Article 21 of the Constitution. This Court on numerous occasions has emphasized on the fundamental conception of fair trial as the majesty of law so commands.

17. A three-Judge Bench speaking through Krishna Iyer, J. in ***Maneka Sanjay Gandhi and another v. Rani Jethmalani***[6]**,** though in a different context, observed:-

> "Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hyperscnahivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case 10 case. We have to lest the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate when- the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

[6] (1979) 4 SCC 167

18. The aforesaid principle has been stated in the context of transfer of a case but the Court has laid emphasis on assurance of fair trial. It is worthy to note that in the said case, the Court declined to transfer the case and directed the Magistrate to take measures to enforce conditions where the court functions free and fair and agitational or muscle tactics yield no dividends. However, liberty was granted to the appellant therein to renew prayer under Section 406 CrPC. Stress was laid on tranquil court justice. It was also observed that when the said concept becomes a casualty there is collapse of our constitutional order.

19. In ***Ram Chander v. State of Haryana***[7], while speaking about the presiding judge in a criminal trial, Chinnappa Reddy, J. observed that if a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. The learned Judge reproduced a passage

[7] (1981) 3 SCC 191

from ***Sessions Judge, Nellore v. Intha Ramana Reddy***[8] which reads as follows:-

> "Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial."

20. While saying so, it has been further held that the Court may actively participate in the trial to elicit the truth and to protect the weak and the innocent and it must, of course, not assume the role of a prosecutor in putting questions.

21. In ***Rattiram and others v. State of Madhya Pradesh***[9] speaking on fair trial the Court opined that:-

> "... Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner

[8] 1972 Cri LJ 1485
[9] (2012) 4 SCC 516

which would totally ostracise injustice, prejudice, dishonesty and favouritism."

In the said case, it has further been held:-

"60. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the accused. The right of a victim has been given recognition in *Mangal Singh* v. *Kishan Singh*[10] wherein it has been observed thus: (SCC p. 307, para 14)

"*14*. … Any inordinate delay in conclusion of a criminal trial undoubtedly has a highly deleterious effect on the society generally, and particularly on the two sides of the case. *But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence*."

(Emphasis supplied)

61. It is worth noting that the Constitution Bench in *Iqbal Singh Marwah* v. *Meenakshi Marwah*[11] (SCC p. 387, para 24) though in a different context, had also observed that delay in the prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost.

62. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused (*quaere* a victim). Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to

[10] (2009) 17 SCC 303
[11] (2005) 4 SCC 370

> the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing.
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> x x x x x
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> 64. Be it noted, one cannot afford to treat the victim as an alien or a total stranger to the criminal trial. The criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. In respect of certain offences in our existing criminal jurisprudence, the testimony of the victim is given paramount importance. Sometimes it is perceived that it is the duty of the court to see that the victim's right is protected. A direction for retrial is to put the clock back and it would be a travesty of justice to so direct if the trial really has not been unfair and there has been no miscarriage of justice."

22. In ***J. Jayalalithaa and others v. State of Karnataka and others***[12] it has been ruled that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the

[12] (2014) 2 SCC 401

right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. It has further been observed that in all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings. Further, the Court has observed:-

> "Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. "No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d'être in

prescribing the time frame" for conclusion of the trial."

23. In ***Bablu Kumar and others v. State of Bihar and another***[13] the Court referred to the authorities in ***Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)***[14], ***Rattiram*** (supra), ***J. Jayalalithaa*** (supra), ***State of Karnataka v. K. Yarappa Reddy***[15] and other decisions and came to hold that keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. It has been further stated that the law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to

[13] (2015) 8 SCC 787
[14] (2010) 6 SCC 1
[15] (1999) 8 SCC 715

create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. We may note with profit though the context was different, yet the message is writ large. The message is – all kinds of individual notions of fair trial have no room.

24. The decisions of this court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot be any strait-jacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognized, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded

by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognized principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalization but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilized to build Castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such.

From the aforesaid it may not be understood that it has been impliedly stated that the fair trial should not be kept on its own pedestal. It ought to remain in its desired height but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. Be it stated when the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears. That is not unthinkable and we have no hesitation in saying so.

25. Having dwelled upon the concept of fair trial we may now proceed to the principles laid down in the precedents of this Court, applicability of the same to a fact situation and duty of the court under Section 311 CrPC. The said provision reads as follows:-

> "**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."

26. A quarter of a century back, a two-Judge Bench in ***Mohanlal Shamji Soni v. Union of India and another***[16] has held that:-

> "Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old section. This section is manifestly in two parts. Whereas the word used in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Court and enables it 'at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,
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> (1) to summon any person as a witness, or
>
> (2) to examine any person in attendance, though not summoned as a witness, or
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> (3) to recall and re-examine any person already examined.
>
> 8. The second part which is mandatory imposes an obligation on the court —
>
> (1) to summon and examine, or
>
> (2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.
>
> 9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. <u>However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any</u>

[16] AIR 1991 SC 1346

> discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case."
>
> [Emphasis added]

The aforesaid passages make it abundantly clear about the broad applicability of the provision and the role of the court in two distinct situations.

27. In the said authority the Court referred to the earlier pronouncements in ***Rameshwar Dayal and others v. State of Uttar Pradesh***[17], ***State of West Bengal v. Tulsidas Mundhra***[18], ***Jamatraj Kewalji Govani v. State of Maharashtra***[19] and proceeded to opine that:-

> "The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."
>
> [Emphasis supplied]

[17] (1978) 2 SCC 518
[18] (1963) 2 SCJ 204
[19] AIR 1968 SC 178

It is important to note here in the said case, it was also observed that:-

> "Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a *just decision of the case* by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties".
>
> [Underlining is by us]

28. In ***Rajendra Prasad v. Narcotic Cell***[20] occasion arose to appreciate the principles stated in ***Mohanlal Shamji Soni*** (supra). The two-Judge Bench took note of the observations

[20] (1999) 6 SCC 110

made in the said case which was to the effect that while exercising the power under Section 311 of CrPC, the court shall not use such power "for filling up the lacuna left by the prosecution". Explaining the said observation Thomas, J. speaking for the Court observed:-

> "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."
>
> [Emphasis added]

After so stating the two-Judge bench referred to the exigencies of the situation and the ample power of the court as has been laid in ***Mohanlal Shamji Soni*** (supra) and further referred to the authority in ***Jamatraj Kewalji Govani*** (supra) and opined thus:-

> "We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can

> the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."
>
> [Emphasis supplied]

29. The aforesaid decision has to be appropriately understood. It reiterates the principle stated in ***Mohanlal Shamji Soni's*** case. It has only explained the sphere of lacuna by elaborating the same which has taken place due to oversight and non-production of material evidence due to inadvertence. It is significant to note that it has also reiterated the principle that such evidence is necessary for a just decision by the Court.

30. In ***U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan***[21], the Court was dealing with an order passed by the High court whereby it had allowed the revision and set aside the order passed by the learned trial judge who had exercised the power under Section 311 CrPC to summon certain witnesses. The Court referred to the earlier

[21] (2006) 7 SCC 529

authorities and ruled that it is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, as it is the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice. Be it stated, in the said case the court came to held that summoning of the witnesses was necessary for just and fair decision of the case and accordingly it allowed the appeal and set aside the order passed by the High court.

31. In ***Rajaram Prasad Yadav v. State of Bihar and another***[22], the Court after referring to Section 311 CrPC and Section 138 of the Evidence Act observed that Section 311 CrPC vest widest powers in the court when it comes to the

[22] (2013) 14 SCC 461

issue of summoning a witness or to recall or re-examine any witness already examined. Analysing further with regard to "trial", "proceeding", "person already examined", the Court ruled that invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case. The Court observed that the power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. The learned Judges further ruled that the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. It was also stated that while such a widest

power is invested with the court, exercise of such power should be made judicially and also with extreme care and caution.

32. The Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 CrPC. We think it seemly to reproduce some of them:-

> "17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.
>
> 17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.
>
> 17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
>
> 17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
>
> 17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

x x x x x x x x x

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

x x x x x x x x x

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be

> ensured being a constitutional goal, as well as a human right."
>
> [Emphasis supplied]

33. Recently in ***Shiv Kumar Yadav*** (supra), the Court reproduced the principles culled out in ***Rajaram Prasad Yadav's*** case and thereafter referred to the authority in ***Hoffman Andreas*** (supra) wherein it has been laid down that:-

> "The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible".

The Court in ***Shiv Kumar Yadav*** (supra) case explained the said authority by opining thus:-

> "15. .....While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. 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. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination."

We respectfully agree with the aforesaid exposition of law.

34. Keeping in mind the principles stated in the aforesaid authorities the defensibility of the order passed by the High Court has to be tested. We have already reproduced the assertions made in the petition seeking recall of witnesses. We have, for obvious reasons, also reproduced certain passages from the trial court judgment. The grounds urged before the trial court fundamentally pertain to illness of the counsel who was engaged on behalf of the defence and his inability to put questions with regard to weapons mentioned in the FIR and the weapons that are referred to in the evidence of the witnesses. That apart, it has been urged that certain suggestions could not be given. The marrow of the grounds relates to the illness of the counsel. It needs to be stated that the learned trial Judge who had the occasion to observe the conduct of the witnesses

and the proceedings in the trial, has clearly held that recalling of the witnesses were not necessary for just decision of the case. The High Court, as we notice, has referred to certain authorities and distinguished the decision in ***Shiv Kumar Yadav*** (supra) and ***Fatehsinh Mohansinh Chauhan*** (supra). The High Court has opined that the court has to be magnanimous in permitting mistakes to be rectified, more so, when the prosecution was permitted to lead additional evidences by invoking the provisions under Section 311 CrPC. The High Court has also noticed that the accused persons are in prison and, therefore, it should be justified to allow the recall of witnesses.

35. The heart of the matter is whether the reasons ascribed by the High Court are germane for exercise of power under Section 311 CrPC. The criminal trial is required to proceed in accordance with Section 309 of the CrPC. This court in ***Vinod Kumar v. State of Punjab***[23], while dealing with delay in examination and cross-examination was compelled to observe thus:-

> "If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in this country the two reasons that

[23] (2015) 3 SCC 220

> may earn the status of phenomenal signification are, first, procrastination of trial due to non-availability of witnesses when the trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial and the unfathomable reasons for acceptation of such prayers for adjournments by the trial courts, despite a statutory command under Section 309 of the Code of Criminal Procedure, 1973 (CrPC) and series of pronouncements by this Court. What was a malady at one time, with the efflux of time, has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, a diseased one, at present".

And again:-

> "The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. …"

36. Yet again, in ***Gurnaib Singh v. State of Punjab***[24], the agony was reiterated in the following expression:-

> "We have expressed our anguish, agony and concern about the manner in which the trial has been conducted. We hope and trust that the trial courts shall keep in mind the statutory provisions and the interpretation placed by this Court and not be guided by their own thinking or should not become mute spectators when a trial is being conducted by allowing the control to the counsel for the parties. They have their roles to perform.

[24] (2013) 7 SCC 108

> They are required to monitor. They cannot abandon their responsibility. It should be borne in mind that the whole dispensation of criminal justice at the ground level rests on how a trial is conducted. It needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar. The administration of justice reflects its purity when the Bench and the Bar perform their duties with utmost sincerity. An advocate cannot afford to bring any kind of disrespect to fairness of trial by taking recourse to subterfuges for procrastinating the same."

37. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The

decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some

questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

38. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no

boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance.

39. In view of the proceeded analysis we allow the appeals, set aside the order passed by the High Court and restore that of the learned trial Judge. We direct the learned trial judge to proceed with the trial in accordance with the law.

.....J.
[Dipak Misra]

.....J.
[Uday Umesh Lalit]

New Delhi
August 24, 2016