

THE HIGH COURT OF MADHYA PRADESH  
Cr.R.No.3589/2017  
(Vikash alias Akash & Another Vs. State of M.P.)

Gwalior, Dated :19.01.2018

Shri Arvind Kumar Dwivedi , Advocate for petitioners.

Shri Kuldeep Singh, Public Prosecutor for Respondent/State.

The present criminal revision u/S 397 read with Sec 401 Cr.P.C. has been filed aggrieved by an interlocutory order passed by 14<sup>th</sup> Additional Session Judge, Gwalior in S.T. No. 366/2015 rejecting an application u/S 311 Cr.P.C. filed by the accused/petitioners for recalling of PW-1 Brajesh who had earlier been examined on 25.01.2016.

The reason assigned in the present petition and also in the application u/S 311 Cr.P.C. is that the counsel who had cross-examined PW-1 – Brajesh was not experienced enough to ask pertinent questions ought to have been asked thereby prejudicing the case of defence.

Without entering into the prolixity of arguments extended by learned counsel for the petitioners/accused, this Court is of the considered view that the law in this regard is settled by Apex Court decision rendered in the case **State (NCT of Delhi) Vs. Shiv Kumar Yadav and Another** reported in **(2016) 2 SCC 402** where Apex Court has clearly held that lack of knowledge, maturity or experience on the part of counsel cross-examining the prosecution witness cannot be a sufficient ground for invoking the provision of Sec 311 Cr.P.C. for recalling of the same witness.

Relevant extract of the aforesaid are reproduced below for ready reference and convenience:

**THE HIGH COURT OF MADHYA PRADESH**  
**Cr.R.No.3589/2017**  
**(Vikash alias Akash & Another Vs. State of M.P.)**

*15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. 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.*

*16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the authorities concerned including the Law Commission and the Bar Council of India.*

**THE HIGH COURT OF MADHYA PRADESH**  
**Cr.R.No.3589/2017**  
**(Vikash alias Akash & Another Vs. State of M.P.)**

In view of the above, no case for recalling of PW-1 Brajesh for cross-examination is made out.

Consequently, the present criminal revision fails and is hereby dismissed.

**(Sheel Nagu)**  
**Judge**

sh/-