

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. MP (M) No. 1395 of 2020
Decided on October 7, 2020

Lovely ...Petitioner
Versus
State of Himachal Pradesh ...Respondent

Coram:
The Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting?¹ Yes.

For the petitioner Mr. Anirudh Sharma, Advocate,
through video-conferencing.
For the respondent Mr. Sudhir Bhatnagar and Mr.
Arvind Sharma, Additional
Advocates General with Mr.
Kunal Thakur, Deputy Advocate
General, through video-
conferencing.

Sandeep Sharma, J. (Oral)

Though by way of instant petition filed under S.439 CrPC, prayer has been made on behalf of the petitioner for grant of regular bail in respect of FIR No. 293, dated 15.9.2016, registered at Police Station, Baddi, District Solan, Himachal Pradesh under Ss. 376, 506 and 120B IPC and Ss. 4 and 17 of the Protection of Children from Sexual Offences Act but learned Counsel appearing for the petitioner fairly states that at this stage, he does not press the prayer for grant of bail. However, while inviting attention of this Court to order dated 8.4.2019 passed by trial court while recording statements of PW-4 and PW-5, learned counsel contends that right of the petitioner to cross-

¹ Whether reporters of the local papers may be allowed to see the judgment?

examine aforesaid witnesses, could not be closed by learned Court below, on account of absence of his counsel, rather, court should have either adjourned the matter for cross-examination or should have appointed some legal aid counsel, to represent the accused, while recording statements of PW-4 and PW-5.

2. Mr. Anirudh Sharma, learned Counsel appearing for the petitioner, while referring to Ss. 401, 482 and 483 CrPC, contends that this Court has inherent powers to correct the illegality, if any, committed by a court while conducting trial, as such, order dated 8.4.2019 in as much as right of cross-examination of petitioner has been closed, may be quashed and set aside, while exercising power vested in this Court under aforesaid provisions of law.

3. Mr. Kunal Thakur, learned Deputy Advocate General, while opposing aforesaid prayer made on behalf of the petitioner, contends that since there is specific remedy provided under the Statute to lay challenge to order sought to be quashed in the instant proceedings, petition at hand deserves to be dismissed being devoid of merit. Mr. Thakur, also contends that otherwise also prayer as has been made herein above, cannot be considered/granted in the instant proceedings filed under S.439 CrPC. Lastly, Learned Deputy Advocate General contends that the order dated 8.4.2019 sought to be quashed in the instant proceedings was passed more than a year back and there is no

plausible explanation rendered on record qua the delay in approaching this court with the aforesaid prayer, as such, present petition deserves dismissal.

4. Having heard learned counsel for the parties and perused the material available on record, this Court finds that on 8.4.2019, statements of PW-4 and PW-5 came to be recorded but since there was none to represent the petitioner-accused, court below closed his right to cross-examine them. Perusal of aforesaid order reveals that the learned Court below, before closing right of cross-examination of the petitioner, made an endeavour to locate the counsel of the petitioner, but since he was at Nalagarh and was unable to appear in the court, court closed right of the petitioner to cross-examine prosecution witnesses.

5. Question which needs consideration in the case at hand, is whether this Court in the instant proceedings filed under S.439 CrPC, can correct the illegality, if any, committed by a subordinate court while closing the right of the petitioner-accused to cross-examine prosecution witnesses? Having perused provisions contained under Ss.401, 482 and 483 CrPC, this Court finds considerable force in the submission made by Mr. Anirudh Sharma, learned Counsel appearing for the petitioner, that High Court has power under Ss. 482 and 483 CrPC, to intervene, when on examination of record, it finds that there is

gross miscarriage of justice or abuse of process of court or the requisite statutory procedures have not been complied with or there is failure of justice or order passed by a Magistrate requires correction. S.482 CrPC clearly provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. S.483 specifically provides that Every High Court shall so exercise its superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates. S. 401 CrPC provides that in the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307. No doubt, order sought to be quashed in the instant proceedings, otherwise is required to be laid challenge, if aggrieved, by way of filing criminal revision under S.397 read with S.401 CrPC, but, as has been taken note herein above, court while exercising power under Ss. 401, 482 and 483 CrPC, can also intervene when it comes to its notice that order passed by a subordinate court, if allowed to sustain, would result in grave miscarriage of justice or same is

result of sheer abuse of process of law. Besides above, court, while exercising power under Ss.482 and 483 CrPC, can also proceed to quash an order, which is found to be passed in violation of procedure laid down in the Code. Reliance is placed upon judgment rendered by Hon'ble Supreme Court of India in **Krishnan & Anr. vs. Krishanverni & Anr.** (Criminal Appeal No. 48 of 1997), decided on 24.1.1997, wherein Hon'ble Apex Court has held as under:

“7. It is seen that exercises of the revisional power by the high court under Section 397 read with Section 401 is to call for the records of any inferior Criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders. The Court of Sessions and the Magistrates are inferior criminal courts to the High Court and Courts of judicial Magistrate are inferior criminal courts to the sessions judge. ordinarily, in the matter of exercise of power of revision by any High Court, Section 397 And section 401 are required to be read together. section 397 gives powers to the High Court to call for the records as also suo motu power under section 401 to exercise the revisional power on the grounds mentioned therein, i.e. to examine the Correctness, legality or propriety of any finding sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court, and to dispose of the revision in the manner indicated under section 401 of the Code. The revisional. power of the high Court merely conserves the power of the high Court to see that justice is done is accordance with the recognised rules of criminal jurisprudence and that its subordinates courts do not exceed the jurisdiction or abuse the power vested in them under the code or

to prevent abuse of the process of the inferior criminal courts or to prevent miscarriage of justice.

8. The object of Section 483 and the purpose behind conferring the revisional power under section 397 read with section 401 upon the High court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to met out justice or to correct irregularity of the procedure or to met out justice. In addition, the inherent power of the High Court is preserved by Section 462 . The Power of the High court therefore is very wide, However , High Court must exercise such power sparingly and cautiously when the sessions judges has simultaneously exercised revisional power under Section 397 (1) however, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or tow correct irregularities/incorrectness committed by inferior criminal court in its juridical process or illegality of sentence or order.

9. The inherent power of the High Court is not one conferred by the code but one which the high Court already has in it and which is preserved by the Code, the object of Section 397 (3) is to put a bar on simultaneous revisional applications to the High Court and the court of Sessions so as to prevent unnecessary delay and multiplicity of proceeding as seen , under sub-section (3) of section 397 revisional jurisdiction can be invoked by" any person" but the code has not defined the word 'person', However, under section 11 of the IPC, 'PERSON' INCLUDES ANY COMPANY OR ASSOCIATION or body of person whether incorporated or not. The word 'person' would, therefore include not only the natural person but also juridical person in whatever form designated and whether incorporated or not By implication the State stands excluded form the purview of the word 'person'

for the purposes of the limiting its right to avail the revisional power of the High Court under Section 397 (!) of the code for the reason that the State, being the prosecutor of the offender, is enjoined to conduct prosecution on behalf of the society and to take such remedial steps as it deems proper. The Object behind criminal law is to maintain law, public order, stability as also peace and progress in the society, Generally, Private complaint under section 202 of the code are laid in respect of non-cognizable offences or when it is found that police has failed to perform its duty under Chapter XII of Code or to report as mistake of fact. In view of the principle laid down in the maxim *Ex debito justitiae* i.e. in accordance with the requirements of justice, the prohibition under section 397 (3) on revisional power given to the High Court would not apply when the state seek s revision under section 401 . So the state is not prohibited to avail the revisional power of the high Court under section 397 (1) read with section 401 of the code.

10. Ordinarily, when revision has been barred by Section 397(3) of the Code, a person accused/complainant - cannot be allowed to take recourse to the revision to the High Court under Section 397 (1) or under inherent power of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of Section 397 (3) or section 397(2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is

preserved with inherent power and would be justified, under such circumstance, to exercise the inherent power and in an appropriate case even revisional power and in appropriate case even revisional power under Section 397 (1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity or procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justices can be ensured only when expeditious trial is conducted.

6. It is quite apparent from the bare perusal of statements of prosecution witnesses recorded on 8.4.2019 that right of cross-examination vested in petitioner has been closed on account of non-appearance of his counsel, who otherwise had informed the court that he on account of pre-occupation at Nalagarh is unable to come. Though, having taken note of the explanation rendered on record by learned Counsel appearing for the petitioner, court below ought to have adjourned the cross-examination, but otherwise should have provided some legal aid counsel to the petitioner in order to conduct cross-examination of prosecution witnesses on behalf of the petitioner and should not have closed the right of the petitioner.

7. One cannot lose sight of the fact that it is the petitioner, who has suffered on account of non-appearance of the

counsel, as a consequence of which his right to cross-examine prosecution witnesses has been closed. Petitioner who is behind the bars even may not be aware that his counsel was not present on the day when prosecution witnesses were being examined, as such, in such like situation, it is duty of the court to ensure that vested right of the accused, who is unable to defend himself/herself is duly protected. Though, Mr. Anirudh Sharma, contends that the counsel as has been named in the order sought to be quashed, was never appointed by the petitioner, but even otherwise, right to cross-examine vested in the petitioner could not have been closed by learned Court below, on account of absence of his counsel, rather, in that situation, court should have provided some legal aid counsel to the accused. By now, it is well settled that it is obligatory for court to grant free legal service to the person, who is otherwise unable to engage a lawyer for himself/herself on account of financial constraints or account of his/her being behind bars. (See: Shri Suk Das and another vs. Union Territory of Arunachal Pradesh (Criminal Appeal no. 725 of 1985, decide don 10.3.1986)[(1986)2 SCC 401].

8. Otherwise also, careful perusal of Ss. 303 and 304 CrPC, provide that a person accused of an offence before court of law or against whom proceedings are initiated under the provisions contained in Code of Criminal Procedure, has a right to be defended by pleader of his choice. If accused is not

represented by a pleader or it appears to the court that the person has no sufficient means to engage a pleader, under S.304 CrPC, court is required to assign a pleader for the defence of the accused at the expenses of the State, but, in no situation, accused can be left without there being any legal aid. Reliance is placed upon **Sh. Sama vs. State of Mizoram** (Cr. Petition No. 2 of 2014, decided on 20.8.2014 by Gauhati High Court), wherein it has been held as under:

“6. I have considered the submissions made by the learned Counsel appearing for the parties and on perusal of the materials available on record, this Court is of the considered opinion that gross injustice have been caused to the petitioner inasmuch as he being an illiterate person, it was a duty bound on the part of the learned Trial Court to have apprised of his right or atleast could have provided an Amicus Curiae to the petitioner. This has not been done.”

9. IN view of discussion made herein above as well as law taken note herein above, it can be safely concluded that there is no complete bar on exercise of inherent power by High court, especially where there is abuse of process of law or extraordinary situation comes to notice of the court in the exercise of aforesaid jurisdiction. Plea of limitation raised by Learned Deputy Advocate General is not applicable in the instant case, because, if glaring injustice stares court on its face, it is bounden duty of the court to correct that glaring injustice by passing appropriate orders.

10. Consequently, in view of above, this Court, while exercising power under Ss.482 and 483 CrPC deems it fit to quash order dated 8.4.2019 passed by learned Court below, while recording statements of PW-4 and PW-5, in as much as it proceeded to close right of the petitioner to cross-examine the prosecution witnesses. Ordered accordingly. Learned Court below is directed to provide adequate opportunity to the petitioner to cross-examine the prosecution witnesses, if not already afforded and, in case, petitioner requires legal aid, same may also be provided to him. Petition stands disposed of in the aforesaid terms alongwith all pending applications, if any.

11. Registry to apprise learned Court below with regard to passing of instant judgment, enabling it to proceed further with the matter.

(Sandeep Sharma)
Judge

October 7, 2020
(vikrant)