

violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order, such a person is held to be indulged in anti-social activities. To bring the accused in the definition of Gangster, the very motive of such accused for committing the offence is relevant. The material collected by the investigating officer must reveal that there was a motive of making wrongful economic gain while committing the crime.

In the present case, this court has noted that although the accused are facing the charge of committing murder, however, there is no material to show that they have committed the crime in order to derive any wrongful economic gain.

8. It is admitted case of the State that the accused petitioner has no concern with case crime No.153 of 2017 (supra), as admitted in para 12 of the counter affidavit. It is also admitted case of the State that when the gang chart was prepared, charge sheet was not forwarded by the police authorities, rather it was forwarded to the court concerned on 25.6.2017. In this context, learned counsel has produced an information sought under Right to Information Act which is taken on record and it also shows that the charge sheet has been filed in the court on 23.6.2017 for the first time. Therefore, in view of the law laid down by this court in the case of **Master Alias Ramzan** (supra), the said charge sheet which was yet to be filed in the court could not have been considered for the purpose of preparation of the gang chart.

9. Considering the argument advanced by the petitioner's counsel as well as learned A.G.A. for the State as also going through the entire material on record and the case laws referred to herein above,

I am of the view that the petition is liable to be and is hereby allowed.

The impugned proceedings of Sessions Trial No.6 of 2018 State versus Sonu alias Santosh and others vide case crime No.279 of 2017 under section 3(1) of U.P. Gangster & Anti Social Activities (Prevention) Act, 1986, P.S. Kotwali Nagar, district Sultanpur as regards the petitioner as well as the charge sheet dated 25.5.2018 and summoning order dated 28.5.2018 are quashed. However, it shall be open for the competent authority to proceed against the petitioner as per law.

(2022)06ILR A366

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 03.06.2022

BEFORE

**THE HON'BLE AJAI KUMAR SRIVASTAVA-I,
J.**

Application U/S 482 No. 3457 of 2022

**Ashwani Kumar (Mishra) ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Applicant:

Sri Tung Nath Tiwari, Sri Ramesh Kumar Dwivedi, Sri Sunil Srivastava

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 -Section 231, 311, 313, 482:- Application for permitting the present accused to cross examine the PW-3 whose examination-in-chief had already been recorded twenty one year back & also cross-examined in detailed on behalf of other co-accused which was further adopted by the counsel for the present applicant & other co-accused - proceeding

pending before Ld. Special Judge (Ayurved Scam Matter), Lucknow since 1997 – rejection of request for recalling PW-3 being found belated & mala fide attempt to stall the trial – just and proper.(Para – 11, 12, 13, 14)

(B) Criminal Law - Code of Criminal Procedure, 1973 -Section 231, 311, 313, 482:- Application for summoning the prosecution witnesses whom were mentioned as PWs in charge sheet but are not produced by the prosecution – once prosecution has choose to closed its evidence after producing the witnesses whom they wants – prosecution is not bound to call each and every witnesses – accused has no legal right to seek to recall each and every PWs – Trial Court rightly declined the request. (Para 15, 17, 18)

Application (U/s 482) is dismissed. (E-11)

List of Cases cited: -

1. Mohammad Shafi Vs St. & ors. (AIR 1953 All 667),
2. Rajbir Vs St. of Har. (1996 Vol. 7 SCC 86),

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Sri S.N. Singh Gaherwar, Advocate has put in appearance on behalf of opposite party No.2 by filing his *vakalatnama* in Court today, which is taken on record.

2. Heard Sri Tung Nath Tiwari, learned counsel for the applicant, learned A.G.A. appearing for the State, Sri S.N. Singh Gaherwar, learned counsel for opposite party No.2 and perused the entire record.

3. By means of instant application under Section 482 Cr.P.C., the applicant seeks for quashing the order dated 25.05.2022 passed by the learned Special

Judge (Ayurved Scam Matter), Lucknow in Sessions Trial No.474 of 1997 (State of U.P. vs. Ashwani Kumar Mishra) and for permitting him to cross examine the prosecution witness, Surendra Prakash Tripathi and also to summon Nomilal and Dwarika as witnesses.

4. From a perusal of record, it transpires that Sessions Trial No.474 of 1997 (State of U.P. vs. Ashwani Kumar Mishra) is pending in the court of Special Judge (Ayurved Scam Matter), Lucknow. In the aforesaid Session Trial, the present accused/applicant, Ashwani Kumar (Mishra) moved an application dated 21.05.2022, under Section 311 Cr.P.C. praying to recall PW-3, Surendra Prakash Tripathi and also praying for summoning witnesses, namely, Nomilal and Dwarika as they are independent witnesses who were not examined by the prosecution in exercise of their right of adducing prosecution evidence.

5. This application dated 21.05.2022, which was moved under Section 311 Cr.P.C., came to be rejected by the learned trial court by a detailed impugned order dated 25.05.2022.

6. Learned counsel for the applicant has submitted that PW-3, Surendra Prakash Tripathi is alleged to have been present on the spot and have witnessed the incident-in-question. He contends that the accused/applicant, Ashwani Kumar (Mishra) did not get opportunity to cross examine PW-3, Surendra Prakash Tripathi which would cause him prejudice as it would amount to denial of opportunity of fair trial to him.

7. His further submission is that though the order sheet would reveal that the

opportunity of cross-examination for accused/applicant, Ashwani Kumar (Mishra) was closed by the then learned trial judge with the endorsement that learned counsel for the accused/applicant has stated to adopt the detailed cross-examination done by the other accused persons. However, no such written consent was given by his counsel. Therefore, denial of opportunity of cross-examination to the present accused/applicant which would cause prejudice to him.

8. Learned counsel for the accused/applicant has also submitted that all the witnesses produced by the prosecution are interested witnesses. Therefore, the prosecution ought to have produced Nomilal and Dwarika as independent witnesses whose names find mention in the charge sheet.

9. Per contra, learned A.G.A. appearing for the State has vehemently opposed the prayer for grant of relief prayed for by submitting that the trial of aforesaid Sessions Trial is pending since the year 1997. Reasonable opportunity was afforded to all the accused persons including the present accused/applicant, Ashwani Kumar (Mishra) and only thereafter, when the learned counsel for the accused/applicant adopted the cross-examination done by other accused persons, the opportunity of cross-examination of PW-3, Surendra Prakash Tripathi came to be closed. This application, at a belated stage, has been moved malafidely and with a view to stall the proceeding.

10. His further submission is that the prosecution cannot be compelled to produce any particular witness. In support of its case, the prosecution has examined

the witnesses whom the public prosecutor thought proper to get examined in order to bring home guilt of the accused persons including the present applicant. Therefore, the prosecution cannot be compelled to produce any such witness. He has, thus, prayed for dismissal of the instant application under Section 482 Cr.P.C.

11. Having heard learned counsel for the applicant, learned A.G.A. for the State, learned counsel for opposite party No.2 an upon perusal of record, it transpires that the statement of PW-3, Surendra Prakash Tripathi was recorded by the learned trial court in three stretches. His examination-in-chief was recorded on 02.02.2000, 19.07.2001 and 20.07.2001. It also transpires from perusal of order sheet dated 20.07.2001 that the learned trial court has made a specific endorsement that the cross-examination of PW-3, Surendra Prakash Tripathi, which was done on behalf of co-accused, namely, Jata Shankar and Shravan Kumar, is being adopted by learned counsel for the applicant. Therefore, it was, accordingly, endorsed at the bottom of the statement of PW-3, Surendra Prakash Tripathi which, thus, stood closed.

12. In the aforesaid background, this Court finds that a belated attempt is being made on behalf of the accused/applicant, Ashwani Kumar (Mishra) by making a prayer to recall PW-3, Surendra Prakash Tripathi whose examination-in-chief has already been recorded and who was cross-examined in detail on behalf of co-accused, Jata Shankar and Shravan Kumar and which was adopted by the learned counsel for the present accused/applicant and co-accused, Pramod Kumar. Therefore, this is nothing but an attempt to stall trial of a case which is pending since the year 1997. It is also an abuse of process of the Court.

13. This matter may be view from another angle also. This Court in **Mohammad Shafi vs. State and others** reported in **AIR 1953 All 667**, while interpreting scope and an ambit of Section 540 of old Cr.P.C. (corresponding to Section 311 Cr.P.C., 1973) has held that this section does not confer a right to any party to examine, cross-examine or reexamine any witness. It is entirely discretionary in the Court, in the interest of justice to take action or not to take action under this section. It is relevant to mention that Section 540 of the old Cr.P.C. corresponds to present Section 311 Cr.P.C.

14. It is indeed disquieting that in the application dated 21.05.2022 moved by the accused/applicant before the learned trial court for recalling PW-3, Surendra Prakash Tripathi for cross-examination, a copy of which is annexed as Annexure No.5 to the instant application under Section 482 Cr.P.C. There is no mention of any question which was to be put to the witness, PW-3, Surendra Prakash Tripathi and which was not covered by the detailed cross-examination of PW-3 which was done on behalf of the co-accused, Jata Shankar and Shravan Kumar and which ultimately came to be adopted for the present accused/applicant also by his learned counsel. Therefore, the exercise of moving an application by the accused/applicant in the form of application dated 21.05.2022 for recall of cross-examination of PW-3, Surendra Prakash Tripathi after about a lapse of twenty one years is nothing but a belated mala fide attempt on behalf of the present accused/applicant to stall the proceeding of aforesaid Session Trial. The same was, thus, rightly declined by the learned trial court.

15. So far as the question of summoning prosecution witnesses, namely, Nomilal and Dwarika, who were mentioned

as witnesses in the charge sheet in this matter is concerned, it appears from records that the prosecution after producing witnesses, whom they wanted to produce, has closed its evidence. Thereafter, statements of applicant and another co-accused have already been recorded by the learned trial court under Section 313 Cr.P.C.

16. Section 231 Cr.P.C. provides as under:-

"231. Evidence for prosecution.-
-(1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

2) *The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."*

17. The Hon'ble Supreme Court in **Rajbir vs. State of Haryana** reported in **(1996) 7 SCC 86** in Para-6 has held as under:-

"6. Learned counsel for the appellant submitted that non-examination of Shri Mool Chand Jain and Shri Makharia who, according to the prosecution case, were present along with Shri Banarsi Das Gupta, PW 17 and sitting on the sofa has created a doubt on the correctness of the prosecution case. Learned counsel further stated that the non-examination of Pawan Kumar, who had snatched the pistol from the appellant was a serious infirmity in the prosecution case and therefore the conviction of the appellant could not be sustained. We cannot agree. It is elementary that the

prosecution is not bound to call each and every witness of an occurrence irrespective of the consideration whether such witness is essential to the unfolding of the narrative on which the prosecution case is based. The prosecution has examined all material witnesses. PW 17 Shri Banarsi Das Gupta is the injured witness. PW 18 and PW 19 had caught hold of the appellant at the spot and handed him over to the police. PW 20 had deposed about the motive. The non-examination of Mool Chand Jain or P.D. Makharia, therefore does not in any way affect the correctness of the prosecution case."

(emphasis supplied)

18. Therefore, once the prosecution has chosen to close its evidence after producing the witnesses whom they wanted to produce, it is none of the right of the accused to seek their recall on the ground that prosecution ought to have produced them in order to prove its case.

19. On the basis of foregoing discussions, this Court is of the considered view that the impugned order does not suffer from any illegality or irregularity. The instant application under Section 482 Cr.P.C. is devoid of merit which is, accordingly, **dismissed**.

20. Let a copy of this order be sent to the concerned learned trial court by the Office for information, forthwith.

(2022)06ILR A370

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 27.06.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 3963 of 2022

Sangam Lal ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Neelu Singh Chauhan

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 173, 190, 190(1)(b), 204, 482 - Essential Commodities Act, 1955 -Section 3/7: - Application - validity of Cognizance/ summoning order and for quashing entire criminal proceeding under EC Act, - trial court materially erred in summoning the applicant on printed proforma by filling up the gaps/blanks - judicial orders cannot be allowed to be passed in a mechanical manner, without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out -Magistrate failed to exercise the jurisdiction vested in him resulting miscarriage of justice - Application allowed - impugned summoning order is quashed - matter is remitted back to proceed a fresh as per law. (Para - 14, 18, 25, 26, 27)

Application (U/s 482) is allowed. (E-11)

List of Cases cited: -

1. Dilwar Vs St. of Har. (2018 vol. 16 SCC 521),
2. Menka Gandhi Vs U.OI.. & ors. (AIR 1978 SC 597),
3. Hussainara Khatoun (I) Vs St. of Bihar (1980 vol. 1 SCC 81),
4. Abdul Rehman Antulay Vs R S Nayak (1992 Vol. 1 SCC 225),
5. P. Ramchandra Rao Vs St. of Karn. (2002 Vol. 4 SCC 578),