

**HIGH COURT SOF JAMMU AND KASHMIR AND LADAKH
AT JAMMU**

Reserved on 22.10.2021
Pronounced on 29.10.2021

CRM(M) No. 465/2019
CrIM No. 1123/2019
CrIM No. 1346/2019

Mohkam Din and others

.....Appellant/Petitioner(s)

Through :- Mr. M. A. Bhat, Advocate

v/s

State of J&K

.....Respondent(s)

Through :- Mr. Aseem Sawhney, AAG

CORAM: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioners are facing trial in the charge sheet, titled, State vs. Mohkam Din and others, pending before the Court of Special Excise Moble Magistrate, Jammu (hereinafter to be referred as the trial court) for commission of offences under sections 452, 323, 325, 427, 336 and 149 RPC.
2. The brief facts as narrated in the petition are that the prosecution evidence was closed and after recording the statements of the petitioners under section 342 Cr.P.C, the case was fixed for arguments as the petitioners did not examine any witness in their defence. It is further stated that when the counsel for the petitioners was preparing the case, it came to his notice that complainant-Qasim Din in his statement has stated that he had lodged an oral complaint in the Police Station, Bahu Fort, Jammu with respect to the alleged incident, however, according to the complainant, no action was taken

by the Police on the said complaint. The counsel for the petitioners asked the petitioners to verify from the said Police Station as to what happened to the said complaint lodged by the petitioners on 03.03.2007 and the petitioners got the knowledge that oral complaint was registered and the investigation was entrusted to the Incharge Police Post, Narwal Jammu and thereafter, complaint under section 107/117 Cr.P.C. was filed before Executive Magistrate on 16.03.2007. It was also revealed that the said complaint was dismissed and consigned to the records.

3. Thereafter, the petitioners approached this Court under section 561-A Cr.P.C. for directing the trial court to allow them to place on record certain documents and summoning the witnesses like complainant, the then SHO Police Station, Bahu Fort and Investigating Officer in FIR No. 69/2007. However, the said petition was dismissed by this Court with a liberty to the petitioners to lay a motion before the trial court. Thereafter, the petitioners filed an application under section 540 Cr.P.C. before the learned trial court for permission to place on record copy of the complaint presented before the Executive Magistrate, Jammu with regard to the alleged incident stated to have occurred on 02.03.2007 and for calling SHO Police Station, Bahu Fort, Investigating Officer of FIR No. 69/2007 dated 03.04.2007 lodged with the Police Station, Bahu Fort and the complainant-Qasim Din.
4. The said application of the petitioners was objected by the respondents therein and ultimately the same was dismissed vide

order dated 08.08.2018. The petitioners have impugned the order dated 08.08.2018 in this petition on the following grounds:

- (i) That the trial court has dismissed the application on the ground that the application was filed only to delay and prolong the matter, whereas the fact remains that the trial court has spent eleven years to record the prosecution evidence and the prosecution evidence was closed on 02.08.2018. Thereafter, the statements of the petitioners were recorded on 18.09.2018 and defence evidence was closed on 04.10.2018 because the counsel for the defence stated that he did not want to produce any evidence and the arguments were also heard in part by the trial court.
- (ii) That since the complainant, Investigating Officer and SHO concerned have not been cross-examined, questioned on the above aspect and effect of the lodging oral report, filing of complaint under section 107/117 Cr.P.C. and fact of concealment of this issue and summoning/recalling of these witnesses, is very much essential for just decision of the case.
- (iii) That even if there was inadvertence or lapse on the part of defense counsel, the trial court was required to show magnanimity and allow the application of the petitioners in summoning the witnesses.

5. Mr. M. A. Bhat, learned counsel for the petitioners vehemently argued that the learned trial court has passed the order impugned against the mandate of provisions of section 540 Cr.P.C. and has

deprived the petitioners of their right to prove the falsity of the case lodged against them.

6. On the other hand, Mr. Aseem Sawhney, learned AAG submitted that the petitioners had every opportunity to cross-examine the complainant, Investigating Officer and further to lead defense evidence and having not done so, the clock cannot be put back, therefore, the application has rightly been dismissed by the trial court.
7. Heard learned counsel for the parties and perused the record.
8. A perusal of the challan reveals that the FIR was registered pursuant to the complaint filed by Qasim Din and in the said application it has been stated by the complainant that he lodged the oral report in the Police Post, Narwal on 03.03.2007 in the morning. Further, a perusal of the record reveals that the complainant was examined on 01.10.2015 and the statement of Investigating Officer, namely, Vikram Sharma was recorded on 07.08.2018. The fact with regard to the lodging of the complaint by the complainant was well within the knowledge of the petitioners' right at the time when the copies of the challan were handed over to them and also when the complainant was examined on 01.10.2015. Even the matter was final argued by the learned counsel for the petitioners and the challan was reserved for pronouncement of judgment.
9. A perusal of the application filed by the petitioners under section 540 Cr.P.C. would reveal that in para No. 5, it has been stated by the petitioners that when the case was fixed for arguments, the counsel for the petitioners was preparing the case and during discussion, it

was revealed that Qasim Din had lodged the oral complaint with the Police Station, Bahu Fort on 03.03.2007, whereas the fact remains that in the instant case, as per the record, learned counsel appearing for the petitioners concluded his arguments on 25.10.2018 and further on 01.11.2018 the matter was fixed for judgment. More so, this fact was already mentioned in application under section 156(3) CrPC on the basis of which FIR was registered. So, the reasons stated by the petitioners for filing the present application are contrary to the records.

10. In the instant case the trial stands concluded and the matter was listed for judgment. No doubt powers under section 540 CrPC are very wide but the same are required to be exercised sparingly particularly when the trial stands closed. In **Hoffman Andreas v. Inspector of Customs, reported in (2000) 10 SCC 430**, the Apex Court has observed that **“Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. 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”.

11. The reason for examining the Investigating Officer in FIR No. 69/2007 and complainant has been demonstrated by the petitioners that they want to confront the said witnesses with the documents mentioned above. Needless to say that the Investigating Officer in FIR No. 69/2007 has nothing to do with complaint lodged by the complainant on 03.03.2007. So far as complainant is concerned, he had already admitted that on 03.03.2007, he had filed the oral complaint with the Police Station, Bahu Fort. The petitioners have already cross-examined the complainant with regard to the report lodged by him orally on 03.03.2007. So, in view of the fact that complainant has already been cross-examined, he cannot be recalled for purpose of confronting with the documents. So far as Investigating Officer and SHO Bahu Fort are concerned, the controversy in the instant case is with regard to the commission of offence occurred on 02.03.2007 and not whether any complaint was lodged with Police on 03.03.2007. As such, they too are not required to be recalled/summoned as the case may be.

12. Viewed thus, there is no merit in the petition, as such, the same is dismissed. The trial court is directed to conclude the hearing and dispose of the charge sheet within a period of 45 days as the matter is more than a decade old.

(Rajnish Oswal)
Judge

JAMMU:
29.10.2021
Karam Chand/Secy

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No