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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.4122 OF 2014**

Smt. Kamlaben Amrutlal
Mahyavanshi .. Petitioner
V/s.
Mr. Vishnu Fakir Damaniya
and ors .. Respondents

Mr. Kaptil P. Dave, for the Petitioner
Smt. P.P. Bhosale, for the Respondent State.

CORAM : M. L. TAHALIYANI, J.

DATE : 15th January, 2015.

P.C.

The issue raised in this petition has come before me for the fourth time.

2. The Petitioner Kamlaben has filed private Criminal Complaint against Respondent Nos 1 to 5 for the offences punishable under Sections 342 read with Section 149 and Section 427 read with section 149 of the Indian Penal Code. The particulars of the offences have been explained to the Respondents and the

trial has commenced.

3. During the course of trial, the Petitioner Kamlaben was examined as P.W.1. One Dhansukh Dayabhai Kelkar was examined as P.W.2. It appears that during the pendency of trial, one Bansurbhai Devrambhai Mahywanshi, had appeared before the Court and claimed that he had deposed before the trial Court as Dhansuk Dayabhai Kelkar. During the course of deciding earlier matters between the parties, this Court had directed the learned Magistrate to hold an enquiry as to whether the allegations made by said Bansurbhai Devrambhai are correct. Bansurbhai claimed that he had deposed as Dhansuk Dayabhai Kelkar, at the instance of the Petitioner. The learned Magistrate, therefore, directed the Petitioner to produce Dhansuk Dayabhai Kelkar, who was examined as P.W.2, as the Petitioner-complainant claimed that Bansurbhai had never appeared as Dhansukh Dayabhai Kelkar. The

complainant was, therefore, directed to produce Dhansukh Dayabhai Kelkar who was examined as P.W.2.

4. The complainant is unable to produce witness as he is not traceable. The son of Petitioner/complainant is present before this Court today. He submits that he is not able to trace the witness. The learned Magistrate, therefore, has passed the impugned order by striking off the evidence of P.W.2 earlier recorded.

5. In my view, instead of striking off the evidence, the learned Magistrate could have considered further development which took place during the course of trial and he could have decided as to how much weight can be given to the evidence of P.W.2. It is possible that the learned Magistrate could have come to the conclusion that the said evidence could not be considered. Striking off the evidence was not a remedy in the facts and

circumstances of the case.

6. In view thereof, the order passed by the learned Magistrate below Exh Nos 123, 124 and 129 and 134 in SCC No.123 of 2003 is set aside. The learned Magistrate is directed to decide the evidentiary value of evidence of P.W.2 at the time of final judgment and order. The petitioner is at liberty to move the trial Court for any further relief including recalling of P.W.1, the petitioner herself or her son to decide the identity of P.W.2.

(M. L. TAHALIYANI, J.)