

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1161 OF 2014

Romin Mukhtar Farid	...	Applicant
vs.		
1. The State of Maharashtra		
2. Mr. Ahmed Asif Fakhi	...	Respondents

Mr.Niteen Pradhan i/b. Ms. K.H.Rajani,Advocate,for the applicant.
Mr. Sameer A.K.Fouzi i/b. A.S.Khan & Associates for respondent No.2.
Mr. V.B.Konde-Deshmukh, APP, for the State.

CORAM: SMT.SADHANA S.JADHAV,J.
DATE : 20th August, 2015.

P.C.

Heard. Rule. Rule made returnable forthwith with consent of the parties.

2. The petitioner herein, questions the correctness and the validity of the order dated 1.11.2014 passed by the Addl. Sessions Judge, Thane, in Sessions Case No.284 of 2010, thereby allowing the application filed by the accused under Section 311 of Cr.P.C.

3. Such of the facts necessary for the decision of this Application are as follows :-

That the applicant herein happens to be the original complainant in C.R. No.24 of 2010 registered at Bhoiwada Police Station against the accused (present respondent) for the offences punishable under Sections 307, 392, 506(II) of Indian Penal Code and Section 3 read with Section 25 of the Indian Arms Act. The applicant had lodged the report on 12.2.2010. The investigation is completed and charge sheet is filed on 3.6.2010. The case is registered as Sessions Case No. 284 of 2010.

4. The applicant herein had stepped into the witness box and her examination-in-chief was recorded. She was cross-examined at length. The cross-examination was concluded on 26.8.2014. PW-2 and PW-3 are the eye-witnesses in the said case. Both the witnesses were cross-examined by the accused and the cross-examination is concluded on 4.10.2014. Thereafter, the prosecution has examined PW-4 who is the doctor, who had examined the victim. The prosecution has also recorded the evidence of two other witnesses. In all six witnesses are examined by the prosecution.

5. On 29.10.2014, the accused filed an application under Section 311 of Cr.P.C. seeking relief of recalling PW-1, PW-2 and PW-3. It is stated in the said application that there are lot of contradictions and variations in their deposition which have not adequately been brought on record in the

cross-examination and therefore it is necessary to recall the said witnesses. There is an averment in the application that the accused have been falsely implicated in the said case. The false implication was not in the knowledge of the accused and the accused had learnt about it only after the examination-in-chief of the prosecution witnesses. That the defence has failed to cross on this part of evidence which is necessary for just decision of the case. It is also averred that the circumstances and the motive of the complainant can be proved if other evidence and/or opportunity of further cross-examination is given. The complainant had objected to the said application.

6. The learned Sessions Judge has allowed the said application. It is pertinent to note that the learned Sessions Court has also observed that it is a part-heard matter. That the accused was a non-practising Advocate. He was represented by an Advocate. The witnesses have been examined and cross-examined. That there were certain proceedings between the parties over the custody of the children and divorce. It is observed by the learned Sessions Judge there was non-diligence and carelessness on the part of the accused to provide information which he ha allegedly made known subsequently to his lawyer and therefore the application was allowed. The

very fact that the Court has observed that sufficient opportunity was given to the accused, but he had been careless in giving instructions would be a sufficient indication to show that the best possible opportunity was not availed of and request to Section 311 of Cr.P.C. is taken only to fill up the lacunas. Section 311 of Cr.P.C. reads as follows :-

“311. Power to summon material witness, or examine person present – Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summons as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

Thus the language of Section 311 of Cr.P.C. would indicate that just reasons have to be marked out. There has to be a foundation for recalling and re-examining the witnesses. The said power cannot be exercised to either fill up the lacunas or to adduce additional evidence by recalling the witness on the material which does not form a part of the record. Moreover, the application filed by the accused itself would show that he had learnt about some .. not touching the case at hand only after the substantive evidence is recorded. The Court cannot be oblivious of the fact that the accused has opportunity to bring material

in his defence at the stage of Section 313 of Cr.P.,C. as well as tender additional documents and file his say under Section 313(2) of Cr.P.C. that can be considered by the trial Court. In the present case, neither there is foundation for recalling and re-examining the witnesses nor the learned Court has assigned any reasons for recalling a witness. The carelessness on the part of the accused or his Advocate cannot be treated as sufficient ground for recalling a witness and that would amount to granting a release just for the asking.

7. The learned counsel for the applicant has placed reliance upon a Judgment of this Court in the case of **Amit @ Monu s/o. Suresh Varma & Anr. vs. State of Maharashtra 2014 ALL MR (Cri) 1429**, wherein this Court had allowed the application seeking recalling of the witnesses. In the facts of that case, it is seen that the prosecution had filed an application after evidence of 15 prosecution witnesses adduced. The accused were examined under Section 313 of Cr.P.C. and the arguments were heard. In that case, the Hon'ble Judge of this Court (Coram: P.D.Kode, J.) had observed that the first information report was not properly proved. The prosecution had not made any efforts to prove the same. Even while adducing evidence of

I.O., he had made an endorsement on the first information report. It was a belated stage that overwriting was observed. The Hon'ble Court had in the facts of that case, observed as follows :-

“Needless to add that every criminal trial first information being the foundation of prosecution case, every facets related with the said report is of immense importance. The matters narrated hereinabove reveal that the evidence has not surfaced at the trial regarding the circumstances in which and point of time at which the crime was registered uipno the said complaint. Apparently it appears that the applicants also have a grievance regarding the said registration i.e. the same being not as contained in the said endorsement as according to them the same contains some interpolation. All the said aspects make it abundantly clear that evidence regarding the said facet is essential for the just decision of the trial.”

It is pertinent to note that in that case, an application was filed by the prosecution to prove its own case and there was material to be confronted to the investigating officer and therefore the application was allowed. In the present case, the application under Section 311 of Cr.P.C. has been filed by the accused to bring additional material on record. The said material is other than the material collected at the stage of investigation and, therefore, the accused can avail of the said opportunity at the stage of 313 to put up his defence.

8. The learned counsel for the applicant submits that although no proper foundation is laid in the application under Section 311 of Cr.P.C. the accused desires to bring on record the motive of the complainant to falsely implicate the accused. This would be additional material. Therefore, the application does not deserve to be allowed.

9. The learned counsel for the applicant has also relied upon a Judgment of this Court in the case of **Tukaram Limbaji Londhe & Ors. vs. The State of Maharashtra 2014 ALL MR (Cri) 1053**. In that case, the Court had allowed the application since the learned Sessions Court had rejected the application under Section 311 of Cr.P.C. by taking into consideration the conduct of the Advocate for the accused and not the accused themselves. This is a distinguishable feature in the present case, whereas it is the accused who have filed the said application and want to bring additional material on record. The learned counsel has also placed reliance upon the Judgment of this Court in the case of **State of Goa vs. Mahanand Naik 2015 ALL MR (Cri) 13**. In that case, the Hon'ble Court had considered that after examination of investigating officer, additional witnesses were

examined and the said witnesses were confronted with the material in the charge-sheet, it was necessary to prove omissions and contradictions of the said additional witnesses through the investigating officer as he would be the only witness who can prove the contractions to witness. In the present case, the accused desire to recall and re-examine the witness only a specific ground to show that accused has been falsely implicated. It is pertinent to note that at the end of the cross-examination of PW-1, the witness has specifically denied to have falsely implicated the accused person. In the present case, it is not necessary to recall the witness as the case rests upon direct evidence in the nature of eye-witness. Hence, this Court is of the opinion that the learned Sessions Judge has committed an error in allowing the said application without assigning justifiable reasons for allowing the same.

10. In view of this, the Application deserves to be allowed. The Application is allowed. The impugned order dated 1.11.2014 passed by the Sessions Judge, Thane, below Exhibit 87 in Sessions case No.284 of 2010 is hereby quashed and set aside. Application is allowed in terms of prayer clause (b).

11. In the eventuality, the accused files a fresh application by laying foundation, the learned Sessions Judge may decide the said application on its own merits, without being influenced by the present order. In any case, the learned Sessions Judge shall see that any application filed by the accused shall be decided within one week from the date of filing. The trial shall proceed in accordance with law without staying further proceedings.

Application is disposed of. Rule is made absolute accordingly.

(SMT.SADHANA S.JADHAV, J.)