

(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 546 OF 2016

1. Vijay s/o Bhimrao Mokale,
Age: 30 years, Occu: Agril.,
R/o : Agathan, Tq. Vaijapur,
Dist. Aurangabad
 2. Bhimrao s/o Kondiram Mokale,
Age: 60 years, Occu: Agril.,
R/o : As above
 3. Sonabai w/o Bhimrao Mokale,
Age: 55 years, Occu: Household,
R/o : As above
- ..PETITIONERS

VERSUS

The State of Maharashtra ..RESPONDENT

Mr K. F. Shingare, Advocate for petitioners;
Mr A. R. Kale, Addl. Public Prosecutor for respondent

CORAM : N.W. SAMBRE, J.

DATE : 18th April, 2016

ORAL ORDER :

Heard learned Counsel appearing on behalf of the petitioners and learned Additional Public Prosecutor.

2. The matter is taken out for final disposal at admission stage.
3. The order passed by the learned Additional Sessions Judge, Vaijapur, on application under Section 311 of the Code of Criminal Procedure, in Sessions Case No. 17 of 2015, passed below Exh. 57 on 6th

(2)

April, 2016, refusing to recall witnesses P.W. 1 to 4 for cross examination, is questioned in the present petition.

4. While trying to make out a case for grant of application under Section 311 of Code of Criminal Procedure, Mr Shingare, learned Counsel appearing on behalf of petitioners submits that the lawyer, who was engaged at the relevant time, was not familiar in conducting the criminal trial and as such, evidence was not appropriately recorded.

5. He would then submit that after change in lawyer, it was noticed that material contradictions and certain omissions in the evidence, remained to be brought on record. One of such aspects, to which attention of this Court is invited, i.e. the statement of Yash dated 18th October, 2014, recorded by the Investigating Officer, whereas in his evidence, he has stated that his statement was not recorded. Apart from above, learned Counsel appearing on behalf of petitioners has invited my attention to certain other material which has remained to be brought on record.

6. In support of his contention, learned Counsel has relied upon the judgment of this Court in the matter of **Ranjana w/o Subhash Dahiware Vs. State of Maharashtra** reported in **2008 (3) Mh.L.J. 476**, particularly paragraph No. 7 which reads thus:

“7. No doubt, in criminal trial neither the prosecution nor the defence is entitled to recall witness at its own sweet will. However, the fact remains that in the present case, it is the

(3)

case of the applicant that on account of wrong impression carried by the learned Advocate for the applicant that statements of three witnesses P.W.1, P.W.2 and P.W.3 were not recorded by PW-8 Rajesh Gautam, material contradictions and omissions vis-a-vis the statement of three witnesses were not put to Rajesh Gautam. Moreover, the applicant is facing a grave charge of murder. Therefore, in my opinion, Mr. Nawab is right in placing reliance on the Judgment of the Apex Court in Rajendra Prasad Vs. Narcotic Cell case (supra) in which the Apex Court has held that no party in trial can be foreclosed from correcting errors. Having regard to the nature of the charge against the applicant and peculiar circumstances of the case, I am of the considered opinion that this is a fit case in which the impugned order deserves to be quashed and set aside and the applicant must be given an opportunity only to put contradictions and omissions vis-a-vis statements of P.W.1, P.W.2 and P.W.3 to P.W.8 Rajesh Gautam.”

6. He also relied upon the judgment of this Court in the matter **Vikas s/o Sureshrao Waghmare Vs. Moreshwar s/o Bhausahab Kadam**, reported in **2011 (2) Mh.L.J. (Cri.) 123**, particularly paragraph No. 13, which speaks about granting permission in such case, invoking provisions of Section 311 of Code of Criminal Procedure.

7. Learned Additional Public Prosecutor submits that, the order of the learned Sessions Judge, is after considering entire pros and cons of the matter. He supported the order and sought dismissal of the petition.

8. Upon perusal of the record, fact remains that in examination-in-

(4)

chief, witness Yash stated that his statement was not recorded, however, petitioner produced on record that the statement of witness Yash is recorded. Apart from above, after going through the evidence on record, it is required to be noted that there are certain material omissions, which remained to be dealt with.

9. Having regard to the observations made by this Court in the matters **Ranjana w/o Subhash Dahiware** and **Vikas s/o Sureshrao Waghmare** (cited supra), in my opinion, case for granting of relief under Section 311, is made out with an view to grant fair opportunity of trial to the present petitioner.

10. As such, present petition stands allowed.

11. The order of learned Sessions Judge, Vaijapur, below Exh. 57, on 6th April, 2016, in Sessions Case No. 17 of 2015 is hereby set aside. The application Exh. 57 stands allowed in above terms.

(N.W. SAMBRE, J.)