

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1161 OF 2015

ASHOK NATHU MALI

PETITIONER

VERSUS

SUMANBAI DHARMA PATIL AND
OTHERS

RESPONDENTS

Mr.K.C.Sant, Advocate for the petitioner.
Mr.N.T.Bhagat, APP for respondent No.5.
Respondent Nos. 1 to 4 served.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 24/06/2016

PER COURT :

1. The petitioner is aggrieved by the order dated 16/07/2015 passed by the learned Judicial Magistrate F.C. Chalisgaon, by which the application filed by the petitioner seeking leave to examine a witness u/s 311 of the Cr.P.C. has been rejected.

2. I have heard Mr.Sant, learned Advocate for the petitioner and the learned APP on behalf of the State for quite some time.

3. Office report indicates that respondent Nos. 1 to 4 have been served as on 13/06/2016. None appeared before this Court on 20/06/2016. As such, by placing respondent Nos. 1 to 4 to notice that

if they do not appear on the next date, the matter would be heard without their assistance, the matter was adjourned to this date. Even today, no appearance has been caused on behalf of respondent Nos. 1 to 4.

4. There is no dispute as regards the peculiar facts of the case. The prosecution had examined its witnesses. Evidence was closed. Statement of the accused was recorded u/s 313 of the Cr.P.C. at Exh.94. Matter was posted for advancing oral submissions.

5. At this juncture, the petitioner/complainant in RCC No.352/2010 moved an application at Exh.96. It was stated that the doctor who had treated the petitioner after he had suffered the offences at the hands of the accused, was required to be examined. The said application dated 10/04/2015 has been rejected by the impugned order. Though interim relief was not granted to the petitioner in this matter, it is informed that the proceedings have not progressed and the parties have not advanced their oral submissions.

6. The Issue involved raises two aspects. Firstly, whether the witness can be presented for leading evidence u/s 311 of the Cr.P.C. after the statement of the accused has been recorded u/s 313. Secondly, whether there are justifiable grounds for permitting such

examination.

7. There can be no debate that the application Exh.96 has been submitted by the petitioner without mentioning the details as regards the name of the doctor and the purpose for which he is required to be examined. However, it cannot be ignored that in paragraph No.7 of the complaint filed by the petitioner, the Medical Officer has been specifically mentioned as a witness. Necessary pleadings are found in paragraph No.5.

8. In an almost similar situation in the matter of Rajendra Prasad Vs. The Narcotic Cell through its Officer-in-charge, Delhi, 1999 AIR (SC) 2292, the Hon'ble Apex Court had permitted recalling of a witness as it concluded that an oversight by the prosecution ought not to be treated as an irreparable lacuna. In the said case, the evidence of the prosecution was recorded followed by the statement of the accused u/s 313 and which was followed by advancement of oral submissions. The observations of the Hon'ble Supreme Court in paragraph Nos. 7 and 8, in my view, would be applicable to this case and which read as under :-

"7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated

with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to error in human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in trial can be fore-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

9. It is therefore not an anathema for the Trial Court to permit the examination of a witness even at the stage of advancement of final submissions considering the effect of the non examination of the said witness.

10. In so far as justifiability is concerned, though the petitioner has

not stated in sufficient words as regards examining the doctor, the Trial Court could not have lost sight of the fact that the petitioner had stated in paragraph No.5 of the complaint that he had been medically treated by the said doctor and he had issued a certificate which the petitioner had carried to the Police Station. In paragraph No.7 of the complaint, the petitioner had specifically stated at Sr.No.8 that the said Medical Officer would be one of his witnesses. In my view, the Trial Court should have therefore considered the pleadings in paragraph No.5 and the mentioning of the Medical Officer in paragraph No.7 while dealing with application Exhibit 96.

11. in the light of the above, this petition succeeds and is therefore allowed. The impugned order dated 16/07/2015 is quashed and set aside. Application Exh.96 is allowed so as to permit the petitioner to examine the Medical Officer, Rural Hospital, Mehunbare, mentioned at Sr.No.8 in paragraph No.7 in the complaint. The learned Magistrate shall therefore pass necessary orders for issuance of summons to the said Medical Officer so as to enable his examination.

(RAVINDRA V. GHUGE, J.)