

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL WRIT PETITION NO.1441 OF 2015**

Santosh Vishnu Lonkar ..Petitioner

Versus

State of Maharashtra ..Respondent

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Mrs.Rashmi Kulkarni, advocate i/b. Mr.Sanket  
Kulkarni, advocate for petitioner

Mr.N.T.Bhagat, APP for respondent - State

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**CORAM : M.T. JOSHI, J.**

**DATE : JANUARY 18, 2016**

**ORAL ORDER :**

Heard both sides.

2] Original accused, who is facing trial for the offences punishable under Section 302 and 376 of Indian Penal Code, is aggrieved by the order passed by learned the Addl. Sessions Judge, Ahmednagar, during trial, for recalling PW 2 - Amol after his examination and cross-examination was over. Hence, the present Writ Petition.

3] The prosecution case would show that on 22<sup>nd</sup> August, 2014, the victim of the offence went missing. Sometime before 7:00 p.m. on the same day, her dead body was found. PW 2 – Amol is cousin brother of the deceased.

. The prosecution case is that on 22<sup>nd</sup> August, 2014, PW 2 – Amol while proceeding on a motorcycle with his friend, had seen the victim all alone at about 5:00 p.m. going towards her house. He had, therefore, asked her, whether he should give lift upon which, she replied that she will go alone. Thereafter, present petitioner/accused – Santosh Lonkar along with other two co-accused were seen going on a motorcycle in slow speed while the victim was going ahead on foot.

4] In this situation, after the deposition of PW 2 – Amol was closed, learned Public Prosecutor filed an application at Exhibit 36 and sought

permission to recall the said witness i.e. PW 2 –  
Amol for putting him following two questions :-

*“Question : After seeing (the victim) in the evening of 22<sup>nd</sup> August, 2014, whether you had any opportunity to see (the victim)? If yes, when? If not, why?”*

*Question : What you had done after hearing about (the victim)?”*

5] The learned Addl. Sessions relied upon the ratio laid down in the case of **Rammi @ Rameshwar Vs. State of M.P., 2000 S.C.C. Criminal 26** wherein, *inter alia*, it was observed that reexamination need not be only for clearing the ambiguities in the evidence. The only requirement is that upon securing permission, if certain material facts are to be proved, the court may be liberal in granting permission to re-examine the witness.

6] Mrs.Kulkarni, learned counsel for the petitioner, submits that not only the questions are leading and vague, the evidence of PW 2 – Amol would show that only to fill the lacuna in the contradictory statements in the evidence of PW 1 and PW 2, these questions would be put.

. She submits that PW 1 – complainant has deposed that PW 2 – Amol, his nephew, told him that he had seen the victim under a tree. PW 2 – Amol, however, in the statement recorded before the police, had not stated about the same and therefore, by putting said questions in re-examination, the State wants to fill-up the lacuna in the evidence. Therefore, relying on the ratio laid down in the cases of (i) ***Shridhar Waman Surushe Vs. State of Maharashtra and anr., 1987(1) B.C.R. 533*** and (ii) ***Rajaram Prasad Yadav Vs. State of Bihar and anr., AIR 2013 SC 3081***, she submits that the learned Addl. Sessions Judge ought not

have allowed the said application for grant of re-examination of the witness.

7] Learned A.P.P. for the respondent – State opposes the petition. He submits that present petitioner would have every opportunity to cross-examine said witness. He further submits that the questions are not leading and vague. He further submits that in order to bring the truth on record, permission to reexamine the said witness is sought.

8] In the case of Shridhar (cited supra), it has been observed that whether recalling and re-examination of a witness, was with a view to fill up the gap in evidence, depends on the facts of each case. In the case of Rajaram (supra), in the facts of the said case wherein, the witness turned hostile initially and after his evidence was over, was recalled, the Supreme Court has set out

certain guidelines for dealing with an application for recalling of the witnesses, in paragraph 23, as under :-

*a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*

*b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.*

*c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.*

*d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

*e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it*

apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

9] The directions would show that balance has to be struck between the competing factors. While the accused is to be guarded from any attempt to fill in a lacuna by the prosecution, the judgment that would be rendered ultimately should not be based on inconclusive facts.

. It has been also observed that the exercise of said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

10] Upon hearing both sides, in my view, as per the prosecution case, PW 2 – Amol was the witness to the facts as claimed to have been detailed by him during investigation. Certain amplification of

those facts which are already on record, are being sought to be brought on record. Present petitioner would have every opportunity to cross-examine the said witness, to question him regarding improvement, if any, over his earlier statement claimed to have been recorded by the police during investigation.

11] In that view of the matter, I do not feel it necessary to interfere in the discretion exercised by the learned Addl. Sessions Judge.

12] In the result, present Criminal Writ Petition is dismissed. Needless to mention that the observations made herein are only for the purpose of discussion as to whether, the questions to be put, are necessary and the learned Addl. Sessions Judge shall not be influenced by any of the observations.

13] At the request of learned counsel for the petitioner, interim stay granted to the impugned order, is hereby extended till 18<sup>th</sup> February, 2016.

**[M.T. JOSHI, J.]**

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