

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4068 OF 2014

The State of Maharashtra		Petitioner
<i>Versus</i>		
Vikram Ashok Patil		Respondent

Mr. A.S. Shitole, A.P.P., for the Petitioner-State.

Mr. M.K. Kocharekar, i/by Mr. Sandip Babar,
for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 23RD FEBRUARY 2016.

P.C. :

1. By this Writ Petition, the State has taken an exception to the order dated 28th March 2014 passed by the Additional Sessions Judge, Islampur, in Criminal Revision Application No.4 of 2014. By the impugned order, the learned Sessions Judge has set aside the order dated 5th December 2013 passed by the Judicial Magistrate, First Class, Islampur, in R.C.C. No.6 of 2007 and directed the Trial Court to recall the Prosecution Witness Nos.1 and 2 for further cross-examination.

2. The Respondent herein is prosecuted by the State for the various offences punishable under Sections 143, 147, 148, 149, 324, 325, 326, 341, 427 and 506 of IPC along with other co-accused in respect of the

incident dated 15th August 2006, when the Original Complainant-Informant Gangaram Shivaji Shingade, a Member of Bharatiya Janata Party, was assaulted by the Respondent and other co-accused. After the evidence of four prosecution witnesses was recorded in the said case, the Defence Counsel moved an application seeking recall of two injured witnesses for further cross-examination. As initially the application was not disclosing the reasons, the Trial Court rejected the said application. Respondent challenged the said order by filing Criminal Revision Application No.26 of 2013. In Revision Application he sought permission to move a fresh application before the Trial Court making out the grounds on which the recall of these two injured witnesses was necessary. Accordingly, the Respondent was granted permission to move a fresh application before the Trial Court and Trial Court was directed to decide it on its own merit, if such application is made.

3. Accordingly, the Respondent herein moved a fresh application before the Trial Court stating therein that, in view of the Respondent-Accused engaging new Advocate on their behalf, it is felt necessary that these two injured witnesses are required to be cross-examined on the point of incident, motive and injuries allegedly sustained by these two witnesses and on other material aspects of the case. It was submitted that, their further examination is essential for just decision of the case to

establish their defence. It was further contended that, as the new Advocate is unaware of the scheme of the defence strategy of the former Advocate and also unaware of the reasons for which the former Advocate had not cross-examined the witnesses on certain important aspects, the recall of these two witnesses at-least was essential.

4. This application was strongly resisted by the prosecution and the Trial Court was pleased to reject the same on the ground that sufficient opportunity was given to the Accused to cross-examine these witnesses and the Accused has availed that opportunity. It was further found that the proceedings was pending in the Court since last seven years and when already sufficient opportunity was given to the Accused to cross-examine the witnesses, it was not necessary to recall them.

5. When the Respondent-Accused challenged this order before the Sessions Court in Revision, the Sessions Court, after taking recourse to the provisions of Section 311 of Cr.P.C. and further relying upon the Judgment of this Court in ***Mansaram Shaligram Sawalkar Vs. State of Maharashtra, 2011 ALL MR (Cri) 3651***, allowed the said Revision holding that the object of the criminal trial is to find out truth and it is, therefore, the right of the Accused to have fair opportunity.

6. While challenging this order of Revisional Court permitting recall of the two injured witnesses, submission of learned A.P.P. is that, once the Trial Court has exercised its discretion, it was not proper on the part of the Revisional Court to interfere in the exercise of the said discretion. Secondly, it is submitted that, both these prosecution witnesses were already cross-examined at length, including on the aspects of motive, enmity or the injuries allegedly sustained by them. It is further urged that mere change of Advocate cannot be a ground to justify recall of the witnesses for further cross-examination. It is also urged that the defence strategy of earlier Advocate, as can be found out from the cross-examination of the witnesses, was to put up the case of the witnesses having sustained injuries in the accident. Now the Defence wants to take up another strategy, which cannot be permitted. Allowing recall of the witnesses is as good as allowing the Defence to fill up the lacunae and, therefore, according to learned A.P.P., the impugned order passed by the Revisional Court is required to be quashed and set aside.

7. Per contra, learned counsel for the Respondent-Accused has supported the said order of the Revisional Court by relying on the various authorities including that of ***Hoffman Andreas Vs. Inspector of***

Customs, Amritsar, 2001 SCC (Cri) 1488 and Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd., 2009 ALL MR (Cri) 948 (S.C.).

8. In the first citation, as the Advocate, who was earlier representing the Accused, has passed away during pendency of the trial, hence the new counsel took up the matter. He was under disadvantage, as he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased Advocate had in mind or as to why he has not put further questions on certain aspects. In such circumstances, it was held that, a liberal view in the interest of justice should have been adopted, particularly when the Court has unbridled powers in the matter, as enshrined in Section 311 of Cr.P.C. It was further held that, after all, the Trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.

9. In the second authority it was held that, the object underlying Section 311 of Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case.

10. Thus, according to the Apex Court, in view of Section 311 of Cr.P.C. the determinative factor is whether the recall of the witnesses is essential for just decision of the case. In the instant case, these two prosecution witnesses are material one as they are injured in the incident. From perusal of their evidence, as recorded before the Trial Court, particularly their cross-examination conducted by the Defence Counsel, it is sufficient to state that there is hardly any cross-examination of these two witnesses except for putting suggestions to them, which are obviously denied by them. In such situation, for “just decision of the case” and taking a liberal view of the matter, without entering into the aspect, whether it is amounting to filling up the lacunae or whether the accused are taking advantage of the fact of change of Advocate, it appears that their further cross-examination is essential. It is true that mere change of Advocate is no ground for recall of the witnesses, but then the object of Section 311 of Cr.P.C. is also required to be kept in mind, which is to ensure that there should not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side, as observed by the Apex Court in the above referred decision of **Godrej Pacific Tech. Ltd. (Supra)**. In this case, though there are suggestions on the aspect of

enmity, motive or injuries, those suggestions are not taken to their logical conclusion in the cross-examination. Mere giving suggestions cannot be called as cross-examination and, therefore, for just decision of the case, it is found essential that the application preferred by the Defence Counsel for recall of these two witnesses needs to be allowed.

11. In view thereof, the impugned order passed by the Revisional Court does not call for any interference. Learned counsel for the Respondent assures the Court that the Respondent will not delay the trial in any way and on the very first day, when the witnesses are recalled, the Defence Counsel will examine them. The Trial Court may impose necessary costs, as may be found essential, towards witness Bhatta and travelling expenses of the witnesses.

12. The Writ Petition is accordingly disposed of as dismissed with aforesaid directions.

[DR. SHALINI PHANSALKAR-JOSHI, J.]