

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

CRIMINAL WRIT PETITION NO. 1343 OF 2017

Nilesh @ Ashok Raosaheb Mehetre
Age: 29 years, Occu.: Agri.,
R/o Akolner, Tq. Nagar, Dist. Ahmednagar. ..PETITIONER

VERSUS

State of Maharashtra
Through Police Station Officer
Nagar Taluka Police Station,
Ahmednagar, Dist. Ahmednagar ..RESPONDENT

....

Mr. N.V. Gaware, Advocate for petitioner.
Mr. K.S. Patil, A.P.P. for respondent.

....

CORAM : V.L. ACHLIYA, J.
DATED : 21st SEPTEMBER, 2017

ORAL JUDGMENT :

1. Issue notice to the respondent. The learned A.P.P. waives service of notice for respondent – State.
2. Rule. Rule made returnable forthwith. By consent, heard finally.
3. In view of the limited challenge raised in the petition, it is not necessary to discuss the facts in detail. The challenge raised in the

petition confines to orders dated 07th September, 2017 and 08th September, 2017 passed by the learned Additional Session Judge, Ahmednagar in Sessions Case No. 141 of 2014. By order dated 07th September, 2017, the learned Additional Session Judge, Ahmednagar rejected the application filed by the advocate representing the petitioner seeking adjournment. By order dated 08th September, 2017, the learned Additional Session Judge, Ahmednagar rejected the application moved to recall the order of no cross and permission to cross examine the prosecution Witness Nos. 1 to 5 by recalling them for cross examination.

4. Mr. Gaware, learned Counsel for the petitioner submits that on 06th September, 2017, the case was listed for recording of evidence. Since the Advocate representing the petitioner was not in a position to cross-examine the witnesses, filed application seeking time to cross examine the witnesses, which was rejected vide order dated 07th September, 2017 and proceeded to record the evidence of Prosecution Witness Nos. 1 to 5 and further passed order of no cross. Immediately on next day i.e. on 08th September, 2017 the petitioner moved application seeking recall of the witnesses and permission to cross-examine the Prosecution Witness Nos. 1 to 5. However, the request was turned down by observing that entertaining such request would amount to violating

the directions issued by the Apex Court in the case of ***Vinod Kumar Vs. State of Punjab (2015) 3 SCC 220***. The learned Counsel submits that the directions contained in the judgment of the Apex Court as referred in the impugned order has not been properly considered while dealing with the application. He submits that entertaining such request very much falls within the exercise of powers by trial Court and entertaining such prayer no way amounts to violation of the directives contained in the judgment referred in the order. The learned Counsel further submits that fair opportunity to defend the case by the accused is a right recognised under Article 21 of the Constitution of India.

5. The learned A.P.P. appearing for the respondent – State fairly submitted that in the larger interest of justice and fair opportunity to accuse to establish his innocence, the opportunity to cross-examine needs to be afforded. The trial Court could have entertain such request on certain terms and conditions, which include imposition of cost.

6. On due consideration of the submissions advanced in the light of the order passed and the reasons recorded, the learned Assistant Session Judge may be justified in the facts and circumstances of the case and practical difficulties faced by trial Court in conduct of the proceeding

due to frequent adjournments being sought in a casual and routine manner to pass such order but I am of the view that the impugned orders are liable to be set aside in the larger interest of justice. The opportunity of hearing is a valuable right available to the accused in conduct of proceeding. The observations made in the decision of Vinod Kumar (supra) as referred in the impugned order are necessarily a note of caution given to trial Court while granting adjournments. The directions appears to be issued in the light of overall facts noticed during the hearing of the case and taking specific note as to the manner in which the adjournments were sought and liberally granted by the Courts. The Apex Court has noted that the cross-examination of witnesses recorded after a period of 1 years and 8 months of recording of examination-in-chief. Therefore, taking into consideration overall state of affairs the direction has been given to avoid granting of adjournments in such liberal manner. The directions given no way operates as an absolute prohibition on the part of the Courts of law to entertain the application seeking recall of witnesses. Such application can be very well entertained and decided by Courts of law on the basis of the facts and circumstances of the case before it and the broad principles to be followed in conduct of the criminal trial. For the fault on the part of the advocate representing the petitioner – accused, the Court should not have taken such a harsh view

in the matter. The request of the petitioner to recall the witnesses and cross examine them could have been entertain on such terms and conditions which may include imposition of cost as Court may deem fit to impose. Taking such harsh view in the matter and to proceed with the case without cross-examination of five witnesses would certainly lead to serious prejudice to the accused. In the case of ***State of Haryana Vs. Ram Mehar and Others 2016 ALL SCR (Cri) 1353***, the Apex Court after considering the earlier decisions culled out certain principles which are to be kept in mind by the Courts of law, while exercising the powers under Section 311 of the Code of Criminal Procedure. Paragraph 32 of the said judgment reads as under :-

“32. The Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 Cr.P.C. We think it seemly to reproduce some of them:-

17.2 *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 and speculative presentation of facts, as thereby the ends of justice would be defeated.*

17.3 *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 reexamine any such person.*

17.4 *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.*

17.5 *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.*

17.6 *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7 *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.*

.
.

17.10 *Exigency of the situation, fair play and good sense should be the safeguard, 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 mistake to be rectified.*

17.11 *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.

.
.

17.14 *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.”*

7. It is further pertinent to note that while taking note of the observations made in the case of ***Gurnaib Singh Vs. State of Punjab (2013) 7 SCC 108***, identical to the view expressed in the case of Vinod Kumar (supra) in paragraph no.37 the Apex Court has further observed as under :-

“37. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time.

and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case

or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

8. Thus, the above quoted view expressed by the Apex Court itself sufficient to dispel the concerned expressed by the learned Judge in

the impugned order. The learned Judge ought to have considered the decision in the case of Vinod Kumar (supra) in the light of facts and circumstances under which such directions were given. In view of the facts of the case, before it, the Court should not have acted so harsh and refused to entertain the application moved seeking recall of witnesses for cross-examination which was made on very next day. The Court ought to have kept in mind the consequences to follow for refusal to allow the cross-examination of the witnesses. I am therefore of the view that the impugned orders are liable to be set aside in the larger interest of justice and fair play and inclined to pass the following order :-

O R D E R

- i) Writ Petition is allowed in terms of prayer clauses (B) and (C), subject to deposit of costs of Rs. 15,000/- to be deposited in trial Court on or before 25th September, 2017. After depositing the amount of costs in the trial Court, same shall be credited to the account of the District Legal Services Authority.
- ii) The impugned orders are set aside. The application Exhibit 42 moved by the petitioner seeking recall of the order of no cross and permission to cross-examine the prosecution witnesses i.e. P.W.1 to 5 is allowed.

iii) Parties are directed to appear before the trial Court on 25th September, 2017. On appearance of the parties, the learned Assistant Sessions Judge, Ahmednagar is directed to fix the date for cross-examination of P.W. 1 to 5 and issue summons for their appearance on the date to be fixed by the Court.

iv) The petitioner – accused and their advocate are directed to fully cooperate with the Court in expeditious disposal of the case and not to seek unnecessary adjournments.

v) Parties to act upon the authenticated copy.

vi) Rule made absolute in the above terms.

(V. L. ACHLIYA, J.)

SSD