

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

CRIMINAL WRIT PETITION NO. 1316 OF 2016

Sachin Ananda Marathe

Age : 35 Yrs., Occ. : Agril.,

R/o : 19-B, Vidya Nagar,

Erandol, Tq. Erandol, Dist.

Jalgaon.

**..... PETITIONER/
[ORI.ACCUSED NO. 2]**

VERSUS

1. The State of Maharashtra **..... RESPONDENT**

2. Pappu @ Nagraj Sudhakar
Mahajan, Age : 26 Yrs.,
Occ.: Agril., R/o :
Jahangirpura, Erandol,
Tq. Erandol, Dist. Jalgaon. **..... RESPONDENT/
[ORI.ACCUSED NO. 1]**
[presently in jail].

3. Pankaj Suresh Dhangar
Age : 26 Yrs., Occ. Agril.,
R/o : Erandol, Tq. Erandol,
Dist. Jalgaon. **..... RESPONDENT/
[ORI.ACCUSED NO. 3]**

.....

Mr. B.P.Suryawanshi & Mr. N.B.Suryawanshi,
Advocate for Petitioner.

Mr. S.Y.Mahajan, A.P.P. for R – 1 - State.

.....

CORAM : V.L.ACHLIYA, J.**DATE OF JUDGMENT : 02/08/2017**

.....

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Learned A.P.P. waives notice for respondent No. 1 State. By consent heard finally.

2. Being aggrieved by the Order dated 21/09/2016 passed in Sessions Case No. 69/2015 by the learned Additional Sessions Judge, Jalgaon, rejecting the application moved u/s 311 of Code of Criminal Procedure, the petitioner/original accused No. 2 has preferred this Writ Petition.

3. Before adverting to deal with the submissions advanced, it is necessary to consider few facts leading to filing of the petition. The petitioner herein i.e. original accused No. 2 is facing prosecution for committing offence punishable u/s 302, 201 read with section 34 and 120-B of the Indian Penal Code with allegations that he has hatched criminal conspiracy with co-accused to cause

murder of one Balu [deceased], the brother of Dagdu [P.W.1]. The petitioner hired the services of respondent Nos. 2 and 3 (original accused Nos. 1 and 3) for said purpose. He paid amount of Rs. 4,00,000/- to accused Nos. 2 and 3 for said purpose.

4. In order to prove its case, prosecution has examined twenty one witnesses which includes Dagdu Rama Patil [P.W.1], the complainant and Sadanand Dattatraya Patil [P.W.6], a panch witness. The petitioner has sought the recall of P.W. 1 for the purpose to prove certain omissions and contradictions, which according to the petitioner inadvertently remained to be put to the witness during the course of his cross examination. Recall of P.W. 6, the panch witness has been sought on the ground that witness was not cross examined as Senior Counsel engaged by the petitioner could not attend the Court on the day of recording of evidence of said witness. The local Advocate who appeared in the matter declined to cross examine the witnesses. It is the contention of the petitioner that the cross examination of P.W. 6 is necessary to unfold the the truth. The prosecution has opposed the application with contention that the application is filed with intention to delay the

proceeding.

5. On due consideration of rival contentions, learned Additional Sessions Judge has rejected the application by observing that application is filed at belated stage i.e. after recording evidence of twenty one witnesses, the application is filed to fill up the lacuna. Being aggrieved, the petitioner has preferred this Writ Petition.

6. Heard Mr. N.B.Suryawanshi, learned counsel appearing for the petitioner and Mr. S.Y.Mahajan, learned A.P.P. representing the State. Perused the application moved u/s 311 of Code of Criminal Procedure as well as the Say filed by the prosecution and the order passed by the trial Court. I have also perused the copies of depositions of P.W. 1 and P.W.6.

7. Mr. Suryawanshi, learned counsel for the petitioner assailed the impugned order with contention that the learned Additional Sessions Judge has not considered the application in its proper perspective. He submits that the observations made in the application that the application was filed at belated stage i.e. after

recording the evidence of twenty one witnesses, is contrary to record. He submits that the application was filed after recording of evidence of P.W. 16, as it was realized that due to oversight certain omissions and contradictions remain to be brought on record during the cross examination of P.W. 1. The cross examination of P.W. 6 found to be necessary to prove the defence of accused. By referring the contents of application filed u/s 311 of Code of Criminal Procedure, it is pointed out that in the application it is specifically mentioned that the request for recall of P.W. 1 is made only for the limited purpose of bringing on record the omissions and contradictions. By referring the decision of the Apex Court in the case of **Mohanlal Sahmji Soni V/s Union of India & Anr.** reported in AIR 1991 Supreme Court 1346, it is contended that the very purpose of providing remedy by way of section 311 of Code of Criminal Procedure is to provide a fair trial to the accused. He submits that the very purpose of conduct of trial is to afford opportunity to bring on record the best available evidence before the Court to prove a fact or the points in issue. If it is found that for the just decision of the case it is necessary to recall the witness, the Court must exercise such powers. He has further referred and relied on the decision of the

Apex Court in the case of **Iddar & Ors. V/s Aabida & Anr. reported in AIR 2007 Supreme Court 3029,** wherein the Apex Court has observed that the powers u/s 311 of Code of Criminal Procedure can be invoked even if it amounts to filling of loopholes. By referring the decision in the case of **Rajendra Prasad V/s Narcotic Cell through its Officer-in-charge, Delhi reported in AIR 1999 Supreme Court 2292,** learned counsel further submitted that the powers u/s 311 of Code of Criminal Procedure can be exercised even if there is any mistake or lapse and is expedient in the interest of fair trial, such mistake needs to be corrected. He has further referred and relied on the decision of this Court in the case of **Dipak Gangaram Ahirrao & Anr. V/s State of Maharashtra reported in 2006 B.C.I. 79,** which the Court has observed that the powers u/s 311 of Code of Criminal Procedure should be examined by taking into consideration principles of natural justice and fair opportunity to the accused.

8. On the other hand, learned A.P.P. supported the order passed by the trial Court and submitted that no case is made out to justify the recall of the witness. He has submitted that P.W. 1 was cross examined at length.

P.W. 6 was offered for cross examination. However, the petitioner's Advocate declined to cross examine the witness. It is further pointed out that P.W. 6 was cross examined at length by the counsel representing respondent No. 1. Same was adopted by the counsel representing accused No. 3. He, therefore, submits that no case is made out to accept the contention that for just decision of the case, it is necessary to recall the witness. In support of the submissions advanced, learned counsel has referred and relied upon the decision of this Court in the case of **Mr. Prashant Madrekar V/s Police Inspector, Altinho & Anr. reported in All Maharashtra Reporter [Crim.] 1470** and **State of Haryana V/s Ram Mehar & Ors. reported in (2016) 8 Supreme Court Cases 762.**

9. If we consider the purport of section 311 of Code of Criminal Procedure, then the object of the provision is two fold. Section 311 empowers the Court to summon any witness though not summoned as a witness, if the evidence of such witness is necessary for the just decision of the case. Further contingency in which the powers u/s 311 of Code of Criminal Procedure can be exercised in a situation wherein the witness

already examined is required to be recalled and re-examined. Such powers can be exercised by either side at any stage of proceeding if the evidence of such person appears to be essential to just decision of the case.

10. The Apex Court in the case of **Rajaram Prasad yadav V/s State of Bihar & Anr. reported in (2013) 14 Supreme Court Cases 461** has considered the nature and scope of exercise of powers u/s 311 of Code of Criminal Procedure to recall and re-examine the witness. After taking survey of earlier decision of Apex Court on this issue which includes the ruling referred and relied by the learned counsel for the petitioner culled out broad principles to be borne in mind while dealing with the application filed u/s 311 of Code of Criminal Procedure. Para No. 17 reads as under :

“ 17. From a conspectus consideration of the above decisions, while dealing with an application under [Section 311](#) Cr.P.C. read along with [Section 138](#) of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1 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?

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 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 re-examine 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.

17.8 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.

17.9 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.

17.10 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.

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.

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

17.13 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.

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. "

11. Keeping in mind the above quoted broad principles to follow in exercise of powers u/s 311 of Code of Criminal Procedure, I have examined the impugned order passed by the trial Court. In order to assess as to whether for the just decision of the case, it is expedient to entertain the request of the applicant to recall the witness, I have perused the copies of deposition of P.W. 1 and P.W. 6. It appears that the case against the accused is mainly based upon the circumstantial evidence. On the basis of the disclosure made by the co-accused of alleged criminal conspiracy hatched to cause the murder of the deceased and role attributed to the petitioner/accused No. 2 that he

had hired the services of co-accused to murder the deceased for consideration of Rs. 4,00,000/-, the petitioner/accused No. 2 has been charge sheeted. The motive behind commission of offence is alleged to avoid the payment of amount to the tune of Rs. 25,00,000/- to Rs. 30,00,000/- by the petitioner to the deceased. In this back-ground, it is the contention of the learned counsel for the petitioner that though P.W. 1 has deposed that the petitioner and the deceased were carrying business together, the facts deposed by him is by way of omission. He further submitted that few other facts deposed by witnesses are not find place in the complaint lodged by the complainant. Inadvertently those omissions remain to be proved while cross examining the witnesses. Thus, the recall of P.W.1 is claimed for the limited purpose to prove certain omissions and contradictions. In my view, if the scope of further cross examination is confined to this limited purpose, no serious prejudice would cause to the prosecution and same can not be termed as act of filling up the lacuna. The mistake occurred due to over-sight can be permitted to be rectified within the scope of exercise of powers u/s 311 of Code of Criminal Procedure. The very purpose of conducting trial is to unfold truth before the Court. By bringing certain omissions and

contradictions if the accused could able to establish his defence, then in my view such opportunity deserves to be granted. If the purpose of filing of such application found to be with some oblique motive, then certainly the Court is expected to be on guard while entertaining such request.

12. Examination of P.W. 6 is sought on the ground that the witness was not cross examined by the Counsel representing the accused. On the day of recording of evidence of P.W. 6, Senior Counsel representing the petitioner being sick could not attend the Court. The local Advocate declined to cross examine the witness. Later-on, it was realized that the testimony of P.W. 6 was not confined to panchanama made in his presence but his statement was also recorded during the course of investigation. In this view, recall of P.W. 6 has been sought by the petitioner.

13. Considering the overall facts of the case and the reasons assigned for seeking recall of the witness, I am of the view that in the larger interest of justice, and fair opportunity to accused to defend himself, the request of the petitioner deserves to be granted. Allowing the request of the petitioner on certain condition would not

cause any serious prejudice to prosecution. Denial of such opportunity may result in to failure of justice. The Court is expected to be magnanimous in permitting mistakes to be rectified if the proper evidence found to be not brought on record due to some mistake. Due to the pendency of the present petition, already hearing of the case is protracted. I am, therefore, of the view that the petition be allowed on certain conditions. I, therefore, pass the following order.

ORDER

1] The impugned order dated 21/09/2016 passed in Sessions Case No. 69/2015 by the Additional Sessions Judge, Jalgaon rejecting the application [Exh.105] seeking recall of Dagdu Tryambak Patil [P.W.1] and Sadanand Dattatraya Patil [P.W.6] is hereby set aside and the application [Exh. 105] is allowed in terms of prayer clause made in the application subject to following conditions.

a] Further cross examination of Dagdu Tryambak Patil [P.W.1] shall be confined to the extent of bringing on record the omissions and contradictions and beyond that no further cross examination will be permitted.

b] Cross examination of Sadanand Dattatraya Patil [P.W.6] shall be confined to the fact deposed by him in his Examination-in-Chief, panchanama [Exh.71] and his statements recorded during investigation.

2] Learned Additional Sessions Judge is directed to fix the date for re-examination of P.W. 1 and P.W. 6 and summon them for cross examination. On the date so fixed, the witnesses shall be cross examined by the learned counsel representing the petitioner/accused. In case the counsel representing the petitioner/accused fails to appear and cross examine the witnesses on the date fixed by trial Court, then the trial Court will be at liberty to proceed further with the matter.

3] Failure to cross examine the witnesses recalled on the date specified by trial Court, the right of the petitioner/accused to cross examine the witnesses shall stand forfeited.

4] Trial Court is directed to complete the exercise of recall of witnesses i.e. P.W. 1 and P.W. 6 and recording of their evidence as expeditiously as possible but within four weeks from the date of the communication of this

order.

5] The petitioner/accused shall extend full co-operation in expeditious disposal of the case.

6] Rule made absolute in above terms.

7] The parties may act upon the authenticated copy of this order.

[V.L.ACHLIYA, J.]

KNP/Cr.W.P. 1316.2016 - [J]