

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.605 OF 2017

Jayshree Shivanand Bansode ... Petitioner
Versus
The State of Maharashtra and anr. ... Respondents

Mr. Ritesh Thobde, Advocate for the Petitioner.
Mr. S.R.Agarkar, APP for the State/Respondent No.1.

**CORAM : RAVINDRA V.GHUGE, J.
DATE : 14 MARCH, 2017.**

P.C. :

1. The Petitioner is aggrieved by the order dated 16th January, 2017 by which application Ex.42 filed by the Petitioner-informant seeking permission to examine three witnesses, has been rejected.

2. The Petitioner is the first informant and Respondent No. 2 is original accused in C.R.No. 34 OF 2012 registered with Akkalkot South Police Station, Solapur. The matter is now set to the trial in Sessions case No.105 of 2014 and Respondent No.2 is charged under sections 436, 427, 504 of the Indian Penal Code, 1872. It has been the case of the Petitioner that on 29th March, 2012 accused Chandawwa Shivsharan set the house of

the Petitioner ablaze. On a complaint filed by the Petitioner, the crime was registered. Neither in the FIR and nor in the investigation, the Petitioner has mentioned the names of the persons viz. Revayya Sidhayya Swami, Santosh Gurushantappa Yadwad and Somayya Shivayya Swami, as being the eye-witnesses. After four years, the Petitioner has, for the first time, filed an application-Ex.42, claiming that these three persons were eye-witnesses.

3. Learned counsel for the Petitioner has strenuously criticized the impugned order. He submits that application-Ex. 42 was filed by invoking Section 311 of the Cr.P.C. which permits examination of a witness at any stage in the trial. The Petitioner-informant had moved an application projecting three persons as being eye-witnesses and who were present at the site of the crime. They had seen the accused setting fire to the house of the informant. Though they were eye-witnesses, the Investigating Officer had not caused any inquiry and had not recorded their statements.

4. I have considered the submissions of the respective sides and have gone through the Petition paper-book with their assistance.

5. The Petitioner has placed reliance upon the judgment of the Hon'ble Supreme Court dated 8th May, 2013 in the matter

of **Natasha Singh Vs. CBI (State)**. He refers to paragraph Nos. 9, 11, 13, 17 and 18 of the said judgment which read as under:

“In *Mohanlal Shamji Soni V. Union of India & Anr.* AIR 1991 SC 1346, this Court examined the scope of Section 311 Cr.P.C., and held that it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr.P.C., wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summonsed as a witness, who are expected to be able to throw light upon the matter in dispute, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.”

“In *Rajendra Prasad v. Narcotic Cell* through its Officer-in-Charge, Delhi, AIR 1999 SC 2292, this Court considered a similar issue and held as under:-

“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 a trial can be foreclosed 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.”

“In *T. Nagappa v. Y.R. Muralidhar*, AIR 2008 SC 2010, this Court held, that while considering such an application, the court must not imagine or assume what the deposition of the witness would be, in the event that an application under Section 311 Cr.P.C. is allowed and appreciate in its entirety, the said anticipated evidence. The Court held as under :

“What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section

243 of the Code is bonafide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefore, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant.”

“The Trial Court, while entertaining the application filed under Section 311 Cr.P.C., had asked the appellant to provide a brief summary of the nature of evidence that would be provided by the defence witnesses mentioned in the application, and in keeping with this, the appellant had furnished an application stating that the appellant wished to examine one Shri B.B.Sharma who was one of the panchanama witnesses, and who the prosecution had neither listed nor examined in court. Therefore, the appellant wished to examine him in defence. The second person was Shri S.S.Batra, Company Secretary of the appellant, as he was the best person to provide greater details of the company of which the appellant is the Director. The third witness was a hand-writing expert, and it was necessary for the defence to examine him regarding the correctness of the signatures of the appellant and others, particularly with respect to the signatures of the appellant.”

“Undoubtedly, an application filed under Section 311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned Trial Court prejudged the evidence of the witness sought to be examined by the appellant, and thereby cause grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr.P.C. By doing so, the Trial Court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the hand-writing expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW. 40) and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the hand-writing expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchanama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B.Sharma, thus, may be in a

position to depose with respect to whether the documents alleged to have been found, or to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case.”

6. Section 311 of the Cr.P.C. reads as under:-

“Power to summon material witness, or examine person present – Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

7. There can be no dispute that Section 311 of Cr.P.C. would always permit the presentation of the best evidence which is available. The evidence cannot be prejudged. In order to ensure that justice is done, no person can be deprived of examining a witness under section 311, except in peculiar or unusual circumstances.

8. I find the case in hand to be quite peculiar. The informant has alleged that her house was burnt by the accused on 29th March, 2012 at about 5.00 p.m. The informant is said to be

present when the accused set her house on fire. She accordingly lodged an FIR and a crime was registered with the Akkalkot South Police Station against the accused for the offence punishable under Sections 436, 427 and 504 of the IPC. Thereafter, the trial has commenced and the prosecution is said to have examined all the witnesses mentioned in the charge-sheet.

9. It is quite curious that neither the Petitioner-informant nor any of the prosecution witnesses have even remotely referred to the three persons namely Revayya Sidhayya Swami, Santosh Gurushantappa Yadwad and Somayya Shivayya Swami. Even the informant, for all these four years has not even whispered these names. She has not stated that they were eye-witnesses. After the examination of the prosecution witnesses was completed that she has moved an application dated 3rd December, 2016 contending for the first time that these three persons are eye-witnesses.

10. In the above backdrop, notwithstanding the scope of Section 311 of Cr.P.C., the Trial Court on the basis of the material before it, in my view has rightly concluded that when these three persons hail from the same village of the Respondent, if at all they were witnesses to the offence that has been committed, she would not have hesitated to mention these three names in the FIR. It has come by surprise that an

application is moved on 3rd December, 2016 by the informant declaring that these three persons are eye-witnesses.

11. Considering the fact situation as above, I do not find that these facts could be seen in any of the Judgments referred to by the Hon'ble Apex Court in the matter of **Natasha Singh** (cited supra). In none of the cases cited, the purported eye-witnesses were not mentioned or disclosed even by the victim who is the informant for 4 years after the commission of the offence.

12. In the light of the above, I do not find that impugned order could be termed as perverse or erroneous. This Petition is devoid of merits and is therefore, dismissed.

(RAVINDRA V.GHUGE, J.)