

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

CRIMINAL WRIT PETITION NOS.1432/2018

1. Popat S/o Nagnath Shinde.
Age : 37 years, Occ. Agril,
R/o Chikhali, Tq. Ashti,
Dist. Beed
 2. Jalindar S/o Navnath Moharkar,
Age; 29 Yrs. Occu. Agril.
R/o Beedsangvi, Tq. Ashti,
Dist. Beed.
 3. Sachin S/o Dnyandeo Pawar,
Age: 30 Yrs. Occu. Agril.
R/o Khadkat, Tq Ashti,
Dist. Beed.
 4. Chetan S/o Mahadeo Galgate,
Age: 30 Yrs., occu. Agril.
R/o Ram Mandir Galli, Ashti,
Tq Ashti, Dist. Beed
- = PETITIONERS**

VERSUS

The State of Maharashtra,
Through Police Station, Karjat,
Tq. Karjat, Dist Ahmednagar

= RESPONDENTS

Mr.Rahul R.Karpe, Advocate for Petitioners;
Mr.S.P.Deshmukh,APP for Respondent-State

WITH

CRIMINAL WRIT PETITION NOS.1436/2018

1. Satish S/o Nagnath Shinde,
Age 34 years, Occu: Agril
and Social work.
2. Chandrakant Dattatray Sapkal
Age 28 years, Occu: Agri.

(2)

Both R/o Shani chowk, Kharada road,
Ashti, Tq. Ashti, Dist Beed.

3. Nitin Rohidas Ransingh
Age 40 years, Occu. Nil.
R/o Murshadpur, R/o Ashti,
Tq Ashti, Dist. Beed
4. Santosh Machindra Goyakar
Age 29 years, Occu:
R/o Ashti Tq. Ashti, Dist Beed

= **PETITIONERS**

VERSUS

The State of Maharashtra,
Through : Police Inspector,
Police Station Karjat,
Tq. Karjat, Dist. Ahmednagar.

= **RESPONDENT**

Mr.N.L.Jadhav, Advocate for Petitioners;
Mr.S.P.Deshmukh,APP for Respondent-State

CORAM : P.R.BORA, J.

RESERVED ON : 6th December, 2018

PRONOUNCED ON : 11th December, 2018

JUDGMENT:

1. Since in both these writ petitions, the challenge is to the order passed by the Additional Sessions Judge Ahmednagar on 27th September, 2018 passed below Exh. 91 in Sessions Case No.394/2012, I have heard common arguments in both these petitions and I deem it appropriate to decide these petitions by a common reasoning.

2. Criminal Writ Petition No.1432/2018 is filed by four petitioners, who are accused Nos. 2, 4, 5 and 12, in aforesaid Sessions Case, whereas Criminal Writ Petition No.1436/2018 is filed by another four accused, i.e. accused Nos.1,7,9 and 11 in the aforesaid Sessions Case.

3. The issue, which has been raised in these petitions is, after examination of the accused under section 313 of the Code, whether an application under Section 311 of the Code of Criminal Procedure (hereinafter referred to as the Code), can be entertained and allowed for examination of such witnesses, which were not examined during the course of the trial.

4. The petitioners in both these petitions, who are the accused in the aforesaid Sessions Case pending in the court of District Judge-3 and Additional Sessions Judge Ahmedangar are facing charges under Sections 395, 143, 147, 148, 379, 337 read with 149, 427, 504, 506 and Section 3/25 of the Arms Act. Charge against all the 12 accused

was framed by the Additional Sessions Judge on 3rd April, 2017. The prosecution has thereafter submitted the list of prosecution witnesses, according to which, total 15 witnesses were proposed to be examined.

5. On 31st July, 2018, five witnesses came to be examined by the Additional Public Prosecutor, Ahmednagar. On the said date, the witnesses viz. Gokul Ganpat Jadhav and Subhash Sakharam Dhane, though were present before the court, they were not examined by the APP stating that they are not supporting the case of the prosecution. On the same day, the APP filed an application seeking fresh witness summon against three witnesses viz. Dadasaheb Pandharinath Barkade; Shivaji Maruti Shinde and Yuvraj Ashokrao Deokar. Accordingly, an order was passed by the Additional Sessions Judge issuing summonses against the said witnesses.

6. On 16th August, 2018, the learned APP filed a pursis at Exh. 74, contending therein that though the summonses were served upon witnesses viz. Dadasaheb Pandharinath Barkade; Shivaji

Maruti Shinde and others, they were not present before the court. The learned APP further contended that out of five witnesses examined by the prosecution till then, four witnesses have not supported the case of the prosecution and had turned hostile. The learned APP further mentioned that in light of the aforesaid fact that the said witnesses did not support the case of the prosecution, there will be no use of examining any more witnesses as their evidence will not be helpful to the prosecution to prove the guilt of the accused. In the circumstances, the APP further contended that the prosecution does not want to lead any more evidence, meaning thereby that the prosecution has closed its evidence. The learned Additional Sessions Judge, therefore, examined the accused under Section 313 of the Code.

7. On 15th September, 2018, the prosecution filed an application at Exh.91 under Section 311 of the Code to examine six witnesses viz. Subhash Shankar Kawle; Babasaheb Pandharinath Barkade; Satish Dattu Pawar; Sanjay Nivrutti Giri; Balasaheb Dada Pawar and Pandharinath Namdev Barkade. The

said application was strongly opposed by the accused. Some of the accused filed their written say to the said application opposing the request made by the prosecution. The learned Additional Sessions Judge after hearing learned APP and the learned counsel for the accused persons, has partly allowed the said application and permitted the prosecution to examine four witnesses viz. Dadasaheb Pandharinath Barkade; Sanjay Nivrutti Giri; Balasaheb Dada Pawar and Pandharinath Namdev Barkade. Aggrieved by, the accused persons have filed these two writ petitions.

8. The petitioners in Criminal Writ Petition No.1432/2018 are represented by Advocate Shri Rahul Karpe; whereas the petitioners in criminal writ petition No.1436/2018 are represented by Advocate Shri Narsingh L.Jadhav.

9. Both the learned counsel in their respective arguments assailed the impugned order on almost similar grounds. The learned counsel submitted that it was impermissible to allow such application filed by the prosecution after the

accused were examined by the trial court under Section 313 of the Code. The learned Counsel heavily relied upon the judgment of the Hon'ble Apex court in the case of **Mir Mohd. Omar and Ors. Vs. State of West Bengal – AIR 1989 SC 1785**, wherein the Hon'ble Apex court had set aside the order passed by the Calcutta High court giving liberty to prosecution to recall witness and ordering deletion of entire examination under Section 313 of the Code. The learned counsel further relied upon the judgment of the Division Bench of Kerala High Court in the case of **Johnson Vs. State of Kerala – 1997 Cri.L.J. 1228**, to urge that when the evidence of the witnesses examined by the prosecution was natural and free from infirmities, the only intention of the prosecution to call some more witnesses was to undermine the defence version and it was impermissible.

10. The learned counsel submitted that when the prosecution had already closed its evidence and the statements of the accused were recorded under Section 313 of the Code and the matter was then kept for final arguments, there was absolutely no reason for the learned Additional Sessions Judge to

allow the application filed by the prosecution under section 311 of the Code. The learned counsel further submitted that in their statements under Section 313 of the Code, the accused have disclosed their defence and only with intention to nullify the said defence, the application was filed by the prosecution to examine the witnesses named in the application at Exh.91.

11. The learned counsel then relied upon the judgment of the Rajasthan High Court in the case of **Cheeku Singh Vs. State of Rajasthan – 1998 Cri.L.J. 950** and more particularly, invited my attention to para 13 of the said judgment to canvass that proceeding if are permitted to be reopened after the statements of the accused are recorded under section 313 of the Code, it would amount to failure of justice.

12. The learned counsel further submitted that the witnesses Subhash Kawale and Satish Dattu Pawar both were present in the court on 31st July, 2018 in pursuance of the witness summons served upon them. The learned counsel submitted that both these witnesses were not examined on the said date. The learned counsel invited my attention to the

pursis filed by APP at Exh.69 to show that the APP had scored the names of Subhash Kawale and Satish Dattu Pawar. The learned counsel further submitted that on the same day, i.e. on 31st July, 2018, fresh witness summons were sought by learned APP against Dadasaheb Pandharinath Barkade; Shivaji Maruti Shinde and Yuvraj Ashokrao Deokar. The learned counsel then attracted my attention to the pursis filed by the learned APP on 16th August, 2018 contending therein that though the witness summons were served upon the aforesaid witnesses, they were not present before the court and further having regard to the fact that the witnesses already examined had not supported the case of the prosecution, there was no use of examining any more witness and as such, the prosecution was closing its evidence. The learned counsel submitted that in light of the earlier two pursis referred to above, whereby the prosecution has closed its evidence, it was impermissible for the prosecution to file another application invoking the provisions under Section 311 of the Code and that too after the statements of the accused were recorded by the court under Section 313 of the Code.

13. Learned counsel submitted that in view of the facts, as above, the learned Additional Sessions Judge should not have allowed the application at Exh. 91. The learned counsel further submitted that by allowing the said application, the learned Additional Sessions Judge has in a way reopened the prosecution case which has caused serious prejudice to the petitioners. The learned counsel, therefore, prayed for setting aside the impugned order.

14. Shri SP Deshmukh, learned APP opposed the submissions advanced on behalf of the petitioners. He supported the impugned order. According to the learned APP, the powers under Section 311 of the Code can be exercised at any stage if the evidence of a witness appears to be essential to just decision of the case and it is duty of the court to summon or recall such person to be examined in the matter. The learned APP further submitted that such powers can be exercised by the court even after evidence is closed by the prosecution and the statements of the accused are recorded by the court under Section 313 of the Code.

15. The learned APP further submitted that in the application filed at Exh. 91, the prosecution has aptly explained as to what was the reason that the witnesses did not earlier come forward to depose before the court. The learned counsel submitted that having regard to the accusations against the petitioners and the other accused persons, evidence of the persons as witnesses is very much necessary, and as such, the trial court has rightly allowed the application filed by the prosecution. The learned APP submitted that the names of these witnesses are appearing in the FIR as well as in the other prosecution papers. The learned APP further submitted that during the course of the investigation, the statements of these witnesses are recorded. In the circumstances, according to learned APP, there is no substance in the objections raised on behalf of the petitioners that the witnesses proposed to be examined are the planted witnesses.

16. The learned APP has placed reliance on the judgment of the Hon'ble Apex court in the case of **Mohan Lal Shamji Soni Vs. Union of India - AIR**

1991 SC 1346 - and more particularly invited my attention to the observations made and conclusions recorded by the Hon'ble Apex court in paras 7 to 12 of the said judgment. The learned APP also relied upon another judgment of the Hon'ble Apex court in the case of **Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi – (1999) 6 SCC 110.** The learned APP emphasized on the observations made in para 9 of the said judgment. The learned APP submitted that the judgment relied upon by the petitioners in the case of **Mir Mohammad (cited supra)** does not support the case of the petitioners, on the contrary, it supports the case of the prosecution. The learned APP also cited the judgment of the Hon'ble Apex court in the case of **Singh vs. Central Bureau of Investigation (State)– (2013) 5 SCC 741.** The learned APP submitted that a well reasoned order has been passed by the learned Additional Sessions Judge and no interference is required in the order so passed. He, therefore, prayed for dismissal of both the writ petitions.

17. I have given due consideration to the submissions made by the learned counsel appearing

for the petitioners and the learned APP for the State. I have perused the impugned order and the other material placed on record by the parties. It is the gist of the arguments advanced by the learned counsel appearing for the petitioners that the Additional Sessions Judge by allowing application at Exh. 91, has erroneously exercised the powers under Section 311 of the Code. Section 311 of the Code reads thus,

"311. 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."

Plain reading of Section 311 makes it clear that the scope of this section is very wide. It enables the court at any stage of an enquiry, trial or

other proceeding to summon any person as a witness, to examine any person who is in attendance though not summoned or to recall and reexamine any person already examined. Having regard to the wide scope of this section, prima facie, there appears no much substance in the objections raised by the petitioners that it was impermissible for the trial court to allow the prosecution to examine some more witnesses invoking the powers under Section 311 of the Code after the prosecution evidence was closed and the statements of the accused persons were recorded under Section 313 of the Code. The powers under Section 311 can be exercised at any stage if the evidence of a witness appears to be essential to just decision of the case. The words 'at any stage' would include the stage reached when evidence on both the sides has been taken and the case is adjourned for judgment. Additional evidence can be permitted to be produced even after the defence has been closed or arguments are heard before giving the judgment. No fixed rules can be laid down in the matter as the interest of justice must be the paramount consideration.

18. The Hon'ble Apex court in **Mohanlal Soni**

(cited supra) in paras 7 to 12 has held thus, -

"7. Section 540 was found in Chapter XLVI of the old Code of 1898 under the heading 'Miscellaneous'. But the present corresponding Section 311 of the new Code is found among other Sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'.

. Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old Section. This section is manifestly in two parts. Whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Code and enables it 'at any stage of enquiry' trial or other proceedings' under the Code to act in one of the three ways, namely,

- (1) to summon any person as a witness or
- (2) to examine any person in attendance, though not summoned as a witness, or
- (3) to recall and re-examine any

person already examined.

8. The second part which is mandatory imposes an obligation on the Court-

- (1) to summon and examine, or
- (2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavorable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in

finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted where under any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

11. There are various other provisions in the new Code corresponding to the provision of the old Code empowering the court specified therein to recall any witness or witnesses already examined or summon any witness, if it is felt necessary in the interest of justice at various stages mentioned in the concerned specific provisions.

12. A Judge under Section 236 (Section 310 old Code) or a Magistrate under Section 248(3) (Section 251-A(13) and 255-A old Code) is empowered to take evidence in respect of the previous convictions of the accused person concerned if he is charged with the previous conviction under sub-section (7) of Section 211 and if he does not admit the previous conviction. Under Section 367 (Section 375 old Code) if, when sentence of death passed by the Court of Sessions is submitted for confirmation to the High Court under Section 366(1) (Section 374 of the old Code), the High Court thinks that a further enquiry should be made into or additional evidence taken upon, any point bearing upon

the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session."

19. The Hon'ble Apex court in the case of **Rama Paswan and Ors. Vs. State of Zarkhand – (2007) 11 SCC 191**, has dealt with the scope and ambit of Section 311 of the Code. I deem it appropriate to reproduce entire paras 8 and 9 of the said judgment, which read thus, -

"8. The scope and ambit of Section 311 of the Code, which reads as follows, needs to be noted:

"311. 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."

9. "26.....The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the

manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code 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. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the

evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28.As indicated above, the section is wholly discretionary.

The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court.

Sections 60, 64 and 91 of the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29.The object of Section 311 is

to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jamatraj Kewalji Govani v. State of Maharashtra*-[AIR 1968 SC 178](#))."

20. The submissions made on behalf of the petitioners as well as on behalf of the State (prosecution) are to be considered in light of the interpretation as has been made by the Hon'ble Apex court of the provisions under Section 311 of the Code. It was the main objection raised on behalf of the petitioners that once the APP had filed the

pursis at Exh. 74 contending therein that the prosecution does not want to lead any more oral evidence, it was not open for the prosecution to seek permission to examine the same witnesses which were dropped earlier. The learned counsel for the petitioners more particularly invited my attention to the following averments in the pursis at Exh. 74, which read thus, -

" Last date prosecution examined P.W.1 i.e. informant Sahebrao Kokane he give material admission in favour of accused. Thereafter prosecution examined P.W. 3,4,5 i.e. Satish Kisan Sonmali, Nikil Parag Chokar, Santosh Narayan Avhare they have not supported to the case of prosecution and turned hostile. Therefore, there will be no use of examine other witnesses as their evidence will not be helpful to the prosecution to prove the guilt of accused. Their evidence will remain empty formality. Therefore, prosecution do not wants to lead any more oral evidence. "

21. Referring to the contentions as aforesaid, the learned counsel submitted that it was precisely the contention of the petitioners

before the trial court that evidence of the witnesses sought to be examined was not required for the just decision of the trial even from the point of view of APP and in the circumstances, the trial court should not have allowed the said application.

22. I am however not convinced with the arguments so advanced by the learned counsel appearing for the petitioners. In the application at Exh. 91 filed on behalf of the prosecution, the learned APP has categorically mentioned that to the witnesses in the aforesaid sessions case, some wrong information was given by the accused about the stage and status of the sessions case and that was one of the reasons that the said witnesses did not remain present though summonses were duly served upon them. In the application at Exh. 91, the learned APP has further alleged that the said witnesses were threatened by the accused persons through their near and dear ones and the said witnesses were compelled to remain absent in the court for giving evidence. It is also alleged that influence was applied upon the said witnesses so

that they shall not remain present before the court for giving their evidence. It is further stated that in the aforesaid circumstances since the witnesses were under pressure, they remained absent. The learned APP has also averred that the absence of the witnesses was unintentional.

23. In view of the allegations made in the application at Exh. 91 by the learned APP and the reasons as are assigned by him explaining the reasons for non-appearance of the witnesses before the court for giving their evidence, the contentions in the pursis at Exh. 74 lose their significance. It can be reasonably inferred that the witnesses, who were not found to be in a position to support the case of the prosecution, may be at the relevant time under influence from the side of the accused. In the circumstances, merely on the basis of the averments in the pursis at Exh. 74, the prosecution cannot be said to have lost its right to examine the witnesses which were dropped earlier, if the said witnesses have now shown their willingness to give their evidence before the court.

24. Similarly, the right of the prosecution to examine the witnesses also cannot be denied on the ground that the statements of the accused persons are already recorded under Section 313 of the Code. In so far as the present matter is concerned, the objection raised by the accused that in their statements under Section 313 of the Code, they have disclosed their defence and hence it may not be permissible to permit the prosecution to examine any more witness to nullify the said defence, also cannot be accepted. In their statements under Section 313 of the Code all the accused have stated that the witnesses deposed against them for the reason that the said witnesses were demanding money from them, but the accused refused to pay the same. It is the matter of record that none of the witnesses examined by the prosecution, i.e. PW 1, 3, 4 and 5, has supported the case of the prosecution. It is thus evident that there is no meaning to the defence raised by the accused in their examination under section 313 of the Code and on that ground, the prosecution cannot be denied to examine some more witnesses, if examination of such witnesses is necessary for the

just decision in the case.

25. As noted earlier, it was also contended by the learned counsel appearing for the petitioners, that the witnesses, who are proposed to be examined, are not named in the FIR and none of the witnesses examined before the court has deposed that those witnesses were present on the spot of occurrence and had eye-witnesses the alleged occurrence.

26. After having carefully perused the material on record, the aforesaid objection is also liable to be turned down. The names of the witnesses – Dadasaheb Barkade; Balasaheb Dada Pawar ; Pandharinath Barkade are very well disclosed in the FIR and in the supplementary statements recorded during the course of the investigation. Though name of Sanjay Giri is not there in the FIR, in the requisition sent by P.I., Karjat Police Station on 13th February, 2011 immediately after occurrence of the alleged incident to the Medical Officer at Primary Health Centre, Mirajgaon, includes name of Sanjay Nivrutti Giri to be one of

the victims of the assaults made in the incident happened on the said date at Nagalwadi along with the other persons whose names are appearing in the FIR as well as in the statements of the prosecution witnesses.

27. Having considered the facts, as aforesaid in light of the judgments (cited supra), it does not appear to me that the learned Additional Sessions Judge has committed any error in allowing the application at Exh. 91 thereby permitting the prosecution to examine more four witnesses named in the said order. As has been held by the Hon'ble Apex court in the case of **Mohan Lal Shamji Soni Vs. Union of India - AIR 1991 SC 1346** , -

"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.

The Hon'ble Apex court has further observed that,
-

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 summoned 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 the said judgment, it has also been held by the Hon'ble Apex court that,

"...the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the

requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

28. In the case of **Singh vs. Central Bureau of Investigation (State)** (cited supra), the Hon'ble Apex court has held in para 16, as under, -

"16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that

there is no breach of the same."

29. The another objection raised by the petitioners that filing of application at Exh. 91 is an attempt to fill lacuna in prosecution case also cannot be accepted in the facts and circumstances of the present case. Moreover, the Hon'ble Apex court in the case of **Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi – (cited supra)** at para 9 of the said judgment, has observed thus, -

"9. 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 over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can before-closed 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.

30. After having considered the entire material on record and the judicial pronouncements on the subject, I do not find any infirmity in the impugned order. Both the writ petitions are, therefore, liable to be dismissed and are accordingly dismissed.

(P.R.BORA)
JUDGE

bdv/
fldr 7.12.18