

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 11 OF 2018**

Mr. Caetanino Julio Barreto,
S/o late Mr. Francisco Antonio Barreto,
aged 49 years, r/o House no.1020,
Near Church,
Premeiro Bairo, St. Cruz,
Tiswadi, Goa.

..... Petitioner

V e r s u s

1. State

Through Police Inspector
attached to Old Goa Police Station.
Old Goa, Goa.

2. Public Prosecutor,

High Court of Bombay at Goa.

.... Respondents.

Shri Carlos A. Ferreira, Advocate for the Petitioner.

Shri S. R. Rivankar, Public Prosecutor for the Respondent/State.

CORAM: C. V. BHADANG, J.
RESERVED ON :7TH FEBRUARY, 2018
PRONOUNCED ON : 13 TH FEBRUARY, 2018.

ORAL ORDER :

The challenge in this petition is to the order dated 5/1/2018
(below Exhibit 59) passed by the learned Sessions Judge in Sessions Case

no.13/2013. By the impugned order, the learned Sessions Judge has allowed the application Exhibit 59 filed by the respondent/prosecution under section 311 of Cr.P.C, thereby permitting the examination of a witness who is not named as a prosecution witness in the charge sheet.

2. The brief facts are that, the petitioner is facing prosecution for the offence punishable under sections 306, 304-B r/w section 498-A of I.P.C for having ill-treated his wife Smt. Fatima Pereira and for having abetted her to commit suicide on account of her failure to fulfill demand for dowry.

During the course of the trial the prosecution filed an application Exhibit 59 under section 311 Cr.P.C. for summoning Ms. K.V. Paravathy as a prosecution witness. The application was opposed on the ground that the name of the proposed witness is not mentioned as a prosecution witness in the charge sheet and as such, she cannot be summoned. It was contended that there was no evidence on record to show that the deceased had confided with the said witness (about the alleged ill treatment meted out to the deceased) and as such, the examination of such a witness would be an exercise in futility. It was contended that by examination of the said witness the prosecution cannot be allowed to fill in the lacuna.

3. The learned Sessions Judge found that under section 230 of

Cr.P.C., the Court on an application, can issue process for compelling the attendance of any witness and section 230 of Cr.P.C. does not speak of issuance of process only to a person who has been named in the charge sheet. The learned Sessions Judge has further found that the petitioner/accused has taken a defence that the deceased was mentally ill and examination of the proposed witness, who was a close friend of the deceased would only help in elucidating the fact about the mental condition of the deceased and to that extent the evidence of the said person would be relevant. Lastly the Sessions Judge has found that the question whether the deceased confided with the proposed witness can be gone into only when the witness is examined. In that view of the matter, the application came to be allowed.

4. It is submitted by Shri Ferreira, the learned counsel for the petitioner that in the evidence of the deceased recorded in Case No.1255/2008, a week before her death, the deceased had admitted that she had not complained to any of her colleagues, regarding the harassment meted out to her by the petitioner. It is thus submitted that the examination of the proposed witness would be an exercise in futility. It is submitted that the name of the witness has not been listed as a prosecution witness in the charge sheet and thus the prosecution cannot be permitted to fill in the lacuna in the prosecution case. It is submitted that admittedly the investigating officer has not recorded the

statement of the proposed witness to be examined and thus if the said witness is summoned and examined in the trial, it would cause prejudice to the petitioner as there would not be any previous statement in relation to which the witness can be cross examined.

5. On the contrary, it is submitted by Shri Rivankar, the learned Public Prosecutor for the respondent that the name of the said witness was informed to the investigating officer and her statement came to be recorded in inquiry in the unnatural death of Fatima Pereira being UD No.24/2009 under section 174 Cr.P.C. of Old Goa Police Station. It is submitted that the powers of the Court under section 311 of Cr.P.C. are wide and can be exercised at any stage of the trial, when the examination of the witness is found to be necessary for the just decision of the case. It is submitted that the learned Sessions Judge has rightly found that the examination of the witness needs to be permitted and this Court may not interfere.

On behalf of the respondent reliance is placed on the decision of Supreme Court in the case of **Natasha Singh Vs. C.B.I (2013) CRI. L.J. 3346.**

6. I have carefully considered the rival circumstances and the submissions made. Admittedly the name of the proposed witness does not figure in the

charge sheet as a prosecution witness. However, the learned Sessions Judge has found and to my mind, rightly so that it may not preclude the Court from permitting examination of such a witness if the evidence of the witness is found to be necessary for the just decision of the case. The nature, scope and object of section 311 of Cr.P.C has been subject matter of several decisions of the Supreme Court and the High Courts. In **Vijay Kumar Vs. State of U.P. and anr. (2011) 8 SCC 136**, the Supreme Court has summarized the principles. It has been found that section 311 of Cr.P.C consists of two parts i.e. (i) giving discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels a Court to examine a witness if his evidence appears to be essential to the just decision of the case. It has been held that the section enables and in certain circumstances imposes a duty on the court to summon a witness who would have been otherwise brought before the Court and the section confers a wide discretion on the Court to act as exigencies of the justice require. It has also been found that the power of the Court u/s 165 of the Evidence Act is complementary to the power u/s 311 of Cr. P.C and they together confer jurisdiction on the Court to act in aid of justice (see para 12 of the judgment).

It, however, cannot be lost sight that although there is wide discretion, that the same has to be exercised judiciously depending upon the facts and circumstances of each case.

7. The Rajasthan High Court in the case of **Salman Khan Vs. State of Rajasthan (2015) SCC Online Raj. 531**. after considering several judgments holding the field has come to the conclusion that even where the statement of a witness is not reduced into writing under section 161 of Cr.P.C., it would not preclude the Court from examining such a witness provided the evidence of such witness is found to be necessary for just decision of the case.

8. Now coming to the present case the witness is said to be a close friend of the deceased and her statement appears to have been recorded in UD No.24/2009. The learned counsel for the petitioner has contended that about a week before her death i.e. on 23/3/2009, while giving her evidence before the learned Judicial Magistrate at Panaji in Case no.1255/2008 the deceased had admitted that she had not complained to any of her colleagues, friends or any authority either in writing or orally regarding the harassment meted out to her. It is thus contended that in the face of such an admission by the deceased, there is no justification for permitting the examination of the said witness. I do not find that the contention can be accepted. This aspect will have to be essentially gone into by the learned Sessions Judge at the trial after the witness is examined and cross examined on behalf of the petitioner.

It is trite that the petitioner will get an opportunity to cross examine the witness and as such, no prejudice would be caused to the petitioner if the witness is allowed to be examined. I have gone through the impugned order and I do not find that it suffers from any infirmity so as to require interference. The petition is without any merit and is accordingly dismissed.

C. V. BHADANG, J.

Ap/