

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

CRIMINAL WRIT PETITION NO.2082 OF 2018

Jamaluddin Mohd. Shaban Ansari	.. Petitioner
Vs.	
The State of Maharashtra	.. Respondent

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Mr.Rohan P. Surve, Advocate for the Petitioner.
Mr.A.R. Patil, APP for the Respondent - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : JULY 12, 2018.

P.C. :

This writ petition is filed for recall of witnesses. The petitioner is facing prosecution for an offence punishable under Section 302 of Indian Penal Code.

2 Trial Court had recorded the evidence of witnesses. After examination of the said witnesses, petitioner preferred an application before the Sessions Court praying that P.W.1, P.W.2, P.W.4 and P.W.5, be recalled.

3 The said application was partly allowed vide order dated 7th March, 2018, by recalling P.W.4. However, the prayer for recall of other witnesses was rejected.

4 The contention of the petitioner is that the witnesses who were sought to be recalled were not cross-examination in proper perspective. The required suggestions, contradictions and omissions were not brought on record. It is also submitted that there was no cross-examination on certain vital aspects.

5 Learned counsel for the petitioner submits that the petitioner is facing a serious charge under Section 302 of IPC. He must be given a fair opportunity to defend himself. It is submitted that the earlier advocate representing the petitioner had not conducted effective cross-examination of the witnesses. Thereafter, the petitioner had changed the advocate and on going through the evidence of the witnesses, it was felt that the defence of the accused has not been properly placed on record nor the contradictions and commissions have been confronted with the witnesses. It is submitted that there was no proper cross-examination to bring out the truth before the Court. As a result of the said cross-examination, which was not conducted effectively, prejudice will be caused to the defence of the accused. It was, thus, submitted that opportunity be extended to the accused to cross-examine the said witnesses. The prosecution opposed the

said prayer contending that sufficient opportunity was given to the defence to cross-examine the witnesses.

6 Learned counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of ***Hoffman Andreas Vs. Inspector of Customs, Amritsar***¹ and several other decisions in support of his application.

7 Learned Sessions Judge while partly allowing the application observed that the charge was framed against the accused in the year 2015. The accused is charged for murder of his son and that the informant is the wife of the accused. The deposition of the informant was recorded in 2015, and, thereafter, five witnesses were examined by the prosecution. The evidence of P.W.5 was recorded on 29th September, 2017. It was, however, observed that except P.W.4, all other witnesses were cross-examined by earlier advocate. P.W.4 was not cross-examined and there was an order of “no cross examination” passed by the Court. It was also observed that the accused had remained absent and non-bailable warrant was issued against him. In pursuant to the issuance of non-bailable warrant, he was arrested, and,

1 (2000) 10 SCC 430

presently, he is in custody. Considering the fact that P.W.4 was not cross-examined, the Court was pleased to allow recall of the said witness and rejected the prayer *qua* other witnesses.

8 Learned APP submitted that sufficient opportunity was given to the petitioner-accused. The complainant was examined in the year 2015, and, thereafter, several witnesses were examined. Change of lawyer is no ground to allow such application. It is further submitted that no case was made out for exercising power under Section 311 of the Criminal Procedure Code. Reliance is placed on the decision of the Supreme Court in the case of ***State of Haryana Vs. Ram Mehar & Ors.***²

9 Having heard both the sides and on perusal of the evidence on record, it is apparent that the trial Court had indeed recorded the evidence of the said witnesses from 2015 onwards. The prosecution had examined about five witnesses. I have perused the evidence of witnesses which is sought to be recalled by the petitioner-accused. As far as P.W.2 is concerned, it will have to be noted that the said witness is a child aged about seven years. The evidence of the said child witness was recorded and is

2 AIR 2016 SC 3942

also cross examined. No relief to recall P.W.2 child witness can be granted. However, as far as P.W.1 and P.W.5, are concerned, I find that there is no effective cross-examination conducted at the instance of the defence. P.W.1 is the first informant and P.W.5 is a Medical Officer, who conducted Postmortem Examination. It is apparent to note that the accused is facing a serious charge under Section 302 of IPC. Although, the evidence of P.W.1 was recorded in the year 2015, and, thereafter, the other witnesses were examined, in the interest of justice, an opportunity will have to be given to the petitioner-accused to conduct further cross-examination of P.W.1 and P.W.5. Both the sides had relied upon the decisions of the Supreme Court relating to the exercise of powers under Section 311 of Criminal Procedure Code. It is settled principle of law that such powers can be exercised at any stage before the conclusion of the trial, but, the purport of exercising of said powers is for the just decision of the case and not to fill up lacuna. Considering the fact that the petitioner is facing a prosecution for an offence punishable under Section 302 of IPC, and, the nature of cross-examination conducted by the advocate for applicant-accused, I feel that P.W.1 and P.W.5, can be recalled.

:: ORDER ::

- (i) Trial Court is directed to recall P.W.1 and P.W.5;
- (ii) The defence be permitted to conduct further cross-examination of the said witnesses;
- (iii) The defence shall conduct the cross-examination of P.W.1 and P.W.5, expeditiously and shall not protract the proceedings;
- (iv) Writ Petition stands disposed of accordingly.

(PRAKASH D. NAIK, J.)