

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

CRIMINAL REVISION APPLICATION NO.682 OF 2018

Amar Baban Jagtap

... Applicant

Vs.

The State of Maharashtra

... Respondent

Mr.S.S. Karmarkar with S.G. Maurya i/b Karmarkar & Associates
for the Applicant

Mr.A.R. Patil, APP, for the Respondent – State

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: DECEMBER 22, 2018

P.C.:

1. This revision application is filed praying that the order dated 5.12.2018 passed by the learned Additional Sessions Judge, Pune in Sessions Case No.542 of 2012 is to be set aside. The applicant/accused is facing trial for the offence of murder under section 302 of the Indian Penal Code. 6 witnesses were examined and on 26.10.2018, PW7 was examined. An advocate is appointed through legal aid services authority to defend the accused. On 26.10.2018, in the morning, when the matter was called out, the learned Counsel was present. However, the witness PW7 who is a

Special Executive Magistrate, who recorded the dying declaration of the deceased, was not present. So, he went to attend to the other Court. In between, PW7 appeared and his examination in chief was recorded. The junior colleague of the defence advocate was present, who requested that the matter is to be adjourned and he could not take cross-examination. So it was recorded as declined. On the same day, i.e., on 26.10.2018, an application was moved by the learned Counsel for the accused that PW7 be recalled by using powers under section 311 of the Code of Criminal Procedure. It appears from the record that no say was given by the learned Prosecutor on the same day which should have been given but the say was given by the learned Prosecutor on 15.11.2018. Thereafter, the learned Judge passed order rejecting the application of recalling PW7 on 5.12.2018. Hence, this petition.

2. Heard. I have perused the impugned orders, the application and the say filed to the application. The learned Sessions Judge ought to have taken into consideration that the applicant/accused is facing trial of murder under section 302. Hence, he is to be given all the opportunities to defend him. Moreover, it is also ought

It should have been taken into account that the learned Counsel defending the accused is from the panel of legal aid. 6 witnesses are examined. PW7 was present. Though the defence advocate was absent and assuming that his junior has declined to cross-examine the witness and so, the evidence of PW7 was closed by the trial Court, the learned Judge ought to have given some opportunity by accommodating the defence counsel on that day or by keeping the matter on the next date.

3. It appears from the say filed by the learned Prosecutor that PW7 is a Special Executive Magistrate who recorded the dying declaration of the deceased and hence, is a very important witness but was suffering from paralysis. It is mentioned in the say that he is unable to move without a wheel chair. Earlier, for the said witness, time was given and the matter was adjourned and cost of Rs.1,000/- was saddled on the accused. Though this might have occurred earlier, it is necessary to allow the application which was filed under section 311 of the Code of Criminal Procedure which was an application for recalling the witness and the witness ought to have been recalled by the learned Judge. When the accused is facing trial under section 302 of the Indian Penal Code and if the

offence is proved then, he has to undergo the capital punishment. In such cases, though there is failure on the part of the Counsel for the accused to conduct the matter, the trial Court may saddle costs on the accused but the right to cross-examine is not to be declined, considering the very further repercussions.

4. In view of the above, the impugned order is hereby set aside. The application for recalling the witness PW7 is allowed. PW7 is directed to remain present before the Court. The Investigating Officer to make arrangement to bring the said witness on a particular date at the earliest, considering the convenience of the Court so also the witness. The learned defence Counsel shall remain present on that day and complete the cross-examination in a day, so that the witness, who is a patient, will not suffer physically. If at all the witness is bedridden and it is not possible for the witness to come to the Court, then, the trial Court may pass order of recalling of the cross-examination on commission.

5. Revision application is disposed of accordingly.

6. All concerned to act on an authenticated copy of this order.

(MRIDULA BHATKAR, J.)