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

CRIMINAL WRIT PETITION NO.1507 OF 2019

The State of Maharashtra
through : Police Inspector,
anti Corruption Bureau,
Jalgaon

... PETITIONER
(Original Complainant)

VERSUS

Sanjay Suresh Neve,
Age 47 years, Occu. Service,
Branch Engineer, Construction and
Water Supply Division,
Mahanagarpalika, Jalgaon

... RESPONDENT
(Original Accused)

.....
Mrs. R.P. Gaur, A.P.P. for petitioner / State
Shri G.V. Wani, Advocate for respondent
.....

CORAM: R.G. AVACHAT, J.

DATED : 19th NOVEMBER, 2019.

J U D G M E N T :

Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel for the parties.

2. The challenge in this Criminal Writ Petition is to the order dated 26.6.2019, passed by learned Additional Sessions Judge, Jalgaon below application (Exh.95) moved by the State

in Special (A.C.B.) Case No.27/2015. By the impugned order, the application for recall of prosecution witness (P.W.2) for his cross-examination came to be turned down.

FACTS

3. The respondent is an accused in Special (A.C.B.) Case No.27/2015. He is alleged to have demanded bribe of Rs.5000/- and accepted the same. The trial in the case commenced. The prosecution examined P.W.2 – Amit Patil, as a witness in pre-trap and post-trap panchanama. At the fag end of his examination-in-chief, the witness testified :

“Accused Neve by showing hand sign asked me to stay at length, thereafter the defacto complainant removed the amount from his pocket and kept it on the table of accused Neve and accused Neve pushed the said amount ahead and thereafter the defacto complainant put the said amount in the pocket of the shirt of accused Neve and came out in frightened condition.

4. According to the prosecution, P.W.2 did not stand by the prosecution case and his police statement as well. On 7.2.2018, recording of examination-in-chief of P.W.2 was over. Learned A.P.P., in-charge of the case, requested the learned Additional Sessions Judge seized of the case, to declare the

witness hostile, as he was not supporting the prosecution case on material point of accepting bribe money. Learned Judge was of the opinion that the witness stood by the prosecution. It was an academic discussion between the learned A.P.P. and the learned Judge. It is the case of the prosecution that, due to oversight, the learned A.P.P. did not move an application to seek the Court's permission to cross-examine the witness. After the cross-examination of the witness was over, the prosecution moved the application Exh.95 for recall of P.W.2.

5. Learned Judge rejected the application on the ground that before moving of the application (Exh.95), an oral request was made to the Presiding Officer to declare the witness hostile and permit the prosecution to cross-examine him. The oral request was not granted. The matter ended there. Application Exh.95 is nothing but an application for review of the oral order passed by the Presiding Officer rejecting request for cross-examination of the witnesses. Review is impermissible in criminal jurisprudence, observed the learned Judge.

6. Learned A.P.P. would submit that, it was an academic discussion between the learned Judge and the learned A.P.P. No application was moved. After having

realised that the witness need to be cross-examined, application Exh.95 came to be moved. Learned A.P.P. urged for allowing the application in the interest of justice.

7. Shri Wani, learned counsel for the respondent would, on the other hand, submit that, oral request of the learned A.P.P. had been turned down. Application Exh.95 was nothing but a request for review of the oral order. Review is not permissible under Criminal Procedure Code. According to learned counsel, the prosecution wants to fill up the lacunae. The same cannot be permitted. There is a delay as well in moving the application. The learned A.P.P. moved the application after the assignment of the Judge who turned down the oral request, has been changed. The prosecution cannot be allowed to move application as per its convenience. He ultimately urged for rejection of the application.

8. Perused pre-trap and post-trap panchanama. Also gone through the evidence of P.W.2. It does appear that, P.W.2, a panch witness, did not stand by the prosecution case and his statement as well. The case of the prosecution is that, the respondent made a demand of bribe amount and in response thereto, the complainant paid him the amount. The respondent accepted the same. However, in examination-in-

chief, P.W.2 testified that the complainant put bribe money into pocket of the respondent/ accused. If this evidence is allowed to go as it is, it would amount to be the case of the prosecution since the witness has not been permitted to be cross-examined by the A.P.P. It appears that, it was an academic discussion between the learned A.P.P. and the learned Presiding Officer. In such matters, unless an application is moved in writing and reasoned order is passed thereon, it cannot be said that the prosecution orally made a request and the same was turned down.

9. Section 311 of the Code of Criminal Procedure reads :-

“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 a 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 this evidence appears to it to be essential to the just decision of the case.”

10. The Hon'ble Apex Court, in the case of **Rama Paswan and ors., V/s State of Jharkhand, (2007 Cri.L.J.**

2750), observed as under :

“8. 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 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 of power the greater is the necessity for application of judicial mind.”

11. If the prosecution is not allowed to cross-examine P.W.2, it may result in failure of justice. The evidence of P.W.2 recorded in examination-in-chief and particularly the matter, “that the complainant put the bribe money in the pocket of

the respondent/ accused” would be taken as the prosecution evidence. In my view, the learned Judge ought to have allowed application Exh.95. Since the same has not been done, interference with the impugned order is called for.

12. In the result, the petition succeeds. The same is allowed. The impugned order is set aside. Application Exh.95 is allowed.

(R.G. AVACHAT)
JUDGE

fmp/-