

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 71 OF 2021

The State of Maharashtra

Applicant

Versus

Atul Vishwanath Wadikar

Respondent

Mr. S.W. Munde, APP for the applicant/State.

CORAM : M.G. SEWLIKAR, J.

DATE : 7th December, 2021.

PER COURT :

1. This is a revision preferred under Section 401 of the Code of Criminal Procedure.
2. Facts leading to this application are that respondent was working as Gram Sewak at the relevant time. Charge-sheet came to be filed against him under Sections 7, 13(10)(d) with 13(2) of Prevention of Corruption Act, 1988.
3. It appears that entire evidence of the prosecution was tendered. Evidence of last witness i.e. Investigating Officer was in

progress. His examination-in-chief was recorded partially. Learned APP sought time. Learned Trial Court granted time and adjourned the matter. However, for 2 to 3 dates, the Investigating Officer did not remain present despite issuance of bailable warrant against him. Since the witness was absent on 2 to 3 dates, learned Trial Court, on 12th February, 2020, passed the following order :-

“Perused Record. Perused the orders of Bailable warrant passed on 3 occasions herein before against P.W. No. 6. Perused the observations of mine while passing order below Exh. 59 and 60. It becomes clear from the record that the witness (I.O.) i.e. P.W. No. 6 though being a responsible officer of the police department, is not been serious in attending the court for his evidence. It has been more than 7 months that he is remaining absent for evidence. I don't feel the todays reason for exemption is cogent and acceptable. Hence, the case is posted to record 313 statement of the accused.”

4. On 5th March, 2020, prosecution filed application for recalling of witness under Section 311 of the Code of Criminal Procedure. This application came to be rejected by order dated 22nd February, 2021. The learned Trial Court rejected the application of the prosecution on the ground that no cause was shown for the absence of the witness on the previous dates. This order is impugned in this revision.

5. Notice was issued to the respondent. Nobody remained present for the respondent.

6. Learned APP submits that this is a serious offence. Prosecution tendered entire evidence. Examination-in-chief of the Investigating Officer was in progress and it was partially recorded. Thereafter for some reason it had to be adjourned and thereafter the witness remained absent and on 22nd February, 2021, learned Trial Court rejected the application. He submits that the order of the learned Special Court deserves to be set aside having regard the gravity of the offence. Learned APP places reliance on the case of V.N. Patil vs. K. Niranjan Kumar and others in Criminal Appeal No. 267/2021 arising out of SLP (Cri.) No. 8965/2018.

7. Section 311 of the Code of Criminal Procedure empowers the Court at any stage of any inquiry, trial or other proceeding under this Code, to 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. It further states that 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.

8. The principles on which witness can be recalled have been dealt with by the Honourable Apex Court in the catena of judgments. In the case of V.N. Patil vs. K. Niranjan Kumar and others (supra), the Honourable Apex Court extensively dealt with the scope of Section 311 of the Code of Criminal Procedure. In paragraphs No. 15, 16 and 17, the Honourable Supreme Court has observed thus :-

“15. The object underlying Section 311 CrPC 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 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 the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said “wider the power, greater is the necessity of caution while exercise of judicious discretion”.

16. The principles related to the exercise of the

power under Section 311 CrPC have been well settled by this Court in Vijay Kumar Vs. State of Uttar Pradesh and Another 2011(8) SCC 136.

“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason.”

17. This principle has been further reiterated in Mannan Shaikh and Others Vs. State of West Bengal and Another 2014(13) SCC 59 and thereafter in Ratanlal Vs. Pralhad Jat and Others 2017(9) SCC 340 and Swapan Kumar Chatterjee Vs. Central Bureau of Investigation 2019(14) SCC 328. The relevant paras of Swapan Kumar Chatterjee (supra) are as under :-

“10. The first part of this section which is

permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.”

9. The powers of the Court under Section 311 of the Code of Criminal Procedure undoubtedly are discretionary and the discretion has to be based on sound judicial principles. Discretion

has to be exercised judiciously and not capriciously.

10. In the case at hand, undisputedly, respondent is facing prosecution under Sections 7, 13(10)(d) with 13(2) of Prevention of Corruption Act. Evidence of almost all the witnesses was recorded. On 6th July, 2019, PW 6 i.e. Investigation Officer Sunil Ramrao Nagargoje was examined. His examination-in-chief was partially recorded. Thereafter the matter was adjourned to 15th July, 2019. The witness was absent on 15th July, 2019, 13th January, 2020 and, on 12th February, 2020, the learned Court closed the evidence of prosecution on account of absence of the Investigating Officer. While recalling the witness, the primary concern of the Court has to be to examine whether the evidence of witness is essential for the just decision of the case. If the evidence of the witness is essential for the just decision of the case, the Court has power to recall the witness. As held by the Honourable Apex Court in the case of V.N. Patil (surpa) the determinative factor is whether it is essential for just decision of the case.

11. In the case at hand, trial is being conducted under Prevention of Corruption Act. Therefore, evidence of Investigating

Officer is essential for just decision of the case. It is true that on 2 to 3 dates the Investigating Officer did not remain present. It is also true that learned prosecutor conducting the prosecution was not diligent enough in assigning reason for his absence. The learned prosecutor appears to be very casual in making application for recalling the witness. However, as held by the Honourable Apex Court in the case of V.N. Patil (supra), the aim of every Court is to discover the truth. As held in the case of Swapan Kumar Chatterjee vs. Central Bureau of Investigation, **2019(14) SCC 328**, power under this provision shall not be exercised if the Court is of the view that the application has been filed as an abuse of the process of law. Learned Trial Court was oblivious of the fact that evidence of the Investigating Officer is essential for discovering the truth. The learned Trial Court could have allowed the application by imposing cost on prosecution. The learned Trial Court committed gross error in rejecting the application. In this view of the matter, I deem it appropriate to allow the revision. Hence the following order:

ORDER

- i) Application is allowed.
- ii) Impugned order dated 22nd February, 2021,

passed by the learned Additional Sessions Judge – 6, Latur below Exhibit 65 in Special Case No. 8/2015 is set aside.

iii) The learned Trial Court shall permit the prosecution to examine Investigating Officer Sunil Ramrao Nagargoje.

iv) The learned Trial Court shall make every endeavour to dispose of the trial within three months from the date of receipt of order of this Court.

v) Parties to appear before the learned Trial Court on 3rd January, 2022.

vi) Application stands disposed of.

(M. G. SEWLIKAR)
Judge