

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.240 OF 2019**

SUBHASH MHAMAL MANDREKAR., ... Petitioner

VS

STATE, THR. PUBLIC

PROSECUTOR., ... Respondent

Mr. A. D. Bhobe, Advocate for the Petitioner.

Mr. Sagar Dhargalkar, Additional Public Prosecutor for the Respondent.

Coram : M. S. SONAK, J

Date : 15th February, 2021

P.C.

Heard Mr. Bhobe, learned counsel for the Petitioner and Mr. Dhargalkar, learned Additional Public Prosecutor for the State.

2. The challenge in this petition is to the judgment and order dated 6th November, 2019 made by the Sessions Judge, South Goa, at Margao and the order dated 9th January, 2019 by the learned JMFC, 'F' Court, Margao, rejecting the Petitioner's application under Section 311 of Cr. P.C.

3. The Sessions Judge in the impugned judgment and order dated 6th November, 2019 has held that no revision application was maintainable to question the JMFC's order dated 9th January, 2019. However, the Sessions Judge has decided the matter on merits as well

since the contentions on merits were pressed before the Sessions Judge. This means that concurrently two Courts have held that the Petitioner's application under Section 311 of Cr. PC could not be allowed.

4. In this case, the Petitioner is being prosecuted for offence punishable under Section 193 of IPC. For the facts and reasons which are borne out in this Court's judgment and order dated 10th October, 2017 in Criminal Writ Petition No.12 of 2015, this Court had directed the JMFC to proceed to decide the case from the stage of framing of charge in compliance with Section 343 (1) of Cr. PC. This was mainly in the context of the decision of the Hon'ble Supreme Court in the case of *State of Goa Vs Jose Maria Albert Vales*¹ in which it has been held that for considering the provisions of Section 343(1) of Cr.PC, the procedure in respect of cases instituted otherwise than on police report is not attracted qua the complaint under Section 340 and/or Section 341 of Cr.PC.

5. After the matter was restored to the file of the JMFC, the charge was framed in compliance with the provisions of Section 343(1) of Cr. PC. The record also discloses that in the earlier round the complainant, i.e. the District and Sessions Judge was examined as PW1 on 6th February, 2010 and relevant documents were produced through this witness including the complaint. Thereafter, yet another witness (PW2) was also examined. Both these witnesses were extensively cross

¹ 2017(9) Scale 527

examined. The complainant i.e. District and Sessions Judge was thereafter appointed as a Judge of this Court and has since retired.

6. After the charge was framed in compliance with the provisions of Section 343(1) of Cr.PC, the same was explained to the Petitioner and his plea thereof was also recorded vide Exhibit 88.

7. Thereafter, the prosecution filed an application under Exhibit 92 on 6th April, 2018 praying that the evidence recorded earlier should be considered as an evidence of prosecution even after framing of the charge and during the trial in terms of Section 242 of Cr.PC. To this application, the learned counsel for the Petitioner gave a specific no objection and even undertook to endorse this no objection on the application made by the prosecution (Exhibit 92). Thereafter, the learned counsel for the Petitioner, did not at any stage claim that he had objected the application at Exhibit 92 or that he had not given his no objection for allowing the prayer therein but the learned counsel simply refused to make necessary endorsement on Exhibit 92. The learned Sessions Judge has observed that this was quite unfortunate. Fortunately, before none of the Courts was any plea taken on behalf of the Petitioner that the counsel for the Petitioner had objected to the application at Exhibit 92 or that the learned counsel had not given any no objection for grant of prayer in Exhibit 92.

8. The matter thereafter proceeded and it is only after the conclusion of record of statement under Section 313 of Cr.PC, the Petitioner took out application under Section 311 of Cr.PC seeking recall of retired High Court Judge as well as other witnesses.

9. If the application seeking to invoke provisions of Section 311 of Cr. PC is perused then there are absolutely no reason or rather convincing reason set out for seeking such relief. From the conduct of the Petitioner, it is evident that the Petitioner wishes to delay the proceedings for one reason or other. The two Courts have quite correctly inferred that the application was not made bonafide. The whole purpose of the application was to delay the proceedings and to embarrass the witnesses.

10. The two Courts have quite correctly observed that full opportunity was granted to the Petitioner to cross examine the prosecution witnesses and this opportunity was fully availed by the Petitioner. Precisely for these reasons, the Petitioner through his counsel did not even insist upon fresh examination of these witnesses and gave his no objection to the prosecution application at Exhibit 92 in which he had invoked the provisions of Section 242 of Cr.PC. The Petitioner in such circumstances and that too at the belated stage cannot be permitted to renege and insist upon opportunity in terms of Section 311 of Cr.PC.

11. In *State (NCT of Delhi) Vs Shiv Kumar Yadav and*

another,² the Hon'ble Apex Court has held that recall is not a matter of course and the discretion given to the Court has to be exercised judiciously to prevent failure of justice and not arbitrarily. A plea for recall for advancing justice has to be bonafide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Mere observation that recall was necessary for ensuring fair trial is not enough unless there are tangible reasons to show how the fair trial suffered without recall.

12. In the present case, the Petitioner failed to make out any case of prejudice whatsoever. Besides, as noted earlier, the conduct of the Petitioner indicates that the application made was not bonafide and the same was only for the purpose of delaying the trial and causing undue hardship and embarrassment to witnesses. Accordingly, applying the principles laid down by the Apex Court in *Shiv Kumar Yadav* (supra), no case is made out to interfere with the impugned order.

13. This petition is liable to be dismissed and is hereby dismissed.

14. The record shall be immediately sent to the Trial Court and the Trial Court shall ensure to dispose of the pending proceedings expeditiously.

² (2016) 2 SCC 402

15. The parties to appear before the Trial Court on 8th March, 2021 at 10.00 a.m., and file authenticated copy of this order.

M. S. SONAK, J

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TARI AMRUT
NAGESH

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