

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 479 OF 2021

Sanjay Rameshchandra Varma

.....Applicant

V/s.

The State of Maharashtra

.....Respondent

* * * *

Mr. Chetan Agrawal a/w. Ms. Nikita Banatwala,

Advocate for the applicant.

Mr. S.S. Hulke, APP for State.

Coram : Sandeep K. Shinde, J.

4th October, 2021.

P.C. :

1. Heard.
2. This application under Section 482 of the Criminal Procedure code, challenges the order dated 19th January, 2021 by which an application moved by accused under Section 311 to recall the complainant

(P.W.1) and P.W.2 to cross-examine them has been rejected, by the Additional Sessions Judge, Thane.

3. Facts essential for the decision of this application are that, applicant is accused in Sessions Case No.81/2019 facing charge under Sections 302 and 397 of the Indian Penal Code. Prosecution case in brief is that; complainant, Monica Naidu (P.W.1) was friend of the deceased. On 5th November, 2021 deceased was not responding phone calls of one, Micheal. Therefore, Michael contacted the complainant. Deceased and the complainant were living in one building. A key of the flat of deceased was kept with one, Celine D'souza, who was also residing in the same building. Thereafter, complainant opened the flat of the deceased in the presence of security guard. Dead body of Rita (deceased) was found lying in the flat. P.W.2 is the son of the informant to whom, the complainant had asked to trace the whereabouts of deceased, when deceased was not responding to phone calls. These two witnesses were cross-examined by the Advocate of the

accused-petitioner on 8th November, 2019. On 26th November, 2019 accused appointed another Advocate, whereafter new Advocate filed an application under Section 311 of the Criminal Procedure Code, on 5th January, 2021. The application reads as under :

“ . It is respectfully submitted that the accused desired to recall the P.W.1 and P.W.2 who have been cross-examined by Adv. Shri. Patil, however, the said witness are remained to be examined on material points which raised in the examination-in-chief, to meet the ends of justice. The accused is facing the trial of Section 302 of the IPC and thorough cross-examination of witnesses is required in the matter. It is also fundamental right of accused to defend the matter by all means.

. It is therefore prayed that, the P.W.1 and P.W.2 may kindly be recalled for the particular cross-examination on material points to meet the ends of justice, in the interest of justice & obliged.”

5. The learned trial Court declined to recall the witnesses on the ground that, application moved by the accused was bereft of convincing reasons. Rather, the

learned Judge was found application was filed routinely to fill up the lacunas. The learned Judge, has noticed that, after discharging the Advocate who had cross-examined the witnesses, another advocate moved this application. On these grounds, the learned Judge declined to pass an order under Section 311 of the Criminal Procedure Code. Feeling aggrieved by this order, the accused has approached this Court in its inherent jurisdiction under Section 482 of the Criminal Procedure Code.

6. Heard learned Counsel for the applicant and learned APP for the State.

8. Learned Counsel in support of the submission relies on the judgment of the Apex Court in case of **P. Sanjeeva Rao Versus. State of Andhra Pradesh, 2012 (7) SCC 56**. In the said case, two prosecution witnesses were not examined, not because there was nothing incriminating in their testimony, but

because the appellant (accused) had intended to cross-examine them after the Trap Laying Officer, had been examined. Keeping in view, the serious consequences will follow, if witnesses were not examined, petitioners in the cited case were permitted to recall the witnesses. These facts in the cited judgments were altogether different than the facts in the case in hand and therefore the judgment has no application herein.

9. I have perused the application seeking to recall the witnesses. The settled law is the aid of Section 311 should be invoked only with the object of discovering relevant facts and obtaining a proper proof of such facts for just decision of the case and it should not be used for filling up the lacuna by the prosecution or by the defence as held in **Mohan Lal Shamlal Soni V/s. Union of India, AIR 1991 SC 1346**. Herein, the application was filed routinely, by an Advocate who was appointed, after discharging the Advocate who had cross-examined the P.W.1 and P.W.2.

The application does not suggest at all as to the circumstances which prompted the accused to apply for recalling the witnesses, except to say, witnesses were not examined on material points. The only reason, in my view, to move the application was that another Advocate appointed by the accused was of the opinion that the witnesses were not properly cross-examined. Obviously, this could not be a reason to move an application under Section 311. It is nothing but an abuse of law. Therefore, the impugned order cannot be faulted with. For that reason, the application is rejected.

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(SANDEEP K. SHINDE, J.)