

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

CRIMINAL WRIT PETITION NO.1558 OF 2021

Shonika @ Sonika Ramesh Salunkhe	...Petitioner
Versus	
The State of Maharashtra	...Respondent

Mr. Ritesh Thobde for the Petitioner

Mr. Sooraj S. Hulke, A.P.P for the Respondent–State

***CORAM : REVATI MOHITE DERE, J.
(THROUGH VIDEO-CONFERENCING)
THURSDAY, 15th JULY 2021***

ORAL JUDGMENT :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith, with the consent of the parties and is taken up for final disposal. Learned APP waives service on behalf of respondent–State.

3 By this petition, the petitioner has impugned the order dated 18th January 2020 passed below Exhibit 70 by the leaned Additional

Sessions Judge, Solapur in Sessions Case No. 103/2018, by which, the learned Judge permitted the prosecution to examine four witnesses, after the arguments were defence had advanced their arguments.

4 Learned counsel for the petitioner submits that after the petitioner's advocate i.e. the defence advanced their arguments, the prosecutor realized that certain witnesses were not examined, pursuant to which, the prosecutor filed an application dated 15th July 2019 and sought examination of four witnesses. Learned counsel for the petitioner submits that the power under Section 311 of the Code of Criminal Procedure ('Cr.P.C') cannot be used to fill up the lacunae. He submits that the impugned order passed by the trial Court would seriously prejudice the accused, who had put forth his defence at the time of argument. Learned counsel for the petitioner relied on the Roznama of the said case from page No. 10 onwards, in support of his submission to show that the said application under Section 311 of Cr.P.C was filed by the prosecutor at a very belated stage, with the sole intent of filling in the lacunae.

5 Learned counsel relied on the judgments of the Apex Court in the cases of *State of Haryana v. Ram Mehar & Ors.*¹ and *Kalpesh*

1 (2016) 8 SCC 762

Ramnath Saroj & Anr. v. State of Maharashtra², in support of his submission.

6 Learned A.P.P does not dispute the fact that the said application was filed by the prosecutor at a belated stage i.e. after the advocate for the petitioner had advanced his arguments. He, however, submits that no interference is warranted in the impugned order.

7 Perused the papers. The petitioner is facing trial for the alleged offences punishable under Sections 302 and 201 of the Indian Penal Code. The said case is pending before the learned Sessions Judge, Solapur being Sessions Case No. 103/2018. After charge was framed as against the petitioner for the alleged offences punishable under Sections 302 and 201 on 22nd June 2018, the prosecution examined 6 witnesses to bring home its case. On 17th April 2016, the prosecution filed a closure purshis after which, the petitioner's statement was recorded by the Court under Section 313 Cr.P.C, on 22nd April 2019. The trial Court fixed the matter for final arguments on 3rd May 2019. On the said date, the trial Court proceeded to hear the arguments of the defence, while the prosecution sought time for advancing their submissions. It is not in dispute that after the arguments for

2 2019 SCC OnLine Bom 1103

the defence were over, the prosecution through the learned A.P.P, on 6th May 2019 preferred an application under Section 311 Cr.P.C, seeking examination of two additional witnesses i.e. Surekha Anil Salunkhe and Pooja Narendra Alkunte. The said application (Exhibit 67) was rejected by the trial Court vide order dated 6th May 2019. A perusal of the said order dated 6th May 2019 shows that the reason for rejecting the said application was that the said application was preferred after hearing the submission of the defence counsel and there were no reasons set out why the said two witnesses could not be examined earlier. It appears that thereafter, the prosecutor sought time to advance final submissions. According to the learned counsel for the petitioner, the prosecution portrayed to the trial Court that the order passed below Exhibit 67 was being challenged in revision before the High Court, when infact, no such revision was filed by the prosecution in the High Court. On 6th May 2019, the prosecution preferred an application and sought an adjournment to advance final arguments, which adjournment was granted by the trial Court. It is a matter of record that on 15th July 2019, the prosecution once again filed another application (Exhibit 70) under Section 311 Cr.P.C, seeking recall of 4 witnesses i.e. Dayanand Jagannath Chavan (Photographer), Bharat Vikas Vidyalay (Head Master), Bebi Maruti Gogale (Arrest Panchnama), Jayshri Arun Dindole (Arrest Panchnama). The said application was allowed by the

trial Court vide order dated 18th January 2020 which order is impugned in this present petition.

8 No doubt, the power under Section 311 Cr.P.C can be invoked at any stage of any inquiry, trial or other proceeding under this Code, 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; and 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. However, the said power cannot be exercised to fill up the lacunae in the case. It is not in dispute that the said application was filed by the prosecution after the defence arguments had concluded and the defence had disclosed and argued on certain aspects. It is also not in dispute that vide order dated 6th May 2019, the Court had rejected the application preferred by the prosecution under Section 311 for examination of two witnesses i.e. Surekha Anil Salunkhe and Pooja Narendra Alkunte on the premise that the said application was filed after the advocate for the petitioner had disclosed his defence and that there were no reasons set out for non-examination of the said witnesses earlier. Admittedly, the application (Exhibit 70) was filed after the defence had concluded the arguments. The said application does not disclose why the said witnesses

were not examined earlier nor does the application set out any cogent reason for the same. The said application (Exhibit 70) is bereft of details. It does not even spell out, how the examination/evidence of these witnesses is essential to the just decision of the case. It is well settled that the power under Section 311 Cr.P.C cannot be used to fill in the lacunae. The said action of the prosecution would seriously prejudice the petitioner. Needless to state, that the power of Section 311 Cr.P.C must be invoked by the Court only to meet the ends of justice for strong and valid reasons and the said power must be exercised with care, caution and circumspection.

9 Considering the aforesaid, the impugned order dated 18th January 2020 passed below Exhibit 70 by the learned Additional Sessions Judge, Solapur in Sessions Case No. 103/2018, cannot be sustained. Accordingly, the same is quashed and set-aside.

10 Rule is made absolute in the aforesaid terms. Petition is disposed of accordingly.

11 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.