

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

CRIMINAL APPLICATION (APL) NO.873 OF 2020

Mr. Jaideo s/o Jagdish Sajjal (In Jail)
Age 37 years, Occ: Agriculturist,
R/o Gauripur, Taluka Chamorshi,
Dist. Gadchiroli. **APPLICANT**

...V E R S U S...

State of Maharashtra through
Police Station Officer,
Police Station Chamorshi,
Dist. Gadchiroli. **NON-APPLICANT**

Mr. Sumedh Kadam, Advocate for Applicant.
Mr. V.A. Thakare, APP for Non-Applicant.

CORAM: **ROHIT B. DEO, J.**
DATE: **25th JANUARY, 2021.**

ORAL JUDGMENT:

With consent the application is finally heard at the admission stage.

2. Inherent power under section 482 of the Code of Criminal Procedure (Code) is invoked to assail the order dated 07.12.2020 rendered by the Sessions Judge, Gadchiroli in Sessions Trial 42 of 2020 whereby the application (Exh.53) preferred by

the applicant herein under Section 311 of the Code seeking recall of witnesses, is rejected.

3. The applicant – who shall be referred to as the accused hereinafter – is facing trial under Section 302 of the Indian Penal Code on the charge of having murder his wife by setting her afire.

4. The accused was provided with legal aid since he did not have means to engage private lawyer.

5. The prosecution examined Mr. Manu Ranjan Mandal PW-1 on 31.08.2200, Mr. Devendra Biswas PW-2 on 22.09.2020, Mr. Balram Rai PW-3 on 22.09.2020, Mr. Gautam Bose PW-4 on 22.09.2020, Laxmi Biswas PW-5 on 01.10.2020, Anima Sajal PW-6 on 01.10.2020, Avinash Bodalkar PW-7 on 13.10.2020, Mr. Jitendra Gadewar PW-8 on 23.10.2020, Avinash Mandal PW-9 on 23.10.2020, Mr. Rajkumar Cinchekar PW-10 on 02.11.2020, Pushpa Kachode PW-11 on 10.11.2020, Digambar Dugane PW-13 on 04.12.2020, Amol Gupta PW-14 on 04.12.2020 and Nisha Khobragade PW-15 on 04.12.2020.

6. The accused preferred an application under Section 311 of the Code on 05.12.2020 and the relevant paragraphs read thus:

2. That, the accused is an under trial prisoner and he was provided with a counsel from Legal Aid Services to defend his case. That the said counsel had conducted his case and cross-examined PW-1 to PW-14 amongst the prosecution witnesses. It is specifically submitted that, the accused being detained in jail, he couldn't meet his earlier counsel to furnish necessary instructions. The fact remains that, the necessary facts which needs to be bring on record through cross-examination, to defend the case of accused was not brought.

3. That, now the accused engaged another counsel and furnished necessary instructions through Video Conferencing to him. That, on perusal of case record coupled with the furnished instructions of the accused it seems that the truth remained to put before the Hon'ble Court for doing justice. Hence, out of the witnesses examined by the prosecution the following witnesses are utmost necessary to be recalled for the cross-examination.

PW.1 Manoranjan Mandal

PW.6 Anima Nalin Sajjal

PW.8 Jitendra Ganediwar

PW.12 Dr. Balmukunda Paliwal

4. That, the recalling of above mentioned witnesses are essential for the just decision of the case and to prevent failure of justice. It will not cause any prejudice to the prosecution, on the contrary the denial will greatly prejudice the accused in his defence.

7. The prosecution responded (Exh.54) by opposing the application under Section 311 of the Code. The prosecution contended that PW-6 Mrs. Anima is closely related to accused and the intention of recalling her is likely to bring on record admissions in favour of the accused. The prosecution then contended that PW-12 and PW-8 are sufficiently cross-examined by the previous counsel. PW-12 is the Doctor who examined the deceased and issued the fitness certificate and PW-8 is the Executive Magistrate who recorded the dying declaration. The prosecution then contended that PW-1, who is the father of the deceased, is not an eye witness and he too is cross-examined. The prosecution implicitly argues that the nature and extent of the cross-examination necessary for the just decision of the case, is not spelt out with particularity. Lastly, the prosecution contended that the application under Section 311 of the Code is moved only to protract the trial.

8. The learned Sessions Judge observed that it is not the case of the accused that Advocate Mr. Bhoyar who cross-examined the witnesses, did not conduct the cross-examination effectively or that he conducted the cross-examination hampered by want of instructions.

9. The learned Sessions Judge then opined that since Advocate Mr. Bhoyar, the appointed counsel who conducted the cross-examination, continued to be Advocate on record along with Advocate Mr. Jiwani, who is engaged by the counsel, it cannot be said that new counsel is appointed. Para 6 of the order impugned reads thus:

6. In the aforesaid backdrop, Vakalatnama at Exh.39 needs to be minutely perused. The said Vakalatnama is filed by advocate Shri Jiwani and Shri Bhoyar (the earlier legal aid counsel) jointly for and on behalf of the accused. It may thereby be gathered that, the earlier counsel who had represented the accused till the date, has continued for his vakalatnama in future also. As such, it is not the case that the earlier counsel was different than the present counsel. Merely because another advocate has started to assist the earlier advocate, that by itself should be no reason to recall the earlier witness. In this premise, the application lacks the merits.

10. The learned Sessions Judge then referred to the decision in *Rajaramprasad Yadav v. State of Bihar and Anr. (2013) 14 S.C.C. 461* and held that the application is vague and ambiguous and it is not clear how recall is necessary for the just decision of the case. The thought process of the learned Sessions Judge is reflected in paragraph 9 of the order impugned which reads thus:

9. *It may in fact be noted that, advocate Bhoyar who has earlier defended the accused, is still an advocate on record. At least he should have been in better position to explain the aforesaid ambiguities. The same is not done. In nutshell, the application is vague and ambiguous. It is not made clear as to how the recall is necessary for the just decision of the case and to meet the ends of justice. In fact, if the enlisted witnesses are recalled, u/s 311, the same would lead to another round of cross-examination, which may lead to an endless task. The same, in my considered opinion, would lead to failure of justice. In the aforesaid backdrop, this Court is guided by the principles laid down in the case law of Rajaramprasad Yadav v. State of Bihar and Anr. (2013) 14 S.C.C. 461. There are various guidelines laid down in the said case which Court should bear in mind while exercising the discretion u/s 311. The most important guideline therein is "the power u/s 311 of the Code of Criminal Procedure, 1973 must be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons and the same must be exercised with great caution and circumspection. The Court should bear in mind that, fair trial entails the interest of the accused, the victim and the society, and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being the constitutional goal as well as the human right.*

11. The learned counsel for the applicant Mr. Kadam would submit that the learned Sessions Judge erred in adopting a hyper technical view and failed to appreciate that the prosecution did not rebut the assertion that the accused, who is in custody, could not interact with Advocate Mr. Bhoyar, and therefore, could

not convey the necessary instructions. Mr. Kadam submits that the accused is in jail, and expeditious trial is in the interest of accused and the intention underlying the application under Section 311 of the Code is not to delay the trial, as is assumed.

12. Mr. Kadam concedes that the application ought to have broadly explained the nature and extent of the cross-examination which remained to be conducted. Mr. Kadam would however, submit, that the learned Sessions Judge could have shown more latitude considering that the accused is in jail and that conviction may entail death sentence. Mr. Kadam would draw support from several decisions, to which a reference shall be made in paragraph/s infra.

13. Mr. Kadam relies on *Dipak Gangaram Ahirrao and another v. State of Maharashtra* 2006(2) Mh.L.J. (Cri.) 89, and in particular the following observation:

8. In the present case the Court should have decided this application immediately. The averments made therein justify the case to recall the witness. If power is available under Criminal Procedure Code to the Court and when it comes to discretion, it should be exercised by taking into consideration the principle of natural

justice read with the principle of giving full opportunity to the accused. In the matter of offences of burn injuries and/or the thing of recording statement by the doctor, may goes to the root of the defence, in that case, one cannot overlook the prejudice likely to be caused to the accused. The discretion therefore, need to be exercised judiciously. The possibility of making mistakes to which humans are prone cannot be overlooked. The advocate at the relevant time, if inadvertently or by mistake failed to take note of some of basic aspects, in that case the Court need to consider the case from the point of view of the accused, as it affects or cause prejudice to his defence. This is not the case to “fill the lacuna in the prosecution case”. This is an application filed by the accused-petitioners during the trial within the framework of the principle as laid down by the Apex Court on the foundation of section 311, Criminal Procedure Code.

14. Mr. Kadam then invites my attention to the decision in *Criminal Revision Application 7 of 2019 Pyarelal Lilaram Tagde v. State of Maharashtra through PSO PS Bela, Dist. Nagpur*. The articulation in paragraphs 8 and 9 of the decision is pressed in service to buttress the submission that the Courts are expected to adopt a liberal approach while exercising power under Section 311 of the Code.

15. Mr. Kadam then cites the decision in *Criminal Writ Petition 1086 of 2009 Vikas s/o Sureshrao Waghmare* and relies on the observations in paragraphs 11, 12 and 13 thereof which

read thus:

11. Having taken the comprehensive view of the matter, it is necessary to reproduce the contents of provisions of Section 311 of Code of Criminal Procedure Code, for ready reference, as mentioned below:

“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 attendance, though not summoned as a witness, or recall and reexamine any person already examined; and the court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case.”

It is clear from the very text of the Section that at any stage of the inquiry or trial or other proceeding, Court can summon any person as a witness or examine any person in attendance, though not summoned as a witness or recall or re-examine any person already examined, if his evidence appears to be essential to the just decision of the case.

12. The petitioner has stated in the application Exh.61 that some vital questions remained to be asked to the complainant inadvertently. Since there is presumption under Section 138 of Negotiable Instrument Act in respect of the documents produced by the complainant necessary questions are required to be put to the complainant witness in cross examination and if such questions are not permitted to be put to him by recalling the complainant, the accused would be unable to put forth his defence before the

Court, and hence principles of natural justice require that such questions are necessary to be put to the complainant which appear to be essential to the just decision of the said case.

13. Hence, resultantly, the principles of natural justice require that the complainant/respondent be recalled for his cross examination to enable the petitioner herein to avail the opportunity to put the questions to him which remained to be asked inadvertently in the earlier cross examination in respect of the documents produced by the complainant on record, to enable the petitioner herein to put forth his defence before the Court, but such cross examination shall be restricted to the extent of documents produced by the complainant on record and, not beyond that.

16. Mr. Kadam then invites my attention to the decision of the Supreme Court in *Mohanlal Shamji Soni v. Union of India and another 1991 Supp (1) SCC 271* to buttress the submission that the power of the Court under Section 311 of the Code is exerciseable at any stage and the accused is entitled to fair and reasonable opportunity to rebut the incriminatory evidence.

17. Mr. Kadam then refers to the decision of the Supreme Court in *Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110*. The said decision is rendered in the context of an application under Section 311 of the Code moved by the prosecution. The Apex Court held that a lacuna in the prosecution case is not to

be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant material or in eliciting relevant answers from witnesses. The Apex Court emphasized that the adage “to err is human” is the recognition of the possibility of making mistakes to which humans are prone and a corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which of course cannot fill up.

18. Mr. Kadam then relied on *Manju Devi v. State of Rajasthan & Anr. Criminal Appeal 688 of 2019*. Paragraph 9.1 of the said decision reads thus:

*9.1 It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions 1. In **Natasha Singh v. CBI (State) : (2013) 5 SCC 741**, though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under:-*

“8. Section 311CrPC empowers the court to summon a material witness, or to examine a person present at “any stage” of “any enquiry”, or “trial”, or “any other proceedings” under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

Vide Mohanlal Shamji Soni v. Union of India: 1991 Supp (1) SCC 271, Zahira Habibulla H. Sheikh v. State of Gujarat: (2004) 4 SCC 158, Mina Lalita Baruwa v. State of Orissa and Others: (2013) 16 SCC 173 and Rajaram Prasad Yadav v. State of Bihar and Ors: 2013 (14) SCC 461 and Natasha Singh v. CBI (State) : 2013 (5) SCC 741.

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause

serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as “any Court”, “at any stage”, or “r any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.”

19. The learned APP Mr. Vinod Thakare relies on the decision of the Apex Court in *Ratanlal v. Prahlad Jat and others* (2017) 9 SCC 340. The said decision is rendered in the context of the glaring facts of the case. Witnesses PW-4 and PW-5 were examined between 29.11.2010 and 11.03.2011 and were cross-examined at length. PW-4 and PW-5 supported the prosecution. After a passage of 14 months, PW-4 and PW-5 moved

application under Section 311 of the Code seeking their re-examination alleging that the statements made earlier were under police pressure. The Sessions Judge rejected the application. The High Court set aside the order of the Sessions Judge and allowed the application under Section 311 of the Code. The Supreme Court, while allowing the appeal and setting aside the order of the High Court observed thus:

22. Coming to the facts of the present case, PWs 4 and 5 were examined between 29.11.2010 and 11.3.2011. They were cross-examined at length during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has recorded a finding that they were not under any pressure while recording their evidence. After a passage of 14 months, they have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over. We do not find any reasons to allow such an application. The Sessions Judge, therefore, was justified in rejecting the application. In our view, High Court was not right in setting aside the said order.

20. I have given my anxious consideration to the material on record and the rival submissions, and having done so, I am inclined to set aside the order of the learned Sessions Judge to the

extent permission to recall witnesses PW-12 and PW-8, the Doctor who examined the deceased and issued the fitness certificate and the Executive Magistrate who recorded the dying declaration, respectively, is rejected, and to confirm the order impugned to the extent the Section 311 application is rejected qua PW-6 Mrs. Anima and PW-1 Mr. Manu Ranjan Mandal.

21. The prosecution did not deny the assertion in the application that Advocate Mr. Bhoyar, the appointed counsel, was not instructed by the accused who is in jail. The assertion is reiterated and indeed further elaborated in paragraphs 7 and 8 of the application under Section 481 of the Code. The prosecution has filed affidavit in response dated 04.01.2021. The assertions in paragraphs 7 and 8 of the application under Section 482 of the Code are not dealt with much less rebutted in the affidavit in response. It is, therefore, safe to proceed on the premise, *prima facie*, that the appointed counsel conducted the cross-examination of the material witnesses, without the benefit of interacting with the accused.

22. It is true, as is argued by the learned APP Mr. Thakare, and is conceded by the learned counsel Mr. Kadam,

that the application is vague in the sense that the aspects which remained untouched in the previous cross-examination are not indicated even broadly or briefly. However, Mr. Kadam did bring to my notice certain aspects of the evidence on which a further cross-examination may be necessary from the perspective of the acts. Lest prejudice is caused to the defence, I would refrain from referring to the likely questions which are formulated by the learned counsel Mr. Kadam which could have, and were not, put to the Doctor and the Executive Magistrate. I have carefully perused the depositions on record, and having done so, Mr. Kadam's submission that in the interest of just decision and fair trial, an opportunity to recall and further cross-examine the Doctor and the Executive Magistrate is deserved, cannot be brushed under the carpet. The same, however, cannot be said qua the prayer to recall and cross-examine the other witnesses. PW-6 is a close relative and PW-1 is irrefutably not an eye witness to the incident. The witnesses, other than the Doctor and the Executive Magistrate, are sufficiently and effectively cross-examined and no prejudice shall be caused to the accused if the application under Section 311 of the Code is disallowed to the extent of the said witnesses.

23. The power of the Court under Section 311 to recall witnesses is couched in the widest possible terms. In plethora of decisions, the Supreme Court has held that the power is not limited, either with regard to the stage at which the power should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the bounden duty of the Court to examine such of those witnesses as it consider absolutely necessary for doing justice between the state and the subjects. The object is to ensure that there is no failure of justice due to the mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statements of the witnesses and the only consideration is whether recall is essential to the just decision of the case. It would suffice if reference is made to the decision of the Supreme Court in *Hanuman Ram v. The State of Rajasthan & Ors.* AIR 2009 SC 69.

24. Closer to the facts is the articulation of the Supreme Court in *Hoffman Andreas v. Inspector of Customs, Amritsar* (2000) 10 SCC 430 and the relevant passage read thus:

“In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a

liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.”

(emphasis supplied)

25. The purpose of any trial or inquiry, and indeed any adjudication, is ultimately the discovery of the truth. In *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria* AIR 2012 SC 1727, the Supreme Court reminded that the Court is expected to discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that the discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

26. In *P. Sanjeeva Rao v. State of A.P.* AIR 2012 SC 2242 the Supreme Court emphasized that grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial and that the fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to the prosecution, is not even a price, leave alone one that would justify denial of a fair opportunity to

the accused to defend himself. The latter observation was made in the context of the apprehension of the prosecution that a belated recall of witnesses may prejudice the prosecution.

27. In the light of the discussion *supra*, the application is partly allowed.

28. The order impugned is set aside to the extent the permission under Section 311 of the Code is rejected qua PW-12 and PW-8. The Doctor and the Executive Magistrate respectively and is upheld to the extent the application is rejected qua PW-1 and PW-6.

29. The learned Sessions Judge is requested to conclude the recording of the evidence after recall, as expeditiously as is possible.

30. It is made abundantly clear, that every observation in this judgment is made for the limited purpose of deciding the Section 311 application and shall have no bearing on the appreciation of evidence, during the trial.

JUDGE