

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.556 OF 2022

VIJAY @ KAKASAHEB S/O BABAN GARJE
VERSUS
THE STATE OF MAHARASHTRA

...
WITH
CRIMINAL APPLICATION NO.1510 OF 2022
IN WP/556/2022

...
Mr. N. S. Ghanekar, Advocate for petitioner.
Mr. S. P. Sonpawale, APP for the respondent – State.
Mr. M. B. Sandanshiv, Advocate for applicant in APPLN/1510/2022
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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 23.06.2022

ORDER :-

. Present writ petition has been filed challenging the rejection of the application under Section 311 of the Code of Criminal Procedure at Exhibit-560 in Sessions Case No.92 of 2019 by learned Additional Sessions Judge, Shrigonda, Ahmednagar on 25.03.2022. Accused Nos.6 and 12 in the said case had filed the said application under Section 311 of the Code of Criminal Procedure for calling Shri. Sanjay Satav, who was the then SDPO, Karjat, Dist. Ahmednagar as witness.

2. Heard learned Advocate Mr. N. S. Ghanekar for the petitioner, learned APP Mr. S. P. Sonpawale for the respondent – State and learned

Advocate Mr. M. B. Sandanshiv for the original informant.

3. The petitioner is accused No.6 in the said sessions case along with other 13 accused persons. All of them are facing trial for the offence punishable under Sections 302, 120(B), 143, 147, 148, 149 of Indian Penal Code and under Section 25/3, 27 of the Arms Act. It is stated that till date, the prosecution has examined 32 witnesses. After the evidence of the prosecution, it is stated that the statement of the accused persons under Section 313 of the Code of Criminal Procedure has been recorded and it appears that thereafter the application at Exhibit-560 was filed under Section 311 of the Code of Criminal Procedure.

4. It has been submitted that an application was filed by the brother of the petitioner on 07.05.2018 to the District Superintendent of Police, Ahmednagar to make inquiry on the count that his brother (cousin brother) was not concerned with the offence but on the day of alleged incident, he had gone out of the village to attend a marriage ceremony. It was posed that there are CCTV footages available which were supposed to be on root establishments which had installed the CCTV's stating the presence of the petitioner at a different place. Deputy Superintendent of Police, Ahmednagar thereafter assigned the said work of conducting inquiry to SDPO, Karjat. It appears that he had taken

statements of witnesses. Along with the writ petition, the ultimate conclusion of the concerned inquiry officer - the then SDPO, Karjat has not been annexed, but on the basis of the said inquiry it was contended in application Exhibit-560 by the accused Nos.6 and 12 that Mr. Satav, SDPO, be called as court witness.

5. Provisions of Section 311 of the Code of Criminal Procedure has two parts. The first part provides that any Court at any stage of any inquiry, trial or other proceeding under this Code may summon any person as a witness, or examine any person in attendance, though not summoned as witness, or recall and re-examine any such person already examined. The second part is rather mandatory and when Court considers that evidence of a person is essential to the just decision of a case, then it shall summon and examine or recall and re-examine any person. The word "shall" in the second part of Section 311 of the Code of Criminal Procedure has been interpreted as a mandatory provision for the Court, if the Court considers that the evidence of a person is essential for the just decision of the case. In this case, the petitioner and accused No.12 intended to invoke the second part of Section 311 of the Code of Criminal Procedure. Before the said powers under the second part of Section 311 of the Code of Criminal Procedure are exercised, the Court has to come to a conclusion that evidence of the person intended

to be called as witness is necessary/essential for the just decision of the case. In this case, petitioner/original accused No.6 had taken up a *plea of alibi*. Therefore, in order to prove his *plea of alibi*, whether the inquiry made by the then SDPO, Mr. Satav was necessary for the just decision or not, was the question before the learned Additional Sessions Judge.

6. If we consider the application filed by the brother of petitioner on 07.05.2018 before the Deputy Superintendent of Police, Ahmednagar as well as the Investigating Officer, who appear to be the SDPO himself also on the same date, states about the annexure. Along with the application it appears that a pendrive of CCTV footage from Hotel Sanjgarwa, Limbaganesh was given. So also, in the same pendrive, the CCTV footage of Hotel Chotu Kolhapuri near Natya Mandir road, Ganesh Multi State Bank and also from the marriage ceremony was given. When there was independent evidence available with the accused it ought not to have been asked by the brother of the accused to collect evidence to support the plea of alibi. Even now the said pendrive or contents thereof would be available with the accused and he would be at liberty to adduce that evidence. It was not necessary that the then SDPO, Mr. Sanjay Satav should have been called by the concerned Judge under second part of Section 311 of the Code of Criminal Procedure when

other evidence is definitely available. Statements of certain witnesses which were recorded by Mr. Satav are available with the petitioner. Instead of examining those witnesses, the petitioner could not have examined only Mr. Satav. The person whose statement has been recorded should be examined as witness and not the person who had recorded the statement of that person can be said to be a proper witness.

7. Perusal of the order passed by the learned Additional Sessions Judge, Shrigonda would show that he has not found that the evidence of SDPO, Mr. Satav is essential for the just decision of the case. It was opined that the accused can call him as his witness independently and not under Section 311 of the Code of Criminal Procedure.

8. When it is not clear under which provisions of law the said application was filed by the cousin brother of the petitioner with both the authorities on 07.05.2018 and then the District Superintendent of Police assigning the same application to the Investigating Officer himself, the conclusion arrived at by the learned Additional Sessions Judge that he cannot invoke the powers under the second part of Section 311 of the Code of Criminal Procedure is perfectly legal and correct. Burden of proving the *plea of alibi* is on the accused and for that purpose when other mode is available, he cannot utilize the powers

of the said Court in such a way. There was no merit in the application Exhibit-560. It has been correctly rejected. No interference is required under the Constitutional powers of this Court under Article 226 and 227 of the Constitution of India.

9. The interim relief granted earlier stands vacated.
10. The writ petition stands dismissed.
11. Criminal Application No.1510 of 2022 stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

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