

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

CRIMINAL APPLICATION NO.819 OF 2022

Mangalchand Nandlal Mishra ...Applicant

V/s.

The State of Maharashtra & Ors. ...Respondents

Ms. Mangula A. Biswas for Applicant.

Mr. A. R. Patil, APP for Respondent No.1 (State).

Mr. Abdul Wahab Shaikh i/by Mr. Umar Kazi for Respondent Nos.2 to 4.

Mr. S. V. Shinde, PSI, Ulhasnagar Police Station – present.

CORAM : AMIT BORKAR, J.

DATE : DECEMBER 07, 2022

P.C.:

1. The applicant is the father of victim who is challenging the order dated 29th June 2022 and 15th March 2022 rejecting Application for recall of PW3. Facts of the case relevant for the adjudication of the Criminal Writ Petitions are as under:-

(i). The respondent no.2 has been charged for offence under Section 304B and 34 of Indian Penal Code, 1860. The examination of witness no.1 was completed on 20th December 2017. Examination of witness no.2 was completed on 23rd November 2021.

(ii). The examination-in-chief of witness no.3 was recorded on 22nd December 2021. His cross-examination was partly over.

According to the petitioner, he was suffering from blood pressure left the Court. Thereafter, other witnesses were examined by the prosecution.

(iii). On 15th March 2022, the prosecution filed an Application under Section 311 of Code of Criminal Procedure, 1973 to recall of PW3, which has been rejected by order dated 15th March 2022.

(iv). On 27th June 2022, the prosecution filed an Application under Section 311 of Code of Criminal Procedure, 1973 another application to recall PW3, as due to ill-health was required to leave the Court and on the next date failed to remain present as he met with an accident.

2. By impugned order, the learned Sessions Judge rejected the said Application holding that order below Exhibit-51 for recall of witness having attained finality, again Application cannot be filed. It is also held that PW3 is relative of victim, and therefore, he could have been recalled earlier.

3. Learned advocate for the applicant submitted that the power under Section 311 of Code of Criminal Procedure, 1973 needs to be exercised to arrive at just and proper decision should not result in miscarriage of justice. It is submitted that in the absence of cross-examination of PW3, the evidence being crucial for the prosecution, the Court would not be in a position to arrive at just decision.

4. Per contra, learned advocate for the accused submitted that enough opportunities were given to the applicant and Application below Exhibit having been rejected, fresh Application was not maintainable. He submitted that no prejudice is likely to be caused to the petitioner, if the relief is not granted.

5. Having considered the submissions made on behalf of both sides, at this stage, it is necessary to place reliance on the Judgment of Apex Court in the case of **Rajendra Prasad Vs. Narcotec Cell**, reported in (1999 SCC (Cri.) 1062). The Apex Court in the said Judgment laid down a preposition that the witnesses cannot be recalled or re-summoned to fill up lacuna in the present case. The expression lacuna has been interpreted by the Apex Court to deem that a lacuna in the prosecution case need not be equated with the fall out of an over-site committed by public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The lacuna in the prosecution needs to be understood as inherent weakness or latent wedge in the matrix of prosecution case. If proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. It is held that it is the function of Criminal Court in the administration of criminal justice and not to count errors committed by the parties.

6. In the facts of the case, it appears that on the date of examination-in-chief, PW3 was suffering from high blood pressure

and was required to move out of the Court. Thereafter, the witness met with an accident, resultantly could not remain present before the learned Sessions Court. Though, it cannot be disputed that earlier Application filed below Exhibit-51 was rejected, the said order being subject matter of challenge in the Petition, this Court can consider validity of both orders rejecting both Applications under Section 311 of Code of Criminal Procedure, 1973. When it comes to question of summoning witness or recall or re-examine any witness, Section 311 empowers the Court to exercise the power to bring on record such evidence as is essential for just decision. The power vested with the Court is available at any stage of inquiry or trial. The only relevant consideration is whether such recall and re-examination of any person is necessary or essential for best decision of the case. The paramount consideration is just a decision. In the case of **Rajaram Prasad Yadav Vs State of Bihar & Anr.**, reported in (2013 (14) SCC 461), the Apex Court in paragraph no.23 held as under:-

“23. . From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

- a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*
- b) The exercise of the widest discretionary power under Section 311, Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.*

- c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.*
- d) The exercise of power under Section 311, Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*
- e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.*
- g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*
- h) The object of Section 311, Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*
- i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*
- j) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*
- k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting*

an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

- l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*
- m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*
- n) The power under Section 311, Cr.P.C. 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 care, 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, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”*

7. Therefore, considering the reasons stated by the prosecution that on the relevant date, PW3 was suffering from high blood pressure, and thereafter, met with an accident would, in my opinion, be sufficient reason to recall the witness. I, therefore pass following order:-

- (i). The impugned orders passed by the learned District Judge dated 15th March 2022 below Exhibit-51 and 29th June 2022 below Exhibit-71 are quashed and set aside.
- (ii). The prosecution is permitted to recall PW3.

(iii). The learned Sessions Judge shall fix a date as per his convenience for examination of PW3.

8. Rule is made absolute in the above terms. No costs.

(AMIT BORKAR, J.)