

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

CRIMINAL WRIT PETITION NO. 4026 OF 2022

Prabhavati Wadkar	... Petitioner
V/s.	
State of Maharashtra	... Respondent

Mr. Vikas Shivarkar for Petitioner.
Mr. R.M. Pethe, APP for Respondent (State)

CORAM : AMIT BORKAR, J.

DATED : 07th December, 2022

P.C.:

1. The petitioner is challenging orders dated 18th June 2019 passed below Exhibit-96, dated 30th November, 2018 passed below Exhibit-91 and order dated 20th September, 2022 passed below Exhibit- 97 having effect of rejecting application under Section 311 of the Code of Criminal Procedure, 1973.

2. The petitioner is an accused in a prosecution under Sections 307 and 34 of the Indian Penal Code, 1860. The prosecution after framing of charges examined four (4) witnesses. During trial, prosecution examined witness no.1. Due to unwillingness of her advocate to cross examine, petitioner herself cross-examined witness no.1. The prosecution thereafter examined witness nos.2 and 3, but again advocate for accused no.1 showed unwillingness to cross-examine witnesses.

3. After the examination of first three witnesses, the petitioner filed an application below Exhibit-78 for recalling of witnesses examined. The application was allowed. Again, advocate for petitioner showed unwillingness to cross-examine witnesses. The prosecution thereafter examined three more witnesses, which were also not cross-examined as the advocate for the petitioner showed unwillingness.

4. The petitioner thereafter filed an application below Exhibit-80, which was rejected by the learned Trial Court, as the petitioner did not comply with the conditional order of deposit of costs. Application below Exhibit-96 dated 18th June 2019 was not pressed by the advocate for petitioner. The statement of accused under Section 313 of the Code of Criminal Procedure, 1973 was thereafter recorded on 22nd February 2019.

5. Ultimately, the petitioner filed an application below Exhibit-97 which has been rejected by the impugned order. The learned Sessions Court while rejecting the application held that the earlier application for recall of witnesses was allowed, subject to payment of costs, but the petitioner failed to deposit the costs. Thereafter, application below Exhibit-96 was not pressed and hence in view of order passed below Exhibit-80 and Exhibit-91, the learned Sessions Judge rejected the application under Section 313 of the Code of Criminal Procedure, 1973.

6. Having heard the learned advocate for the petitioner and learned APP, in my opinion, though the petitioner has been negligent in conducting the trial, but from the examination of

witness no.1 of the prosecution conducted by the petitioner herself, it appears that the advocate for the petitioner was not cooperating with the petitioner for conducting the cross-examination of the witnesses. The offence alleged against the petitioner is under Section 307 of the Indian Penal Code, 1860. On perusal of the examination-in-chief of the witnesses of prosecution, in my opinion, it is necessary that the petitioner needs to be given an opportunity to cross-examine the witnesses in a time-bound program and by compensating the witnesses in terms of costs.

7. The Apex Court in the case of Rajendra Prasad Vs. Narcotic Cell ,1999 SCC (Cri) 1062 recognized the principle of human lacunae. It is observed that the adage “to err is human” is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during conducting of a case cannot be understood as a lacuna which a Court cannot fill up. The lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. After all, function of criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

8. In the case of Rajaram Prasad Yadav Vs. State of Bihar and Anr. (2013) Criminal Law Journal 3777, the Apex Court has laid down following principles while considering the application under Section 311 of the Code of Criminal Procedure, 1973, paragraph no.23 read 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.”*

9. It has been held by the Apex Court that if evidence of any witness appears to the Court to be essential for just decision of

the case, it is the power of the Court to summon and examine or recall and re-examine any such person. The exercise of power under Section 311 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 case. It is held that the Court should bear in mind that fair trial entails the interest of 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.

10. In the light of the principle laid down by the Apex Court, in my opinion, in the peculiar facts of the case, it appears that petitioner herself cross-examined witness no.1 facing charge under Section 307 of the Indian Penal Code, 1860. Advocate for petitioner declined cross-examination of material witnesses of the prosecution. Petitioner is a woman. Absence of cross examination, in the peculiar facts of the case, would result in miscarriage of justice. The powers of Writ Court need to be exercised in furtherance of justice and to prevent miscarriage of justice. Therefore, in my opinion, the negligence on the part of the petitioner can be compensated by directing the petitioner to compensate the witnesses in terms of money. I, therefore, pass following order:

- (I) The impugned orders dated 18th June 2019 passed below Exhibit-96, dated 30th November, 2018 passed below Exhibit-91 and order dated 20th September, 2022 passed below Exhibit- 97 are set aside;

- (ii) The application of the petitioner to recall witnesses nos.1 to 5 is allowed.
- (iii) The learned Sessions Court shall fix a schedule for cross-examination of witnesses nos.1 to 5. The petitioner through her advocate shall cross-examine each of the witness on the dates assigned by the learned Sessions Judge. Any default on the part of the petitioner either by remaining absent or by not cross-examining witnesses would result in recall of present order and the right of petitioner to cross-examine witnesses nos.1 to 5 would stand forfeited.
- (iv) The petitioner shall pay costs of Rs.5,000/- towards costs to each witness to be cross examined.
- (v) It will be open for the learned Sessions Judge to fix the schedule of re-examination as per his convenience and shall decide the sessions case finally as expeditious as possible, and in any case, within three (3) months.
- (vi) Payment of cost shall be condition precedent for cross-examination of each witness.

10. The Writ Petition, therefore, stands disposed of in the above terms. No costs.

(AMIT BORKAR, J.)