

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 5068 OF 2019**

1. Sai Vitthal Ballal
2. Abhishek Vitthal Agarwal
3. Bharat Dushyant Chokse ...Petitioners
Versus
1. The State Of Maharashtra
2. Helen Cristopher Fonseca
3. The Senior Police Inspector,
Borivali Police Station, Borivali (W), Mumbai. ...Respondents

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Mr. Mahesh Vaswani a/w Ms. Shreya Tiwari a/w Ms. Dharini Nagda i/by Mr. Rajesh Anantrao More, Advocate for the petitioner.

Mr. Jignesh Chauhan with Ms. Supriya Gurav i/by Sachin Bandkar for Respondent No.2.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 4th AUGUST, 2022

PC :

1. The petitioner has challenged the order dated 13.09.2019 passed by learned Metropolitan Magistrate, 26th Court at Borivali, Mumbai below exhibit-66 in CC No. 2694/PW/2015 rejecting application to recall PW-1 for further cross-examination.

2. The petitioner is facing the prosecution for offences punishable under Sections 354 (A), 354 (D), 504, 506 of Indian Penal Code read with Section 67 (A) of Information Technology Act.

3. Respondent No.2 is the first informant. FIR was registered on 15.07.2015. On completing investigation, charge-sheet was filed for offences under Sections 354(A), 354(D), 109, 504, 506 of IPC and Section 67(A) of the Information Technology Act.

4. The prosecution examined three witnesses. PW-1/ Respondent No.2 is the first informant. Her examination-in-chief was recorded on 08.01.2018, 14.04.2018, 15.05.2018 and 11.06.2018. The cross-examination of this witness was recorded on 11.06.2018. The notes of evidence mention below cross-examination of PW-1 on 11.06.2018 that "Re-examination - Nil". On 10.09.2018, the learned Magistrate passed order below Exhibit-1 as follows:-

"Present case is for cross-examination of informant. APP submitted that cross-examination of informant is over therefore, she is absent today. I have gone through the record. Part of cross-examination took place on dated 11.06.2018. Due to typing mistake re-examination nil is recorded in the deposition. It is purely typing mistake. After 11.06.2018 informant was present for cross-examination but cross examination was not recorded due to other reason. Witness summons was also issued to informant to remain present on 23.08.2018, it shows that cross-examination is yet to be completed. Hence, prosecution is directed to

produce informant for further cross-examination.”

5. Order dated 10.09.2018 was challenged by complainant/respondent No.2 by preferring Revision Application No.258 of 2018 before the Sessions Court, Dindoshi. The said Revision Application was dismissed by order dated 21.12.2018. The learned Sessions Judge had observed that the examination-in-chief of complainant was started on 08.01.2018. It was then deferred till next date for further examination-in-chief which was then recorded on 18.04.2018. The CD has been produced before the trial Court. But since facility to see CD is not available in the trial Court and on the request of both the parties further examination-in-chief was recorded. On 11.06.2018 cross examination was started and one paragraph of cross-examination was recorded. While adducing the evidence in the form of examination-in-chief of complainant some document are also relied on. One CD wanted to be displayed before trial Court. The CD was in the envelope and it was pointed out on behalf of accused that said envelope is in torn condition. Ultimately, it was found that there is crack on DVD and technician submitted that due to crack CD could not be played. CD is directed to be sealed

and to be kept in safe custody. It is thus seen that prosecution besides lengthy examination-in-chief of complainant wants to rely on electronic record. Under these circumstances, it is difficult to hold that cross-examination of complainant was concluded by asking few questions. The learned Magistrate in the impugned order has categorically observed that, it was due to mistake words "Re-examination Nil" were recorded below the cross examination of few lines. The Court can correct the mistakes if noticed latter on. The Sessions Court also recorded submission of advocate for complainant that accused have right to ask for recalling witness and observed that exercise may waste valuable time of the Court. The impugned order is just and proper. No case is made out for interference therein. The order dated 10.09.2018 was confirmed. The petitioner was apparently not party to the Criminal Revision Application No. 258 of 2018.

6. Order dated 21.12.2018 was challenged by Respondent No.2 before this Court by preferring Criminal Application No.209 of 2019. The petitioner was not impleaded as party in said Application. This Court by order

dated 16.07.2019, observed that on perusal of order dated 10.09.2018 it appears that the accused did not make any grievance nor prayed to cross examine Respondent No.2. Respondent No.2 was cross-examined by advocate for the accused. There is nothing to indicate that cross-examination of Respondent No.2 was incomplete on 11.06.2018. At the end of cross-examination it is written "re-examination". Hence *suo moto* direction of the learned Magistrate directing the prosecution to produce the informant for cross-examination was not warranted. Hence, order dated 21.12.2018 passed by learned Sessions Court in Criminal Revision Application No. 258 of 2018 and order dated 10.09.2018 passed by learned Magistrate were set aside.

7. After the order dated 16.07.2019 was passed, the prosecution examined PW-2 on 05.08.2019 and thereafter PW-3.

8. On 04.09.2019, the petitioner preferred application under Section 311 of Cr.P.C. to recall complainant for further cross-examination. The said application was rejected by learned Magistrate by order dated 13.09.2019. While rejecting the said application, it was observed that the High

Court had directed to dispose off the case within four months from the date of order of the Court. The prosecution examined PW-2 on 05.08.2019. PW-3 was examined on 07.08.2019. The accused did not apply for recalling of witness immediately. However, the application was made on 04.09.2019. From the conduct of the accused, it seems that, he accepted that the cross-examination is over. Sufficient grounds are not mentioned in this application to recall the witness for further cross-examination. The High Court had observed that the cross-examination of the accused is already over. Hence, grounds mentioned in the application that inadvertently cross-examination is over as mentioned in deposition is not material. The High Court has held that from evidence it appears that cross-examination is over and there is nothing to indicate that cross-examination was incomplete. Suo moto direction to prosecution to produce informant for cross-examination is not warranted.

9. Learned advocate for the petitioner submits that the order dated 13.09.2019 is erroneous. The petitioner cannot be deprived for further cross-examination of PW-1. The cross-examination of PW-1 was not concluded. It was

inadvertent error to record that cross is over and re-examination nil. The petitioner was not impleaded as party in the Revision Application preferred by complainant before the Sessions Court as well as in Criminal Application No. 209 of 2019 preferred before the High Court. The Hon'ble High Court has proceeded on the basis that accused had no grievance about closure of evidence of PW-1 and hence learned Magistrate ought not to have suo moto passed order dated 10.09.2018. The petitioner has preferred application for recall of PW-1. However, according to the learned Magistrate in view of order passed by this Court, the application under Section 311 of Cr.P.C. cannot be entertained. Powers under Section 311 of Cr.P.C. can be exercised, at any stage of trial. The order dated 16.07.2019 was passed without hearing the petition. The reliance is placed on the decision of the Supreme Court in the case of **Daxaben Versus State of Gujarat and Others**¹ and it is contended that order passed without hearing can be revived.

10. Respondent No.2 has filed reply opposing the prayer in this petition. Learned advocate for respondent No.2

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submits that this Court had set aside the order passed by learned Magistrate and the Sessions Court on 16.07.2019. The petitioner cannot be re-open the same issue by preferring application under Section 311 of Cr.P.C. The application was preferred for recall of witness belatedly. In the order dated 16.07.2019, it is observed that the cross-examination is completed. The Magistrate ought not to have issued directions to prosecution to produce witness for further cross-examination. The petitioner did not take steps for review of order dated 16.07.2019 passed by this Court. The application under Section 311 of Cr.P.C. is preferred to fill up lacuna. The application is vague. Application does not specify why witness should be recalled. The petitioner has cross-examined PW-2 and PW-3. Reliance is placed on decision of Allahabad High Court in the case of **Anurag Srivastava Vs. State of U.P. and Another** dated 06.10.2010 delivered in Criminal Revision Application No. 4338 of 2010.

11. The petitioner is facing prosecution for the offences referred to herein above. The evidence of PW-1 (complainant) was recorded on 08.01.2018, 18.04.2018, 15.05.2018 and 11.06.2018. On completing Examination-

in-chief, the cross-examination for accused had commenced on the same date i.e. 11.06.2018. On perusal of the cross-examination it is apparent that, it is brief and running into about 10 sentences. The noting on the cross-examination dated 18.06.2011 reflects the endorsement of "Re-examination Nil". The learned Magistrate passed order dated 10.09.2018.

12. Order dated 10.09.2018 was challenged by complainant before the Court of Sessions by preferring Criminal Revision Application No. 258 of 2018. The said Revision Application was dismissed vide order dated 21.12.2018. The High Court set aside order dated 21.12.2018 as well as order dated 10.09.2018.

13. Surprisingly, the petitioner was not made party in Criminal Revision Application No. 258 of 2018 nor in Criminal Application No. 209 of 2019 and had no opportunity to oppose contentions of respondent No.2. The fact remains that in view of order dated 16.07.2019, the order of Sessions dated 21.12.2018 and order dated 10.09.2018 are set aside. The prosecution had supported order dated 10.09.2018 before Sessions Court while

deciding Criminal Revision Application No. 258 of 2018. The High Court was primarily concerned with the fact as appears from the order dated 16.07.2019 that accused did not urge for cross-examination and did not make any grievance about closure of evidence. The Magistrate suo moto issued directions to the prosecution to produce complainant for further cross-examination. The right to apply for recall of witness has not been closed by this Court vide order dated 16.07.2019. The High Court in the said order has indeed observed that there is nothing to indicate that cross-examination is complete. The petitioner had thereafter, no opportunity to put forth his stands since he was not heard in proceedings initiated by respondent No.2. The powers under Section 311 of Cr.P.C. can be exercised at any stage of the proceedings, if it is found that examination of witness is necessary. Section 311 of Cr.P.C. confers very wide discretionary power upon the court. The caution to be exercised while invoking such powers is that the discretion has to be exercised judiciously and not arbitrarily. The parties shall not be allowed to invoke section 311 of Cr.P.C. to fill up lacuna. The power has to be exercised for just decision case. The petitioner is facing the charges for the aforesaid offences. The examination in chief is lengthy.

The cross-examination of PW-1 is of 10 lines. It is pertinent to note that while deciding criminal Revision Application No. 258 of 2018 preferred by respondent No.2 before Sessions Court, it was urged on behalf of respondent No.2 that accused could have applied for recall of witness. In examination in chief several documents are exhibited and Articles were marked. For just decision of case, the witness is required to be recalled for enable petitioner to conduct further cross-examination.

14 The accused cannot be deprived of his right to defend and fair trial. In the interest of justice, the petitioner ought to be permitted to further cross-examine the complainant by recalling PW-1, hence I pass the following order.

ORDER

- (i) Writ Petition No. 5068 of 2019 is allowed.
- (ii) Order dated 13.09.2019 passed by learned Metropolitan Magistrate 26th Court, Borivali Mumbai below exhibit-66 rejecting the application for recall of witness in CC No. 2694/PW/2015 is set aside.

- (iii) The application for recall of witness is allowed. PW-1 be re-called for the purpose of cross-examination.
- (iv) The petitioner is permitted to further cross-examine PW-1 through his advocate.
- (v) The trial Court is requested to recall the PW-1 and permit the petitioner's advocate to further cross-examine PW-1.
- (vi) Writ Petition stands disposed of.

(PRAKASH D. NAIK, J.)