

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

CRIMINAL APPLICATION (APL) NO. 228 OF 2022
Namdev Baban Shitole...Versus... State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. R.K.Tiwari, Advocate for the applicant.
Ms. Shamsi Haider, APP for Respondent /State

CORAM : AVINASH G. GHAROTE, J.

DATE : 09/03/2022

Heard Mr. Tiwari, learned counsel for the
applicant and Ms. Haider, learned APP for respondent/State.

2] The application challenges the order dated 3.12.2021 passed by the ld. Session Judge, whereby the application filed by the prosecution under Section 311 of Cr.PC for recalling DW-1 Nitin Tale, has been allowed.

3] Mr. Tiwari, learned counsel for the applicant submits by relying upon **State of Haryana vrs. Ram Mehar, III (2016) CCR 504 (SC)** (para 37), that the impugned order cannot be sustained, as that grants an opportunity to the prosecution to fill up the lacunae. He therefore submits that the impugned order is liable to be quashed and set aside.

4] Learned APP opposes the application and places

reliance upon **Rajendra Prasad vrs. Narcotic Cell, (1999) 6 SCC 110**, which explains the sphere of lacuna and therefore submits that since the application under Section 311 of Cr.P.C indicates about certain facts having come to the knowledge of the prosecution post the cross-examination of the DW-1, the same were necessary to be brought on record. It is further contended that the language of Section 311 of Cr.P.C. does not put any fetters upon the powers of the Court to recall and re-examine any witness if his evidence appears to be essential to the just decision of the case. It is further submitted that since the learned Sessions Court who was conducting the trial, was satisfied as to the necessity of recalling and in the past the prosecution witnesses have also been recalled for the purpose of cross-examination by the defence, an equal opportunity ought to be afforded to the prosecution, as the entire endeavor is to bring out the truth and not to fill in the lacuna.

5] The language of Section 311 of Cr.P.C. would indicate that it confers a wide discretion upon the Court to recall and re-examine any person already examined. No parameters have been fixed or laid down in Section 311 of Cr.P.C. for the purpose of exercise of this discretion. What is however necessary is for the learned Sessions Court to arrive at a finding that the evidence on recall appears to be essential to the just decision of the case. **Ram Mehar** (supra) considers

Rajendra Prasad (supra) relied upon by learned APP and indicates the scope of the said decision, in as much as in para 29 it indicates in what manner the said decision is to be understood and holds that **Rajendra Prasad** (supra) explains the sphere of lacuna by elaborating the same which has taken place due to over sight and non-production of material evidence due to inadvertence and the principle that such evidence was necessary for a just decision by the Court. In **Ram Mehar** (supra), the recall was merely on account of change of counsel in light of which the Court has held that the same was not permissible. It is further material to note that **Ram Mehar** (supra) itself holds that Section 311 of Cr.PC should be allowed to have its full play and therefore, the discretion to be exercised by the learned Sessions Court while exercising the powers under Section 311 Cr.PC has to be construed on a case to case basis depending upon the factual position availing on record. In the instant matter, it is not in dispute that on earlier occasions, the witnesses for the prosecution were recalled and examined at the behest of the accused No.8. It is also not disputed by Mr. Tiwari that some other prosecution witnesses were also recalled at the instance of accused Nos. 1, 3 and 4 (the present revision application being at the behest of accused No. 3). The learned Sessions Court, who is the person before whom the trial is being conducted has recorded his satisfaction as to the essential need of the witness to be recalled, considering the reasons

put forth. The learned APP has further made a statement on instructions that no question in respect of the statement under Section 161 of Cr.PC of DW1 shall be put and the cross-examination after recall shall not touch that aspect, and only 4-5 questions are required to be put, considering which in view of the satisfaction recorded by the Sessions Court, I do not consider this as an appropriate case to interfere in the order passed by the learned Sessions Court. The application therefore is dismissed, with no order as to costs.

JUDGE

Rvjalit