

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

CRIMINAL WRIT PETITION NO. 904/2021

Nilkamal S/o Ishwardas Gajbhiye,
 aged about 50 years, Occ. Nil,
 R/o. Anjangaon, Tah. Mouda,
 Dist. Nagpur.

... **PETITIONER**

VERSUS

State of Maharashtra,
 through Police Station Officer,
 Mouda, Teh. Mouda,
 Dist. Nagpur.

... **RESPONDENT**

Mrs. Radhika D. Raskar, Advocate petitioner.
 Mr. H. D. Dubey, APP for respondent/State.

<u>CORAM</u>	: <u>VINAY JOSHI, J.</u>
<u>RESERVED ON</u>	: <u>06/07/2022</u>
<u>DATE OF JUDGMENT</u>	: <u>17.08.2022.</u>

JUDGMENT :

RULE. Rule is made returnable forthwith.

2. Heard finally by consent of respective parties.

3. The Petitioner (accused) has impugned herein two orders of the Trial Court, by which the petitioner's application for adducing further evidence in terms of Section 391 of the Code of Criminal Procedure ('Code') and application to amend appeal memo has been rejected. The petitioner has challenged both the orders by stating it to be unreasonable, illegal and unsustainable in the eyes of law.

4. Briefly stated, at the instance of report lodged by the Head-mistress of the High School, a Crime No. 3049/2013 was registered against the petitioner for the offence punishable under Sections 323, 294 and 506 of the Indian Penal Code ('IPC'). Precisely, the informant lady alleged that the petitioner while working as Peon in the School has abused her in filthy language and assaulted her by means of steel bucket. The Police investigated the matter and filed final report in the Court of jurisdictional Magistrate. The learned Magistrate after recording evidence of five witnesses, vide judgment and order dated 27.09.2017 has convicted the petitioner (accused) for the offence punishable under Section 323, 294 and 506 of the IPC. The said order of conviction has been challenged by the petitioner under Section 374(3) of the Code in the Court of Sessions. During pendency of appeal, the petitioner has moved an application (Exh.24) seeking amendment in the appeal memo which was rejected vide order

dated 27.08.2019. Likewise, the petitioner has filed another application (Exh. 24-A) for adducing further evidence in terms of Section 391 of the Code which was also rejected vide order dated 12.10.2021. Being aggrieved and dissatisfied by both orders, the petitioner has invoked writ jurisdiction of this Court.

5. The learned counsel appearing for the petitioner would contend that the Appellate Court seriously erred in rejecting both applications, by which deprived the opportunity of fair trial. It is submitted that the petitioner desired to examine two witnesses in appeal, who are named in the charge-sheet. It is contended that in the Trial Court, the petitioner has filed pursis (Exh.14) expressing his desire to examine those witnesses. According to the petitioner, while recording his statement in terms of Section 313 of the Code, he has mistakenly declined to lead defence evidence, which can be weighed on the enveil of pursis (Exh.14). The learned counsel appearing for the petitioner relied on several decisions to contend that the powers under Section 391 of the Code are quite wide and can be exercised for the just decision of the case.

6. Per-contra, the learned Additional Public Prosecutor stiffly resisted the petition by contending that merely to prolong the hearing of appeal, both applications were filed with malafide intention which

are properly rejected. It is pointed out that the accused had opportunity to lead defence evidence which he voluntarily declined by answering question No. 20 in his statement under Section 313 of the Code and thus, at appellate stage, he cannot revive his urge for leading additional evidence. It is submitted that the powers under Section 391 of the Code are to be exercised in exceptional circumstances and not for mere asking.

7. Let me first consider the petitioner's application (Exh.24A) for adducing further evidence which has been rejected by the Appellate Court vide order dated 12.10.2021. The petitioner has moved said application on 05.02.2020 seeking to examine two witnesses namely Nanaji Gajbhiye and Prakash Rangari as defence witnesses. Under the scheme of the Code, the accused is a competent witness for the defence and may give evidence on oath in disprove of the charges, if he desires so. However, the accused shall not be called as a witness except at his own request in writing. After examination of prosecution witnesses and recording of the statement of accused under Section 313 of the Code, the stage of recording defence evidence arrives provided accused expresses his intention to do so. Herein, the prosecution has examined as many as five witnesses followed by recording his statement in terms of Section 313 of the Code on 06.04.2017. The question No. 20 was

specifically posed making accused aware about his right to examine himself on oath in defence or to examine defence witness. However, the accused has flatly denied to examine witness in his defence and thus, the trial proceeded further.

8. The learned counsel appearing for the petitioner (accused) has attracted my attention to a pursis (Exh.14) dated 27.02.2017 by which accused has informed to the Court that he desires to examine defence witness. However, the said pursis was filed at the time when the prosecution evidence was underway. In other words, pursis (Exh.14) was filed on 27.02.2017 when prosecution has examined three witnesses and was to examine some more witnesses. Thereafter, the prosecution has examined PW-4 on 20.03.2017 and PW-5 on 06.04.2017 i.e. after filing of pursis (Exh.14). The said pursis was filed at the stage when he was not called upon to state whether he desires to examine defence witness. Be that as it may, I do not adhere to the technicalities, but when the accused was specifically asked vide question No. 20, he has flatly denied to examine defence witness. Thus, it could be seen that during trial, accused expressed his desire to examine defence witness, however, after completion of prosecution evidence, he has changed his mind and specifically denied to examine the defence witness.

9. The learned counsel appearing for the petitioner (accused) has submitted that the accused has mistakenly answered question No. 20, in the negative, but in-fact, he was desires to examine defence witness. I do not find any substance in the said submission for the reason obvious that after recording statement under Section 313 of the Code, the case was adjourned for final argument on several dates. The record indicates that after accused denying to examine defence witness vide answer to question No. 20, the case was adjourned for arguments on 15.04.2017, 22.04.2017, 27.04.2017, 13.06.2017, 28.06.2017, 12.07.2017, 26.07.2017, 03.08.2017 and on 17.08.2017 final arguments were advanced. Thereafter also, the Trial Court adjourned the case for judgment on 24.08.2017, 07.09.2017, 11.09.2017 and then delivered the judgment of conviction on 27.09.2017. It is quite evident that the accused has not mistakenly refused to examine defence witnesses, but it was a voluntary act. Had it been the fact that accused was desires to examine defence witness then on the dates of argument, he would have requested the Court to permit him to examine defence witness by stating that he has mistakenly denied the same while recording his statement in terms of Section 313 of the Code. The accused had ample opportunity to agitate his right before the Trial Court, however, he has not opted to exercise his right to examine

defence witness on any of the adjourned date, but arguments were advanced. It is quite evident that after five months from the recording of statement in terms of Section 313 of the Code, the Trial Court has delivered the judgment, meaning thereby the accused did not express his intention to examine defence witness in the meantime which is a voluntary act.

10. In the wake of above position, one can see that the appeal challenging the order of conviction was filed in the year 2017, however application (Exh.24A) for permitting to lead further evidence as per Section 391 of the Code has been filed on 05.02.2020 i.e. after few years. It requires to note that the accused has not raised a ground in appeal that he was desiring to examine defence witness, but the Trial Court did not permit him. Rather, it is a matter of record that he has not expressed his intention to examine defence witness at all. True, the accused has filed another application (Exh. 24) seeking to amend the appeal memo for inserting the ground of examining defence witness, however said application was also belatedly filed on 06.07.2019.

11. Thus, it is crystal clear that the accused chooses not to examine defence witness in trial. Post conviction first time, he came up with a case to examine defence witness. Core question is whether at this stage especially on above background, the accused could be

permitted to lead further evidence in the appeal.

12. The learned counsel for the petitioner (accused) has submitted that the powers under Section 391 of the Code are wide and unbridled. The Appellate Court is empowered to exercise the powers to prevent the failure of justice. To substantiate said contention, reliance is placed on the decisions of the Supreme Court in cases of ***Brig. Sukhjeet Singh (Retd.) MVC Vs. the State of Uttar Pradesh and ors, (Criminal Appeal No. 148/2019 [arising out of SLP (cri) No.1120/2017]*** and ***Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others, (2004) 4 SCC 158***. No doubt, in these decisions, the Supreme Court has expressed that the powers under Section 391 of the Code are wide and invested with the object to appropriately deciding the appeal to secure ends of justice. However, on the basis of the given facts of the case, these powers are to be exercised. Section 391(1) of the Code provides that if the Court thinks an additional evidence to be necessary, in that case, such powers are to be invoked. There is no restriction in the wording, meaning thereby in given facts of the case, the Court is to form an opinion whether it is necessary to adduce further evidence. The factual aspect would be decisive in the matter for exercise of jurisdiction.

13. The learned counsel appearing for the petitioner though relied on the decision of the Rajasthan High Court in case of *Paramjeet Singh and another Vs. State and another, 2004 CRI L. J. 2653*, however said decision relates to Section 311 of the Code which has no application to the facts of this case. The petitioner has further relied on the decision of the Supreme Court in cases of *State of Madhya Pradesh Vs. Ramesh and another, (2011) 4 SCC 786*, *Tara Singh Vs. the State, AIR 1951 SC 441* and *Dadarao Vs. the State of Maharashtra, AIR 1974 SC 388* which has also no relevance to the exercise of powers under Section 391 of the Code.

14. The petitioner has been convicted for the offence punishable under Sections 323, 294 and 506 of the IPC vide judgment and order dated 27.09.2017. Apparently, he has denied his right of examining defence witness while recording his statement under Section 313 of the Code. The record itself indicates that the petitioner never intended to examine defence witness. Though the matter was adjourned for near about four months, he did not apply to the Trial Court to examine defence witnesses. Inasmuch as, the learned counsel appearing for the petitioner has advanced final arguments in the Trial Court without hiccup and thus, took a chance by allowing the Trial Court to render a judgment. Further, it is evident that in appeal also

said ground was not raised, meaning thereby he never intended to challenge the conviction on said ground. However, after gap of two years, he desired to take out this application which is not entertained by the Appellate Court.

15. It is a case of assault on a lady in which the prosecution rendered evidence of victim lady and other witnesses. The proposed two witnesses are cited by the prosecution as witnesses in the charge-sheet. However, after examining few witnesses, the prosecution has dropped them which is the prerogative of the prosecution. It is one of the ground that the prosecution has deliberately not examined those two witnesses to suppress the truth. The said submission is devoid of merit as it is choice of the prosecution to examine particular witness in the trial. Apart, it is to be seen whether additional evidence of those two witnesses is necessary for the decision of appeal. The Trial Court was satisfied about the evidence led by the prosecution to render conviction. All the prosecution witnesses were cross-examined to test their veracity. Adding some witnesses is not essential from the view point of just decision of the trial or even for arriving on appropriate conclusion. One can easily foresee that those witnesses may not support the prosecution case and in that eventuality also it will not affect the worth of the evidence of the witness which are examined in

the trial. Therefore, there would be no failure of justice in non-examining of further witnesses. The Trial Court is well justified in rejecting the said application which appears to be filed for oblique motive.

16. As regards to another application (Exh.24) is concerned, the petitioner sought amendment in appeal memo which has been rejected. The petitioner seeks to amend appeal memo by inserting additional ground of examining defence witnesses. For the foregoing reasons said urge has been rejected, therefore, there is no substance in the proposed amendment in appeal memo which is rightly rejected by the Trial Court.

17. In view of above discussion, petition carries no merits and it is rejected accordingly. No order as to costs.

18. Rule is discharged accordingly.

(VINAY JOSHI, J.)

Gohane

Digitally
signed by
JITENDRA
BHARAT
GOHANE
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