

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

933 CRIMINAL WRIT PETITION NO.174 OF 2021

**AKRAMODDIN S/O. AFZALODDIN KAZI AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

Mr.Sayyed Tauseef Yaseen, Advocate for the petitioners.

Mrs.D.S. Jape, APP for the respondent/State.

Mr.H.V. Tungar, Advocate for respondent No.2.

**CORAM : KISHORE C. SANT, J.
DATED : 27.01.2023**

PC :-

01. Heard learned Advocates for the parties. The petition is taken up for final disposal by the consent of the parties.

02. The petitioners are before this Court challenging the order passed below Exh.106 in Criminal Appeal No.13 of 2016 by learned Additional Sessions Judge, Beed dated 05.12.2020. By way of the impugned order, the learned Lower Appellate Court has allowed the application and directed the JMFC to issue summons to two doctors for recording their evidence to prove injuries sustained by the informant i.e. injured witnesses with direction to the witnesses to produce original medical record and papers of treatment given to them and accordingly record the evidence as additional evidence and submit

the same to the Appellate Court. This order was passed on the application preferred by the original informant for issuing witness summons to the Medical Officers for recording their statements by application dated 06.11.2019.

03. The facts are that total seven persons including the present petitioners – original accused faced trial bearing RCC No.146 of 2006 for the charges of committing offences punishable under sections 147, 148, 326, 324, 323, 504 and 506 read with section 149 of the Indian Penal Code. The trial Court found the accused persons guilty of the offences for which they were charged except charge for the offence punishable under section 326 of the IPC by judgment and order dated 14.01.2016. Said order came to be challenged by the accused persons. The informant – present respondent No.2 also preferred an appeal bearing Criminal Appeal No.13 of 2016 to the extent of acquittal from the offence punishable under sections 326, 504, 506 and 149 of the IPC. This appeal was filed on 09.02.2016. Both the appeals are presently pending in the Court of learned Additional Sessions Judge, Beed. Present respondent No.2 filed an application below Exh.106. It is stated that the Medical Officer, who treated the informant, namely Dr. Deshpande died.

Therefore, PW-5 Medical Officer, who was working with late Dr. Deshpande was examined. It is stated that the informant was referred from Ashti Hospital to Civil Hospital, Beed for further treatment, where the informant and other two persons were operated and rod was fixed in the hand of the informant. In the trial summons was issued to one Dr.Kotecha. Dr. Kotecha informed that the informant was treated by Dr. Deshpande and one Dr.R.B.Ghumare.

04. That application below Exh.141 was preferred by the prosecution in the Trial Court. Both the Doctors were present in the Court on 07.09.2013. However, for some reason, learned APP dropped these two witnesses. Since the witnesses were dropped, this respondent No.2 – informant again preferred application below Exh.146 on 09.10.2013 praying to the Court for calling Dr.Ghumare and Dr. Deshpande again to the Court to depose in the case along with original documents of treatment and the record in respect of informant and other injured persons. Said application was opposed by saying that already one Dr.Wanve is examined. Already application was made for issuance of witness summons to these Doctors. Pursuant to that the Doctors were present. However, it is the prosecution, who dropped those witnesses.

Considering this application, the learned Trial Court by order dated 19.12.2013 was pleased to reject the application observing that there is no plausible reason to recall again the said witnesses. The application was thus rejected and there is nothing to show on record that any attempts were made by the informant to take any further steps pursuant to said rejection. The petitioners filed their say to application below Exh.106 in the appeal. It is specifically stated that these Doctors were already called as witnesses, however, they were dropped. Now it is not necessary to recall and examine them. The application is filed after much delay i.e. after seven years from the date of filing the application in the Trial Court. It would not be proper now to allow the application.

05. The learned Appellate Court after hearing the parties and after examining the matter, though observed that the injury certificate Exhs.130, 131 and 132 show that all the injured were referred to Civil Hospital, Beed for treatment, it is observed that the application was made for issuance of summons to the Doctors. It is considered that both the Doctors were material witnesses. In para 15 of the order it is observed that the revised certificates though produced on record, they are not exhibited. It is observed that though

the Doctors are now examined, no prejudice would be caused to the accused, as they will get chance to cross-examine witnesses. The lower Appellate Court further observed that the appellant kept mum since filing of the application and this application is filed at belated stage itself cannot be a ground to reject the application. Merely because the injured has not stated that rod was inserted in his hand in Civil Hospital, Beed, cannot be considered as a ground to reject the application and directed the learned JMFC as stated above. Against this order, present petition is filed. Respondent No.2 has also filed reply to the petition.

06. The learned Advocate for the petitioners vehemently argued that the application is filed at belated stage. Already these witnesses were called for giving their evidence in the Trial Court. However, it is the prosecution who dropped all these witnesses. Though he had filed application, but same came to be rejected. No steps were taken thereafter. He did not make such application even while filing appeal i.e. Criminal Appeal No.13 of 2016. Though he has taken various grounds in the appeal, there is no specific ground that because these two Doctors were not examined, prejudice is caused. He further submits that now calling for these Doctors would be filling

up lacuna in the case of prosecution. There is no case of the prosecution that it was not given opportunity to examine the witnesses. As a matter fact, it is the prosecution who dropped these witnesses.

07. The learned Advocate for the petitioner relied upon following judgments:-

- i) Bala Subbarayudu Vs. State of Andhra Pradesh, Cri. Appeal No.28 of 1993. (Andhra Pradesh High Court)
- ii) Sallo Singh Vs. The State of Bihar, Cri. Appeal No.3 of 2003 (Patna High Court).
- iii) Pawan Vs. State of Haryana & Ors., CRR-3909-2017 (Punjab and Haryana High Court).
- iv) T. Balu Vs. The State represented by Station House Officer, Tindivanam Police Station, Cri.R.C. No.383 of 2017, (Madras High Court).

08. Learned Advocate Mr.Tungar for respondent No.2 vehemently opposed the petition. He submits that from the record it is clearly seen that the evidence was not brought on record though it was already available. The revised certificates though were produced on record, those were not exhibited, as the Doctors who issued those certificates are not examined. Since beginning the informant was making attempts to examine the Doctors and therefore he had filed an application below Exh.146 in the Trial Court itself, however, the same came to be rejected. As the evidence is not brought on

record, the petitioners are acquitted of the offence punishable under section 326 of the IPC. The informant has preferred appeal, which shows that he is pursuing the matter diligently. He submits that Dr. Kotecha, who was examined, was not the Doctor who examined the injured person and it has already come on record. Even PW-5 Dr. Wanwe has not examined injured witnesses. In this case evidence of Doctors, who actually examined the injured and who conducted operation is not on record. In absence of their evidence no proper finding can be recorded. For doing justice to the parties, it is very much necessary to allow the prosecution to bring on record the best possible evidence. He submits that no prejudice would be caused even if the Doctors are called as witnesses, as the petitioners would have opportunity to cross-examine the witnesses. He further submits that it is necessary for fair trial to allow the evidence to come on record. He relies upon following judgments :-

- i) Zahira Habibulla H. Sheikh Vs. State of Gujarat, AIR (SC) 2004 3114.
- ii) Nago Manik Patil Vs. Pratap Gabaji Patil & Anr., 2013 ALL MR (Cri) 2913.
- iii) Kocharya s/o. Khatrya Valvi Vs. State of Maharashtra & Anr., 2010 ALL MR (Cri) 1400.

09. The learned APP submits that the petitioners would obviously

have right to cross-examine the witnesses, if they are called. She further submits on specific query as to why learned Prosecutor in the Trial Court has dropped the witnesses. She submits that since Exhs.130, 131 and 132 were already on record, no further evidence was necessary and probably for that reason the witnesses may have been dropped. She submits that the prosecution has in-fact put best possible evidence on record and thereby conviction is also recorded. Since the prosecution has proved the case, conviction is recorded and the accused persons are sentenced.

10. In re-joinder, the learned Advocate for the petitioners submits that now by examining the new witnesses the informant wants to put up a new case. Even injured witnesses have not stated anything about putting of the rod in their hand or that any of the injured has undergone any operation. Thus, it was not case at all of any of the witnesses or even of the informant that he was required to be operated. Now by introducing these witnesses, the informant wants to bring a new case.

11. While deciding this petition, first this Court needs to look into the judgments which are cited. First judgment cited by the petitioners is in the

case of Bala Subbarayudu (Supra). In the said case even the Doctor who conducted autopsy was not examined. Another case cited is of Sallo Singh (Supra). In that case it is observed that the post-mortem report was not brought on record and the Doctor who conducted the post-mortem was not examined. An oral prayer was made to summon the Doctor, who conducted the postmortem examination, as additional evidence under section 391 of the Cr.P.C. The court in that case held that though there is power with the Appellate Court to take additional evidence, still it must be exercised sparingly and only in suitable cases and it rejected that prayer. In the case of Pawan (Supra), it was held that since it was clear that opportunity was given to lead the evidence to the prosecution, however, it was failure of the prosecution to avail that opportunity and therefore, such application was not allowed in the appeal. In this case it is clear that not only that opportunity was given, but as a matter fact the Doctors were also present and were dropped by the prosecution. In the case of T. Balu (Supra) also application was filed under section 391 of the Cr.P.C. for examination of Doctor as additional evidence. In that case, also the Trial Court had dismissed such application and that application was not challenged. In these circumstances, the application was rejected.

12. Insofar as the judgments relied upon by the respondent No.2 are concerned, first judgment is in the case of Zahira Sheikh (Supra). The learned Advocate relied upon certain portion of para No.74, wherein the Hon'ble Apex Court has observed that though the prosecution is not bound to examine each and every person, who has been named as witnesses, the witness may be given up when there is material to show that he has been gained over that there is no likelihood of the witness speaking truth in the Court. He submits that in this case in-fact the witnesses were called for examination to bring on record the truth. By relying upon para 76, he submits that, however, in this case this Court finds that there is no case made out that the prosecution witnesses were dropped because they were not likely to support the prosecution. The case of Zahira Sheikh (Supra) is totally in different context and different circumstances, where it was found that the prosecution had failed to conduct the prosecution properly and even for that reason, the trial was required to be transferred from one State to another State. In the same para of the case, it has been held further that provisions under section 391 of the Code are by way of exception and the Court has to carefully consider the need for and desirability to accept additional evidence.

. Next judgment relied upon is in the case of Nago Manik Patil (Supra). This Court had held that the prosecution shall not be precluded from leading essential evidence and it was held that prosecution cannot be precluded from leading essential evidence at the belated stage. The Court discussed the powers available under section 391 of the Cr.P.C. There is no dispute that the Appellate Court has power to call the witness for additional evidence for just decision in the appeal. However, it would be depending upon facts of each case.

. Last judgment relied upon by respondent No.2 is in the case of Kocharya Valvi (Supra). On the basis of this judgment, learned Advocate submits that fair trial is necessary and prosecution ought to have at least examined the complainant, investigating officer, medical officer and eye witnesses, if any. It appears that in that case even the complainant and the medical officer were not examined and in that fact situation application under section 391 of the Cr.P.C. was allowed.

13. Coming to the case in hand, this Court finds that already opportunities were given to the prosecution. It is not the case of the prosecution that no sufficient opportunity was given to conduct the case or to

bring on record any material evidence or examine any witnesses. As a matter of fact documents Exhs.130, 131 and 132 were very much on record and were exhibited. The Trial Court has also relied upon those certificates and have come to the conclusion that the injuries are proved. There are almost six witnesses examined in the Trial. From the injured witnesses it is clear that even these witnesses have not stated about the operation and putting up rod in the hand. The respondent has produced along with his reply the documents which were on record i.e. certificates, however, those are not exhibited and styled as revised certificates. Second fact that needs to be considered is that the application of the informant came to be rejected by the Trial Court by order dated 19.12.2013. However, no further steps were taken. Secondly in 2016 the informant has also filed an appeal. However, in that appeal, no specific ground is taken that because of non examination of the Medical Officer, any prejudice is caused to the prosecution. He could have filed application in 2016 itself for additional evidence. However, he again waited till 2019 for filing an application and filed it only on 06.11.2019, after a gap of 3.5 years.

14. Considering all these facts, this Court finds that no case is made

out by the informant before the Trial Court to allow the application. On reading of the impugned order, it is seen that the learned lower appellate Court has allowed the application solely on the ground that documents Exhs.10, 131 and 132 are already on record showing that the injured were referred to the Civil Hospital, Beed for further treatment. It is not properly considered in this case that it is not grievance of the party that no proper opportunity was given in the Trial Court while conducting the case. As a matter of fact, it is also noticed that earlier the informant had filed an application below Exh.146 for recall of witness and the same was rejected. An opportunity was granted to the prosecution. The prosecution by specific endorsement had dropped the witnesses. Though that order was not challenged by the informant, even in the appeal, he has not raised serious grievance about non-examining the medical officer. This Court finds that application should not have been allowed, when the Court has also noted that the appellant has kept mum since filing of the appeal and the application is filed at belated stage. No doubt, the prosecution has every right to get fair chance to bring its case by adducing necessary evidence. But while doing so, it is necessary to show that the prosecution was prevented for some reason from adducing the evidence or the evidence could not be brought on record

for some reason. In this case, none of the above situation appears to be there on record. While allowing such application, the Court must be satisfied that the case is made out by the applicant that for some reason the evidence could not be recorded in the trial. In this case, no such case is made out by the respondent. Thus, this Court finds that the learned Lower Court has committed mistake by allowing the the application. Hence, the writ petition is allowed in terms of prayer clause (B).

[KISHORE C. SANT, J.]