

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

CRIMINAL WRIT PETITION NO.553 OF 2023

AMARSINGH SHERSINGH KAMTHEKAR AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA

...

Advocate for Petitioners : Mr. H. V. Tungar
APP for Respondents: Mr. G. O. Watamwar

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CORAM : R.M. JOSHI, J

DATE : JUNE 13, 2023

PER COURT :

1. This Petition takes exception to the order dated 29th March, 2023 passed by learned Chief Judicial Magistrate, Nanded below application exh. 446 in R.C.C. No. 181/2008 recalling PW 4 for reexamination to the extent of document nos. 4 and 8 at the list below exh. 209.

2. Petitioner is taking exception to the said order basically on the ground that after the disclosure of defence of the accused, now the prosecution cannot be permitted to fill up lacuna by leading additional evidence. Learned Counsel for the petitioner has drawn attention of this Court to the application Exh. 446 to contend that inadvertence has been pleaded only in respect of document no. 4 and no such pleadings is

appears about document no. 8. He further states that the trial Court has recorded findings on the merit of the case and therefore, on these amongst other grounds set out in Petition the impugned order deserves to be set aside.

3. Learned APP and learned Counsel for the informant supported the said order with the submissions that the documents which are now sought to be proved by reexamination of witness were already placed on record and that it is not the case of filling up lacuna. It is also submitted that it is open for the defence not only to cross-examine this witness but also to reexamine other witnesses and option to led evidence is always open to the defence.

4. Learned Trial Court exercised power under Section 311 of Cr.P.C. which reads thus:

311. Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re-examine any person already examined; and the

Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

5. It is clear from the said provision that the Court may, at any stage of the trial, issue summons to any witness for examination or reexamination. For that purpose, however, such recalling of the witness must be essential for the just decision of the case. Apart from this, while exercising such power Court is expected to record reasons for doing so.

6. No doubt, perusal of the impugned order shows that the learned Trial Court for the purpose of arriving at said finding has taken into consideration the issue pending before it but said discussion need not be construed as opinion on the merits of the case. To decide application for re-examination of witness, it is necessary not only to consider the case sought to be made out before it but also to *prima facie* look into the material evidence led till date. The Trial Court, therefore, has considered as to whether recalling of witness is necessary for the just decision of the case.

7. There is no dispute about the fact that before commencement of the evidence of prosecution Exh. 209 came to be filed before the trial Court and number of documents were brought on record. Though it is true that during examination of informant document no. 4 and 8 and other documents were referred to, however, that does not mean the said document is consciously kept away by the prosecution. With regard to prosecution on police report, one needs to keep in mind that the informant is not having any control over the prosecution and it is for the prosecutor to take decisions and to lead the informant while recording his evidence. Considering this fact and as there is inadvertence pleaded in the application, it cannot be allowed to be said that said inadvertence can be only to the extend of one document and not in respect of other document.

8. Learned Counsel for the Petitioner has sought to argue that the defence of the accused is exposed, therefore, reexamination of witness for the proof of documents is not in the interest of justice. In this regard relevant portion of the evidence was brought to

the notice of this Court, bare perusal of which indicates that it is a case of the defence that even if such document exists, it is immaterial for the purpose of determination of the issue. One such stand is taken it cannot be permitted to the defence to claim that the defence taken by the accused is exposed.

9. Having regard to the nature of issue involved in trial and as *prima facie* there is reason to believe that the exclusion of these two documents was inadvertent, the order passed by the learned Trial Court recalling the witnesses cannot be faulted with. For want of perversity in the order, no interference is necessary therein. Hence, Petition stands dismissed.

(R.M. JOSHI, J.)

Malani