

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.98 OF 2023

Ganesh Valmiki Chitalkar ... Applicant

V/s.

The State of Maharashtra ... Respondent

Mr. Ritesh M. Thodbe with Mr. Sagar S. Tambe for the applicant.

Mr. M.G. Patil, APP for the respondent/State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 15, 2023

P.C.:

1. By the impugned order, the learned Sessions Judge has allowed an application under section 294 and an application issuing witness summons to the witnesses named in the application.

2. The main contention of the applicant is that both the applications were not maintainable and in any case such permission could not have been granted by the Sessions Judge as the prosecution had already examined eleven witnesses and the accused had opened their defense. Allowing such application would amount to filling up of lacuna.

3. On perusal of the impugned order, it appears that the application under section 294 requires prosecution to call upon

accused either to admit or deny genuineness of the documents. From the reply filed by the petitioner, it is clear that the accused denied the genuineness of such documents and, therefore, prosecution filed an application seeking permission to examine the witnesses.

4. The contention about filling up of lacuna has already been interpreted by the Apex Court in **Rajendra Prasad v. Narcotics Cell** reported in (1999) 6 SCC 110. The lacuna in the prosecution's case has been interpreted in paragraphs 7 and 8 of the judgment, which reads thus:

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not “fill the lacuna in the prosecution case”. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage “to err is human” is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any

inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

5. The Apex Court has held that a lacuna in the prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant material or in eliciting relevant answers from the witness. The mistakes during conducting of trial cannot be understood as lacuna which Court cannot fill up. It has been held that no party in a trial can be foreclosed from correcting error. If the prosecution fails to bring on record proper evidence or relevant material due to inadvertence, the Court should be under magnanimous in permitting such mistakes to be rectified. The function of the Criminal Court is administration of criminal justice and not to count errors committed by the parties.

6. In that view of the matter, I find no reason to interfere with the positive exercise of the jurisdiction by the learned Sessions Judge.

7. The petitioner shall have remedies as are available in law to meet the evidence sought to be brought on record by prosecution.

8. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)