

Ghuge

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

CRIMINAL APPLICATION NO.121 OF 2023

Mahanamsing Alias Robin Mansing
Thapa

... Applicant

V/s.

State of Maharashtra

... Respondent

Mr. Rajendra Tajane with Ms. Sangita Patil i/b Mr.
Mangesh Deshmukh for the applicant.

Mr. Arfan Sait, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : APRIL 6, 2023

PC.:

1. The application is directed against the order dated 7th March 2023 passed by Additional Sessions Judge Kalyan in Sessions Case No.51 of 2014. By suo motu exercising power under Section 311 of the Code of Criminal Procedure, 1973, the Sessions Judge directed the prosecution to lead evidence of Three witnesses within Seven days from the date of order.

2. The applicants are tried for the offences punishable under Section 302 of the Indian Penal Code, 1860. The applicant is in Jail during the trial. During the trial, the prosecution examined six witnesses. The defence examined one witness. The arguments of the parties were concluded.

3. After completion of the argument and when the matter was fixed for judgment, the Additional Session Judge, on 7th January 2023, directed the prosecution to examine three witnesses within seven days. Aggrieved thereby, accused has filed the present application.

4. Learned advocate for the applicant raised the following contentions.

- i) Once the trial is fixed for judgment, it amounts to termination of trial and therefore, power under Section 311 of the Code of Criminal Procedure, 1973 could not have been exercised.
- ii) Exercise of such power has resulted in prejudice to the accused as they are in Jail during the trial.

5. In so far as the contention of the learned advocate for the applicant, the trial stand concluded as it was fixed for the delivery of judgment. It is well settled that till the judgment is pronounced as per Section 353 of the Code of Criminal Procedure, 1973, the Trial Court has the power to recall the witness under Section 311 of the Code of Criminal Procedure, 1973 unless the Trial Court satisfied that such examination is not necessary to arrive at just decision in a case. In the Judgment of **Natasha Singh Vs. C.B.I.** reported in 2013 (5) SCC 741. The apex Court has laid down principles of exercise of power under Section 311 of the Code of Criminal Procedure, 1973. In paragraph 8 of the judgment, the apex Court has held that the Sessions Judge has suo motu power to invoke Section 311 of the Code of Criminal Procedure, 1973, provided the exercise of such power is necessary to arrive at a just decision in trial. Paragraph 8 of the Judgment reads as under:-

8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined ***if his evidence appears to it, to be essential to the arrival of a just decision of the case.*** Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.
6. The second contention raised on behalf of the applicant is that the applicants have suffered prejudice by exercising such power as the applicant is in Jail. A perusal of the impugned order indicates that the Sessions Judge directed the prosecution to complete the examination of witnesses within Seven days. During the arguments the advocate for the applicant submitted after the pronouncement of the impugned order, the applicant sought time before the Sessions Judge to challenge the impugned order, which delayed the examination of witnesses as directed in the impugned order. The Sessions Court directed the prosecution to complete the examination of witnesses within seven days. The argument prejudice on the point of delay cannot be countenanced as delay needs to be attributed to the applicant himself.
7. The learned advocate for the applicant submits that the accused has applied for transfer of matter before the concerned

Principal District Judge. Filing such an application has no consequence on the validity of the impugned order.

8. Learned advocate for the applicant relied on the judgment of the Kerala High Court in the case of **K. Sajeendran and Another Vs. The Secretary, Thalikulathur Gram Panchayat**, reported in 2014 CRI. L. J. 555 to urge that the trial stands terminated in view of Section 353. The Single Judge has held that power under Section 311 of the Code of Criminal Procedure, 1973 cannot be exercised once the case has been posted for final judgment. I cannot persuade myself to subscribe to the view taken by the learned Single Judge. The Apex Court in **Sukhpal Singh Khaira v. State of Punjab**, reported in (2023) 1 SCC 289 at page 307 held as under :-

“29. The above aspects would indicate that even after the pronouncement of the judgment of conviction, the trial is not complete since the learned Sessions Judge is required to apply her/his mind to the evidence which is available on record to determine the gravity of the charge for which the accused is found guilty; the role of the particular accused when there is more than one accused involved in an offence and in that light, to award an appropriate sentence. Therefore, it cannot be said that the trial is complete on the pronouncement of the judgment of conviction alone, though it may be so in the case of acquittal as contemplated under Section 232CrPC, since in that case there is nothing further to be done by the learned Judge except to record an order of acquittal which results in conclusion of trial.”

9. The next judgment relied on by the applicant in the case of **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation**, reported in 2019 ALL SCR (Cri) 1889 the Apex Court in the facts of the case held that in view of the closure of evidence and absence

of sufficient reason for non-examination of witness, successive application for recall of witnesses could not be allowed. However, paragraph 12 of the said judgment holds that such power can be invoked to meet the ends of justice.

10. For the reasons afforested, I am satisfied that the exercise of discretion by the Sessions Court is neither arbitrary nor capricious. There is no miscarriage of justice. Therefore, the Criminal Application stands rejected. No costs.

(AMIT BORKAR, J.)