

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

CRIMINAL APPLICATION NO. 367 OF 2023

Mukesh Bhanushali

...Applicant

Versus

The State of Maharashtra & Anr.

...Respondents

Mr. Shubham S. Upadhyay for the Applicant.

Ms. M.R. Tidke, APP for the State-Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 23rd JUNE, 2023.

PC. :

1. This Application is filed for recalling CW-1 Vipesh Sangoi for his re-examination in complaint No. SCC/2889/2018 pending before the Judicial Magistrate First Class, 6th Court, Vashi, Navi Mumbai.

2. Heard Shri. Shubham Upadhyay, learned counsel for the Applicant and Ms. M.R. Tidke, learned APP for the Respondent-State.

3. Learned counsel for the Applicant submitted that the earlier Advocate, who conducted the cross-examination of CW-1, did not ask pertinent questions and that has caused prejudice to the defence of to the Applicant who is the original accused in that

proceedings. He submitted that the Applicant-accused may not be put to prejudice because of the incompetence of his earlier Advocate. In the interest of justice, the Applicant be permitted to re-examine CW-1.

4. I have considered these submissions. The Application was preferred by the Applicant, who was the original accused in the said case. It is a short Application and the only reason mentioned for recalling CW-1 is that, there were certain documents, facts and additional affidavit which were untouched in the cross-examination due to oversight. It was crucial to the defence of the Applicant-accused.

5. Learned Magistrate considered this Application and passed a reasoned order rejecting the Application. Learned Magistrate observed that the case was kept for recording of statement of the accused under Section 313 of Cr.P.C. Learned Magistrate observed that a party cannot fill in lacuna in this way. Learned Magistrate went on to observe that the accused had cross-examined the complainant on 29th November 2021, 18th December 2021 and 31st March 2022. On that day i.e. on 31st March, 2022, the cross-examination of the complainant was over; and after that, this Application for recalling the witness under Section 311 of Cr.P.C. was filed on 2nd July, 2022. The accused had already cross-examined the complainant for about three times and

after a gap of four months, this Application was filed. It was observed that sufficient opportunity was already given to the accused and he had availed of that opportunity. The accused was trying to fill up the lacuna of the case and was prolonging the matter. On this ground the Application was rejected.

6. I do not see any illegality, impropriety or incorrectness in the order passed by the learned Magistrate. The application for recall of the witness is devoid of any details. There is absolutely no reason mentioned except saying that due to oversight, crucial defence of the accused was not put to the complainant.

7. The power under Section 311 of Cr.P.C. cannot be allowed to be used for filling up lacuna. There has to be special circumstances demonstrating how failure of justice would occasion if the order was not passed under Section 311 of Cr.P.C. No such ground is raised in the said application; and therefore, the learned Magistrate was justified in rejecting the application.

8. I do not see any reason to interfere with the well reasoned order of the Magistrate. In this view of the matter, the present Application is dismissed.

(SARANG V. KOTWAL, J.)