

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

CRIMINAL WRIT PETITION NO.2177 OF 2023

Sadhana Rajaram PatilPetitioner
Versus
The State of Maharashtra Respondent

Mr. Satyavrat Joshi, Advocate i/b. Samay Pawar, for the
Petitioner.

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

CORAM : SARANG V. KOTWAL, J.

DATE : 03rd JULY, 2023

P.C. :

1. The Petitioner has challenged the order dated 24.4.2023 passed by the Judicial Magistrate, First Class, Shirala below Exhibit-33 in S.C.C. No.113/2020. Said order was challenged by the Petitioner before the Court of Additional Sessions Judge, Islampur, District-Sangli vide Criminal Revision Application No.11/2023. That Revision Application was dismissed vide order dated 14.6.2023. Said order is also under challenge in this Petition.

2. Heard Shri Satyavrat Joshi, learned counsel for the Petitioner and Ms. M.R. Tidke, learned APP for the State.

3. The Petitioner is facing the trial before learned Magistrate for commission of the offence punishable under Section 134A of the Representation of the People Act, 1951. The prosecution had examined five witnesses and thereafter the Petitioner's statement under Section 313 of Cr.P.C. was recorded. PW-1 was the Block Development Officer, PW-2 was a team-member who was involved in recording the election rallies, PW-3 was one of the panchas who had turned hostile, PW-4 had prepared the C.D. and PW-5 was the investigating officer. The allegation against the Petitioner was that though she was a Police Patil, she gave a speech in an election rally of a political party.

4. The prosecution made an application at Exhibit-33 for issuing summons to the Tahsildar, Shirala for producing the documents and for recording his evidence in respect of the record concerning tenure of the Petitioner as a Police Patil. Said application was allowed; and this is the

subject matter of the present Petition.

5. Learned counsel for the Petitioner submitted that the application is made at a belated stage after the statement under Section 313 Cr.P.C. was recorded. It was made to fill-up lacuna in the prosecution case and this course of action was not permissible. The Tahsildar was not examined during the investigation. He was not even cited as a witness. No documents, which are sought to be produced through the Tahhsildar, are part of the investigation and no details are mentioned in the application. He submitted that the prosecution, through the evidence, failed to prove that the Petitioner was the Police Patil.

6. Learned APP opposed these submissions and relied on the reasoning given in both the impugned orders.

7. I have considered these submissions. The core issue in this prosecution is about the fact whether the Petitioner was a Police Patil on the day when the rally in question was held during the elections. Therefore, the

documents and the evidence in that behalf are obviously quite important.

8. The question is whether the application was made to fill-up the lacuna or it was made at a stage when it was not permissible to prefer such application. This issue will have to be considered seriously.

9. I have gone through both the impugned orders and I have no hesitation in recording that the reasoning given by both the Courts below, and in particular given by learned Magistrate, are correct in law. Learned Magistrate has referred to Sections 311 and 91 of Cr.P.C. He has reproduced those sections. For convenience, they are reproduced here as well.

“91. Summons to produce document or other thing.--

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such

officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed--

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

“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.”

10. More importantly learned Magistrate has rightly relied on the ratio of the Hon'ble Supreme Court in the case of **Rajendra Prasad Vs. The Narcotic Cell through its officer in charge, Delhi** as reported in **1999 (6) SCC 110** (also reported in **AIR 1999 SC 2292**). The relevant paragraphs from the judgment reported in AIR 1999 SC 2292 are paragraphs-7 to 11, which read thus :

“7. 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.

8. The very same decision, *Mohanlal Shamji Soni v. Union of India*, AIR 1991 SC 1346 : 1999 Cri LJ 1521 (supra), which cautioned against filling up lacuna has also laid down the ratio thus (Para 27):

“It is therefore clear that the Criminal

Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.”

9. Dealing with corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was) speaking for a three-Judge bench of this Court had said in *Jamatraj Kewalji Govani v. The State of Maharashtra* (1967) 3 SCR : (AIR 1968 SC 178 : 1968 Cri LJ 231), as follows (Para 14 of AIR and Cri LJ):

“It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises the power under the second part, the inquiry cannot be whether

the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is necessary by it for a just decision of the case.”

10. Chinnappa Reddy, J. has also observed in the same tone in *Ram Chander v. State of Haryana*, AIR 1981 SC 1036 : (1981 Cri LJ 609).

11. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.”

11. In the present case also the core issue, as mentioned earlier, is about whether the Petitioner was the Police Patil at the relevant time when the rally was held. The Tahsildar is the proper person who can answer this issue

with reference to the documents. As mentioned in that judgment, it is not about the competence of the investigating officer or learned prosecutor which should be the main consideration, but, the Court is required to find the truth and do its duty. Learned Magistrate has rightly examined the issue before him in the correct perspective. He has observed that the prosecution cannot be barred from taking recourse to law and by such course of action the right to fair trial will not be violated as far as the accused is concerned. It was also observed that the Court can call for a document at any stage of the trial under Section 91 of Cr.P.C. Even learned Additional Sessions Judge has upheld the order of learned Magistrate by observing that there was no error committed and that a witness can be examined under Section 311 of Cr.P.C. at any stage.

12. I do not find any reason to take a contrary view to both the impugned orders based on the observations of the Hon'ble Supreme Court in **Rajendra Prasad's** case (supra).

13. In this view of the matter, I do not find any merit in the Petition and it is dismissed. It is made clear that the Petitioner shall be given sufficient opportunity to cross-examine the proposed witness. The Petitioner shall be given copies of the documents, which the prosecution wants to adduce in evidence, well in advance to afford her reasonable opportunity to cross-examine the witness on those documents .

(SARANG V. KOTWAL, J.)

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