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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.3075 OF 2023
IN
CRIMINAL APPEAL NO.899 OF 2019

Sunatilal Shivaji Gavit] .. Applicant
vs.
State of Maharashtra & Anr.] .. Respondents

Mr.Nitin Gaware Patil a/w Dhananjay Bhosale i/b M.B. Gavade for the Applicant.

Mr.Y.M. Nakhwa, APP for the State.

CORAM : BHARATI DANGRE, J

DATE : 13th September, 2023.

P.C.

1] The Appeal having been admitted, an Interim Application is taken out under Section 391 of the Cr.P.C. to examine the owner of a xerox centre on two counts; he ought to have been examined by the prosecution as witness, as his centre is located close to the spot and secondly on the ground that the amount which has been accepted is by way of the expenses incurred in obtaining photo copies of the 7/12 extract and mutation entries.

2] Heard the learned counsel for the Applicant and the learned APP for the State.

Section 391 of the Cr.P.C. reads thus :

391. Appellate court may take further evidence or direct it to be taken-

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate court is a High Court, by a Court of Sessions or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

3] The Apex Court in the case of **Rajeswar Prasad Misra vs. State of West Bengal & Anr. AIR 1965 SC 1887**, Justice Hidayatullah (As his Lordship was then) speaking for the Bench propounded upon the scope of Section 428 of the Old Code, in the following words :

“Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however,

be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. Commentaries upon the Code are full of cases in which the powers under Section 428 were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy.”

4] It is trite position of law that though the discretion is conferred while exercising the power under Section 391 of the Code the discretion will have to be exercised depending upon the facts and circumstances of the case which ultimately is aimed at securing of the elucidation of truth.

The primary object of the provision in form of Section 391 of the Code as has been highlighted in case of *Ashok Tshering Bhutia vs. State of Sikkim (2011) 4 SCC 402*, by the Hon’ble Apex Court, being the prevention of a guilty man’s escape through some careless or ignorant action on part of the prosecution before the Court or for vindication of an innocent person wrongfully accused, where the Court omitted to record the circumstances essential to elucidation of truth.

5] In the wake of aforesaid authoritative pronouncement of the Hon'ble Apex Court, when I have tested the Application which is filed upon the Appellant having been convicted in Special ACB Case No. 2/2015 and was found guilty of committing offence under Section 7 and 13 (1)(d) and 13(2) of the Prevention of Corruption Act, I must weigh discretion against him, in turning down the application filed, seeking examination of the said witness, by way of an additional witness at the stage Appeal.

6] The Appellant faced the charge, when the complainant reported to the ACB that he was in need of the 7/12 extract of the agricultural land and he met the accused who was working as Talathi, but he avoided to provide the necessary extract. He had gained knowledge that the necessary extract would be made available to him only upon some bribe being offered and on 12.08.2014, when the complainant met the accused, a demand made of Rs.3000/- for issuance of 7/12 extract and mutation entries. When the complainant expressed the inability to pay the amount, he was directed to bring an amount of Rs.400/-.

He lodged the report with ACB Office, Nashik. Accordingly a trap was laid, with the use of a voice recorder which was handed over to the Complainant by switching it on.

The Panchanama record that there was a xerox centre styled as 'Manoj Xerox' located nearby and the accused asked the complainant to come near the xerox center alongwith money. The trap was successful, as money was found in possession of the Accused.

7] A full dress trial was conducted at the hands of the special Judge and an opportunity was given to the accused to deal with the evidence

brought on record by the prosecution by recording his statement under Section 313 of the Cr.P.C. and in specific, accused brought his case through 313 Statement to the effect that the informant suddenly took out some amount from his person and made an attempt to put the same in his hand, though he asked him to wait for some time as after calculating the requisite fee, he may pay the amount.

8] The prosecution has successfully established through the cogent evidence on record that the accused demanded the bribe of Rs.3000/- when the complainant met him for issuance of copies of 7/12 extract and mutation entries. The xerox copy of mutation entries and 7/12 extract were taken by the accused from Manoj Xerox Centre. But the receipt was not issued.

9] Now it is the case of the accused that being the owner of Manoj Xerox Centre if he would have been examined by the prosecution, the truth would have surfaced. The accused is under misconception of the said fact, since it was never the defence taken by him that the amount was due towards the xerox charges of obtaining the certified copies and the learned Judge has clearly recorded that even if the said case of the Accused is to be tested, there were only 26 copies which were required to be issued as certified copies and there was no reason for demand of a sum of Rs.400/-, as charges towards xerox.

Nonetheless an opportunity was available to the Accused to examine this witness as defence witness but it was not availed by him, nor his case has never surfaced through the cross-examination to the effect that this amount was paid as xerox charges of the 7/12 extract and mutation entries, which were obtained from Manoj Xerox.

The purpose of provision, which is sought to be invoked by the

accused by filing the present application, is not to give an opportunity to fill up the lacuna in the case of prosecution or that of the accused.

The decision in the case of *State of Maharashtra vs. Ankush Marauti Shinde*, in Criminal Application No.2/2006 decided on 14.11.2016, relied upon by the learned counsel for the Applicant, is not of any succor to him, as it can be seen that it was a confirmation case when at the time of its hearing, the Division Bench recorded that the evidence of the Sub Divisional Magistrate who conducted Test Identification Parade was inadvertently not brought on record and it is in these circumstances, the prosecution was allowed to lead the additional evidence of Sub Divisional magistrate, who had already conducted the Test Identification Parade in respect of accused No.1.

10] As far as the case of **Rajeswar Prasad Misra** is concerned, the principal of law which has been pronounced in the said decision, continue to guide, the discretion vested in the Court while exercising the power under Section 391 of the Cr.P.C. and it has been categorically ruled in the said decision that additional evidence can be adduced at the Appellate stage, only in exceptional circumstances, and only in cases where circumstances, so warrant in public interest. It has also been held that such power is exercised to enable formal proof of documents so as to make ends of justice, but definitely it is not an authority, for the principle of law that Section 391 can be invoked to fill up the lacuna in either prosecution case or that of the accused.

It is the duty of the prosecution as well as of the Accused to get the best evidence placed before the Court and if it is the case of the Accused that the prosecution failed to examine a witness, though in my considered view, he was not a material witness, it was always open for the accused to get the summons issued to him and examine him

as a defence witness and he failed to do so and it was never his case that the amount of Rs.400/- was asked to meet the xerox charges of the necessary documents, and for the first time a new case cannot be introduced, at the appellate stage and that too by invoking Section 391 of the Code.

In the wake of above application is rejected.

[BHARATI DANGRE, J]