



**IN THE HIGH COURT OF JUDICATURE OF BOMBAY**  
**BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO. 34 OF 2024**

Sudhir Jagannath Pawar

...Petitioner

VERSUS

The State Of Maharashtra

...Respondent

...  
Mr. Umesh Mitkari, Advocate for petitioner.  
Mr. S.B. Jadhav, APP for respondent.

.....

**[CORAM : NITIN B. SURYAWANSHI, J.]**

**DATE : 8<sup>th</sup> JANUARY, 2024**

**ORDER :**

1. Petitioner is aggrieved by order passed by Special Court, Jalna, below Exhibit-85 in Special Case ACB No. 5/2015, thereby allowing the application filed by prosecution under section 311 Cr.P.C., for re-examination of investigating officer or calling investigating officer for re-examination which is restricted only on the point of hearing recorded conversation between accused and complainant and recorded voice of accused in open Court.

2. During the course of trial, witnesses were examined, so also, investigating officer and on 02.05.2023 investigating officer was cross examined. At this stage, prosecution filed

*Bhagyawant Punde*

application Exhibit-85 stating that, during the cross examination witness was asked about recording of conversation in CD form. Accused has denied that voice in the CD is that of accused. Application given by prosecution for providing copies of voice recording and conversation recording to accused was allowed by Court, copies were made by technician called from Cyber lab Jalna. He had copied the same in presence of Court and report of it is submitted by prosecution. From record it appears that copies of CD are not accepted by defence. Application, therefore, is filed with a prayer to recall investigation officer for re-examination which would be restricted only on the point of hearing recorded conversation between accused and complainant and recorded voice of accused in open Court. The same is necessary in the interest of justice as written script of conversation is on record.

3. Petitioner/accused opposed the application on the ground that prosecution is trying to fill up the lacuna. Trial Court has allowed the application observing that "*police papers show that conversation of accused has been recorded during the trap. Said fact has been stated by Sitaram Mehetre (PW4) and other witnesses. Prosecution wants to play the CD. By no stretch of*

*imagination it can be said that prosecution is trying to fill up the lacuna."* By relying on ratio in *Rajendra Prasad vs. The Narcotic Cell Through its officer in-charge, Delhi*, MANU/SC/0397/1999, Trial Court held that, "*lacuna in the persecution case cannot be equated to the oversight committed by public prosecutor during trial. The CD is not prepared after the evidence. It is already in existence. However, prosecution failed to play it during examination in chief. Hence, playing CD in re-examination does not amount to fill up lacuna and it is not the case of afterthought evidence or forged evidence. The CD is already prepared during investigation.*" Trial Court was of the view that "*power under Section 311 Cr.P.C. needs to be exercised for just decision of the case and for the ends of justice. CD is crucial evidence of conversation of accused and it needs to be tendered in evidence for just decision of case.*"

4. Learned advocate for petitioner has assailed the impugned order contending that Trial Court has erred in allowing the application which amounts to filling up the lacuna and serious prejudice will be caused to petitioner/accused, because of the impugned order. He therefore submits that impugned order is unsustainable in law and facts of the case and same may

be quashed and set aside.

5. Heard learned advocate for petitioner and learned APP for respondent. Perused the memo of writ petition, annexures thereto and the impugned order.

6. It is settled legal position that examination or re-examination under Section 311 Cr.P.C. can be permitted so as to enable the Court to arrive at just decision of the case. In

**Ratanlal v. Prahlad Jat**, MANU/SC/1202/2017 it is held:

*"17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the Accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."*

7. In Zahira Habibullah Sheikh v. State of Gujarat,

MANU/SC/1344/2006, it is held:

*"27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The Section is not limited only for the benefit of the Accused, and it will not be an improper exercise of the powers of the court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the Accused. The Section is a general Section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the Section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."*

8. In U.T. Of Dadra & Nagar Haveli & Another v.

Fatehsingh Mohansingh Chauhan, (2006) 7 SCC 529 , it is held:

*"The principle is well-settled that the exercise of power under Section 311, Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary*

*duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused resulting in miscarriage of justice."*

9. In the light of aforesaid legal position, there is no merit in the submission of petitioner that prosecution is trying to fill up the lacuna. The approach of the Trial Court is in consonance with the settled legal position. No case is made out by petitioner to warrant interference in extra ordinary writ jurisdiction. Writ petition being devoid of merit is dismissed.

**[NITIN B. SURYAWANSHI, J.]**