



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

**CRIMINAL WRIT PETITION NO. 678 OF 2024**

Prakash @ Bitty Vishwambhar Kshirsagar

....Petitioner

**VERSUS**

The State Of Maharashtra

.....Respondent

.....  
Mr. D.S. Patil h/f Mr. S.S. Gangakhedkar, Advocate for the  
Petitioner

Mrs. S.S. Joshi, APP for Respondent

.....

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

**DATE : 08<sup>th</sup> APRIL, 2024**

**ORDER :**

1. By this petition filed under Article 227 of Constitution of India, petitioner, under trial prisoner, has challenged the order dated 16.03.2024, passed below Exhibit-147 in Sessions Case No. 106/2021, thereby rejecting application filed by petitioner under section 311 of Cr.P.C.

2. Petitioner is facing charge under section 307, 324, 354(A), 354(B) of Indian Penal Code r/w 4/27 of Arms Act in Sessions Case No. 106/2021. At the instance of informant/PW1 Crime No. 207/2021 was registered on 01.04.2021 with Nanded Police Station. Informant is mother of victim. Pursuant to

*Bhagyawant Punde*

registration of crime, petitioner was arrested on 08.04.2021 and he is under trial prisoner. Prosecution has led its evidence and evidence of informant Kondabai Suryawanshi was recorded and her cross examination was concluded on 20.12.2021. Thereafter, evidence of victim PW-2 was recorded and her cross examination was concluded. According to petitioner, prosecution evidence is over and on 16.02.2024 his statement under section 313 of Cr.P.C. is recorded and the matter was adjourned for recording defence evidence. Learned advocate representing petitioner filed application Exhibit-147 along with affidavit contending that after visiting petitioner in jail, it was decided to request the Trial Court to call PW-2 as defence witness by resorting to Section 233 of Cr.P.C. Said application was opposed by prosecution. Trial Court rejected the application. Petitioner is aggrieved by this order.

3. Heard learned advocate for petitioner and learned APP for respondent. Perused the documents placed on record.

4. It is a matter of record that after recording evidence of PW-2, advocate for petitioner remained absent and in spite of giving opportunities he did not cross examine PW-2. Trial Court therefore passed no cross order against petitioner on 07.02.2023. This Court set aside that order on 28<sup>th</sup> June, 2023 in

Criminal Writ Petition No. 478/2023. At that time, learned advocate for petitioner on instructions had undertaken to proceed with the trial without seeking any adjournment. This Court directed the Trial Court to permit defence to cross examine witness No. 2 by observing that, "*In case of any dilatory tactics adopted by defence, it is open for Trial Court to pass appropriate orders in accordance with law.*" Even after passing of this order, PW-2 was not cross examined by petitioner and from time to time adjournments were sought for cross examination of PW-2.

5. Record indicates that from time to time petitioner has deliberately prolonged the trial on one pretext or other. In spite of granting opportunity to cross examine PW 2 by this Court, petitioner has failed to avail the same. It appears from the record that petitioner is trying to prolong the matter only with a view to avoid the Court. After prosecution closed its evidence petitioner has filed present application praying to issue witness summons to PW-2 as petitioner wants to examine her as defence witness. This application is misconceived and same is filed only with a view to protract the trial. Trial Court has rightly rejected the said application by giving elaborate reasons.

6. Learned APP has rightly placed reliance on State of *Madhya Pradesh vs. Badri Yadav & Another*, 2006 AIR (SC) 1796, wherein it is held:

*"14. Section 233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as provided under Section 311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW- 9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by sub-section (3) of Section 233 Cr.P.C.*

*15. When such frivolous and vexatious petitions are filed, a Judge is not powerless. He should have used his discretionary power and should have refused relief on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the present case, the witnesses were examined by the prosecution as eyewitnesses on 18.12.1990, cross-examined and discharged. Thereafter, an application under Section 311 Cr.P.C. was rejected. They were recalled purportedly in*

*exercise of power under sub-section (3) of Section 233 Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17.7.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law.”*

7. It is clear from the record that application Exhibit-147 is filed by petitioner only with a view to protract the trial and to defeat the ends of justice. Prosecution witnesses once examined cannot be called as defence witnesses. Trial is of the year 2021 and though petitioner is under trial prisoner every effort is made on his behalf to protract the trial. Application filed by petitioner is therefore rightly rejected by the Trial Court. There is no merit in the challenge raised in the present petition and writ petition deserves to be dismissed and same is dismissed.

8. However, in the interest of justice and with a view to give last opportunity to petitioner to cross examine PW-2 Saraswatibai Kondji Suryawanshi, she shall be called on 16<sup>th</sup> April, 2024 or 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> April, 2024. If petitioner fails to conduct her cross examination on the day on which she appears, then this opportunity shall stand forfeited. After completion of her cross examination, Trial Court shall record statement of petitioner under section 313 of Cr.P.C. on the same day and shall

hear final arguments on the following day and shall deliver judgment by the end of this month.

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