



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

CRIMINAL WRIT PETITION NO. 1686 OF 2023

- 1] Santosh S/o Bhikaji Mote
Age: 25 years, Occu.: Labour,
- 2] Vilas S/o Bhikaji Mote
Age: 40 year, Occu.: Labour.
- 3] Kailas S/o Bhikaji Mote
All R/o Indira Nagar, Garkheda Parisar,
Tq. And Dist.Aurangabad. .. Petitioners

Versus

. The State of Maharashtra ..Respondent

.....
Advocate for Petitioners : Mr.Chaitanya C.Deshpande
APP for Respondent : Mr.N.R.Dayama
.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 26 AUGUST, 2024

PRONOUNCED ON : 02 SEPTEMBER, 2024

ORDER :-

1. By invoking provisions under Section 227 of the Constitution of India, petitioners, original accused has set up following prayers :

B] By issuing a writ of certiorari or any other appropriate writ or order or directions in the like nature the order below Exhibit 50 in Sessions case no.330/2021 passed by the additional sessions judge Aurangabad, be quashed and set aside and the application exhibit 50 may kindly be allowed as prayed for.

C] Pending the hearing and final disposal of this criminal writ petition, the further proceedings of Sessions Case No.330/2021 pending before the court of additional sessions judge at Aurangabad be stayed.

D] As the petitioner is in jail the affidavit in support of this petition may kindly be dispense with.”

2. Mr.Deshpande, learned Advocate for the petitioners would submit that by virtue of Crime No.464 of 2021, on report, offence was registered under Sections 302, 326, 504, 506 read with Section 34 of the Indian Penal Code against in all four persons. That case was committed to the Court of Sessions and learned Additional Sessions Judge commenced trial vide Sessions Case No.330 of 2021. Learned Advocate pointed out that recording of evidence is in progress. That even prosecution witness no.1 namely Ramesh Uttam Jadhav, who is informant, has adduced his evidence at Exh.47. That two Advocates were representing four accused persons. Advocate representing present petitioners was not present and even when there was no authorization to other Advocate representing accused no.4, he has conducted cross-examination even on behalf of present petitioners. That there were no oral or written instructions or even Vakalatnama in favour of said Advocate to represent present petitioners. Resultantly, there was ineffective cross-examination by

said Advocate. Therefore, application Exh.50 was pressed into service, but learned trial Court rejected the same holding that Advocate D.B.Zodge has already conducted cross-examination.

3. Learned Advocate pointed out that there was nothing in black and white on record permitting Advocate Zodge to represent even present petitioners. Therefore, cross-examination of sole accused cannot be applied to present petitioners. That serious prejudice has been caused to their case and therefore, learned Advocate submits that it is necessary to direct the trial Court to allow recalling of the witness PW1 Ramesh Uttam Udhav / informant to enable present petitioners to cross-examine him, who is a crucial witness. That even learned trial Court has not considered and appreciated the scope and object of Section 311 of the Code of Criminal Procedure (Cr.PC.) and has erred in rejecting application exh.50.

Lastly, it is submitted that, if such opportunity is not given then petitioners will lose precious opportunity and valuable right to defend their own case. Hence, the above prayers.

4. Above application is opposed by learned APP, who pointed out that it is evident from the record that Advocate Zodge, representing accused, has conducted cross-examination. That there was no

application for adjournment or even matter was not sought to be kept back for appearance of so called Advocate representing petitioner. After hearing Advocate Zodge, learned trial Court allowed cross-examination to be conducted on behalf of all accused and as such, present attempt to recall is only with sole intention of filling up lacuna left out in cross-examination and therefore, trial learned Court committed no error whatsoever in rejecting application and even according to him, no case is made out to allow the prayers and so he prays to dismiss the petition.

5. After considering the submissions of both sides, there is no dispute that present petitioners are facing trial vide Sessions Case No.330 of 2021 on the file of Additional Sessions Judge, Aurangabad i.e. Sessions trial for commission of offence under Sections 302, 326, 504, 506 read with 34 of the Indian Penal Code. Present petitioners Santosh Bhikaji Mote, Vilas S/o Bhikaji Mote and Kailas S/o Bhikaji Mote as emerging from the papers, are arraigned as accused.

6. Papers show that prosecution has opened the case by examining PW1 Ramesh / informant, who faced cross-examination on 17-08-2023 at exh.47. One Advocate Dilip Ghodke seems to have conducted cross-examination on behalf of accused persons and said

cross-examination was completed and there is Court endorsement on exh.47. There is no re-examination i.e. 17-08-2023 itself. Application exh.50 seems to have been moved by present petitioners on 04-09-2023 i.e. after 18 days contending that, defence Advocate representing accused nos.1 to 3 was not present during the cross-examination and only Advocate representing accused no.4 was present and he conducted cross-examination but on behalf of all even when he was not authorized. It is contended that PW1 Ramesh is an eye witness and therefore, it is necessary to cross-examine him in detail and therefore, PW1 Ramesh be recalled to enable petitioners / accused nos.1 to 3 to cross-examine him and that they are ready to pay necessary charges for recall.

7. On going through Exh.50, it is emerging that learned trial Court, on receipt of said application dated 04-09-2023 sought Say of learned APP, who while opposing exh.50, gave following Say.

“That on last date cross examination of witness was already over. On that date no any application was filed.

That scope of recalling witness is only allowed under re-examination. The scope of re-examination is narrow. Hence this application may kindly be rejected.”

8. After considering the contents of the application exh.50, Say of

learned APP, learned trial Court by order dated 04-09-2023 i.e. on the same day, rejected the application, giving rise to instant petition.

9. It is perceived from the submissions and the grounds that Section 311 of the Cr.P.C. is tried to be invoked for raising above prayers i.e. setting aside the order passed by the trial Court on exh.50 and seeking further directions to the trial Court to permit recalling of PW1 Ramesh.

Provisions under Section 311 of the Cr.P.C. having put into play, for the sake of clarity and brevity, it is desirable to reproduce the said Section :

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. The settled principle on the point of object and scope of powers under Section 311 of the Cr.P.C. is dealt in following cases by the Hon'ble Apex Court.

(I) ***Ratanlal v. Prahlad Jat, (2017) 9 SCC 340.***

“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 reexamine 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.”

(II) *Vijay Kumar v. State of U.P., (2011) 8 SCC 136*

“17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of (CrPC) and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously.”

(III) *Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374.*

“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.”

(IV) *State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402.*

“... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined.”

11. Further it is to be noted that Sessions case is of 2021 and PW1 Ramesh was examined on 17-08-2023. Out of four accused, defence Advocate for only accused no.4 seems to have undertaken cross-examination, but in the evidence of PW1, such cross-examination is not shown to be confined to only accused no.4, rather it is “**cross-examination on behalf of learned Advocate for accused nos.1 to 4.**”

12. Learned Advocate for the petitioners fairly conceded that evidence is shown to be on behalf of all accused, but he would emphasize that learned Advocate for accused no.4 was not authorized to even conduct cross-examination on behalf of accused nos.1 to 3. However, on Court query, he fairly conceded that there was no application on behalf of learned Advocate appearing for accused nos.1 to 3 on that day seeking any adjournment. Application exh.50 seems to have come on record on 04-09-2023 when cross-examination of PW1 was already over on 17-08-2023. For almost a period of three weeks, no steps appear to have been taken i.e. on the same day or even very next day.

The Hon'ble Apex Court in the case of *Umar Mohammad v. State of Rajasthan, (2007) 14 SCC 711* has held that “*the delay in filing application is one of the important factors which has to be*

explained in the application.”

Here on going through exh.50, it appears that there is no plausible explanation as to why Advocate representing accused nos.1 to 3 was absent and why he was not in position to cross-examine crucial witness like PW1 Ramesh / informant, who is eye witness. Delayed efforts frustrate the very claim. Further in the trial Court, learned Advocate appearing for accused no.4 has put on record application exh.51 contending that “*he most respectfully submits that the above stated case is pending for evidence but in the past date i.e. previous date I have cross examined on behalf of accused no.1 to 3 as per their oral instructions*”.

13. Therefore, considering such application, it appears that defence Advocate for accused no.4 also subjected informant to cross-examination on behalf of accused nos.1 to 3. Trial Court has noted that there is no re-examination. Therefore, after such stage having been reached and there being no justifiable ground showing what exact prejudice has been caused, merely on application at a belated stage for recalling, such request cannot be considered. Therefore, even this Court, as like trial Court, is convinced that no case is made out for recalling. Consequently, I proceed to pass following order :

ORDER

Criminal Writ Petition No.1686 of 2023 is dismissed.

(ABHAY S. WAGHWASE)
JUDGE

14. On pronouncement of this order, learned Advocate for the petitioners prays for six weeks time so as to enable him to approach the Hon'ble Apex Court.

15. Learned APP strongly opposes the same.

16. Considering the above request made by learned Advocate for the petitioners, six weeks time is granted to the petitioners to approach the Hon'ble Apex Court.

(ABHAY S. WAGHWASE)
JUDGE