

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

**CRIMINAL REVISION APPLICATION NO. 221 OF 2024**

Nitin Shahaji Patil

...Applicant

vs.

State of Maharashtra

...Respondent

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| Mr. Priyal Sarda:- | Advocate for the Applicant. |
| Mr. A. S. Gawai:-  | APP for the State.          |

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**CORAM : S. M. MODAK, J .**

**DATE : 21<sup>st</sup> JUNE 2024**

**P. C. :-**

1. Heard learned Advocate Mr. Sarda for the Applicant and learned APP.

2. I have heard this matter on 13<sup>th</sup> June 2024. Today the matter is fixed for submission of judgments which was relied upon by learned advocate for the Applicant. He has relied on following judgments:-

(i) **Ishrat Hussain vs. State of Maharashtra.**<sup>1</sup>

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1 2013 SCC OnLine Bom 1462.

(ii) **Nasib Singh vs. State of Punjab & Anr.**<sup>2</sup>

3. Considering the limited issue involved in this Revision, it is taken up for final hearing by consent.

4. Admit.

5. The Applicant faced trial for producing mark sheet of 10<sup>th</sup> Standard while making an application to the post of Junior Bus Conductor. It contains 592 marks out of 750 marks (**Exhibit-29** is the mark sheet produced by him). He got employment as a Junior Bus Conductor. However, when the mark sheet was sent for verification to S. S. C. Board, it was noticed that in fact accused secured only 428 marks out of 750. This verified mark sheet was marked as **Exhibit-30** through P. W.-1.

6. He faced trial for the offence punishable under section 420, 467 and 468 of Indian Penal Code. The prosecution examined following witnesses :-

(i) P. W. 1 - Dattatraya Ramchandra Panchwag – Deputy General Manager, State Transport.

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<sup>2</sup> (2022) 2 SCC 89.

- (ii) Ashok Gopalrao Jadhav – Divisional Manager, S. T.
- (iii) P. W.3 - Kundlik Vithal Navghane – Panch of seizure of documents.
- (iv) P. W.4 - Unus Allabaksha Shaikh – Investigating Officer.
- (v) Ganesh Yashwant Patil – Transport Superintendent
- (vi) Varsharani Jeevandhar Patil – Investigating Officer.

When the statement of applicant was recorded, he took defence of denial. On this evidence, the trial court convicted the applicant for the offence punishable under section 420, 467 and 468 of IPC vide judgment dated 6<sup>th</sup> April 2017-. The correctness of this judgment was challenged before the Sessions Court. The Court of Session Judge vide judgment dated 22<sup>nd</sup> May 2024 set aside the conviction. However, instead of acquitting the accused, he remanded the matter for limited consideration. That is why present revision.

**7. The only issue involved in this Revision is :-**

- (a) Whether the Appellate Court was **justified in remanding** the matter for limited purpose to prove Exhibit-30 or
- (b) Whether Appellate Court **ought to have decided the Appeal** on the basis of available evidence.

The Appellate Court had chosen to remand the matter and placed reliance on the provisions of section 386(b)(i) of the Code of Criminal Procedure. Following are the provisions :-

- (a) **Reverse the findings**, sentence and acquit the accused;
- (b) **Order re-trial.**

8. It is true that section does not gives any guidelines as to when such power is to be exercised. It does not mean that such power is unfettered. When discretion is there, it has to be exercised with care and caution. It is true that every accused is having right to speedy trial. Contention is the prosecution has not proved the mark sheet verified by the S. S. C. Board as Exhibit-30. It is undisputed that this lacuna remained in prosecution case.

9. A document is said to be proved when concerned witness is examined. In this case verified mark sheet was marked as Exhibit-30 through the evidence of P. W.1-Dattatraya Panchwag–Deputy Manager of State Transport. Initially he was not cross-examined but accused cross-examined him later-on through Advocate. During his evidence he produced the verified mark sheet and it is marked as Exhibit-30. It is true that marking of document as an exhibit does not mean proof of

document. It has to be proved through relevant witness. It is true that unfortunately it has not happened in this case.

10. That is why the Appellate Court remanded the matter. Relevant observations find place in paragraph Nos.19 and 20. Paragraph No.19 is reproduced below:-

*19. If document Exh.30 has not been exhibited by the Trial Judge, there would have been an opportunity to the prosecution to prove the said document by calling the concerned witness of Latur Education Board. Both prosecution and the accused are affected because improper proof/ exhibition of mark sheet Exh.30.*

11. Whereas in paragraph No.20 and 23 the Appellate Court has quoted the relevant provisions of Code of Criminal Code. It is sections 386 and 391. Ultimately, in paragraph No.24, Appellate Court has quoted reason why opportunity has to be given to prosecution to prove the document. The Appellate Court was cautious enough not to order full re-trial. That is why it is observed in paragraph No.25 and in the operative order.

12. There cannot be any dispute about power of re-trial. Even Hon'ble Supreme Court has interpreted power of re-trial has to be exercised exceptionally. When, with the assistance of both the sides, I have gone through the impugned Judgment but I do not find anywhere any findings recorded by the appellate court why prosecution has not examined any witness to prove Exh.-30. There are two aspects for exercising power of re-trial. They are :

- (i) Why re-trial is necessary and
- (ii) What is the purpose of ordering retrial whether it is for removing the lacuna.

One can understand, by ordering retrial by examining witness, both parties will get an opportunity to put forth their case. As such there is no injustice. But the question does not ends there. The appellate court is required to ascertain why this lacuna remained before the trial court and why it was not filled up by prosecution by examining necessary witness. I think the Appellate Court has not given any finding why the prosecution has failed to examine the witness to prove Exhibit-30.

13. I have perused the judgment of conviction passed by the trial

court in order to ascertain how the trial court has dealt with Exh. 30. Trial Court considered the answers given by the accused in a 313 statement. The reference is -

*“furthermore he has stated in his statement recorded under section 313 of the Code that the mark sheet wherein it is shown that he has obtained 420 marks out of 750, that is a mark sheet Exh.30 is his true and correct mark sheet.*

Trial Court further observed -

*“the submission as to source, traveling of letter is irrelevant to disbelieve the conjoint evidence of prosecution witness man may speak lie but the documents never”.*

Trial Court further observed -

*“the oral evidence is corroborated by documentary evidence placed at Exh.29, Exh-30 and Exh,-42.” (paragraph No.38.)*

14. It may not be proper to make comment on these observations because it will cause prejudice to both the sides. But the issue is when the conviction is challenged before the Appellate Court and when the

Appellate Court has chosen to adopt second option of remand, the **Appellate Court ought to have verified why necessary witness to prove Exh.30 was not examined by the prosecution.**

15. Ultimately, the Appellate Court was seized of all the record of the trial Court. The Appellate Court could have heard both the sides and could have perused the record. Unfortunately, it has not happened. It cannot be said that discretion is exercised judiciously. Therefore, I am inclined to set aside the order and remand it to the Appellate Court.

16 Why it is said that the power of remand is to be exercised sparingly? The reason is it is connected to right of the accused to insist for acquittal and one of the ground is failure of the prosecution to prove particular fact. If the matter is remanded, it has got bearing on the right of the accused to insist for acquittal. That is why the appellate court is required to ascertain why the prosecution has not examined the concerned witness.

17. There are various reasons. One of the reasons is the witness has not attended inspite of service of summons or the witness is not traceable. Or the Learned A.P.P. might have overlooked the necessity

of examining witness to prove Exh. 30. It may be for the reason that the verified mark sheet was marked as exhibit. 30.

18. Hence, I am inclined to remand the matter to Appellate Court.

Hence following order:-

### **ORDER**

- (i) Revision is partly allowed.
- (ii) The order passed by the Court of Sessions Judge, Pune on 22<sup>nd</sup> March 2024 in Criminal Appeal No.206 of 2017 is set aside.
- (iii) The Appeal is remanded to the Appellate Court.
- (iv) The Applicant to appear before the Appellate Court on 1<sup>st</sup> July 2024.
- (v) The Appellate Court to hear the appeal again with following directions:-
  - (a) Go through the record of the trial Court and hear the parties on the point of any attempt made to examine witness to prove Exhibit-30.
  - (b) Then hear the Appeal again as per merits.
  - (c) The Applicant is at liberty to address Appellate Court on this aspect as well on other merits.

(d) The Appellate Court is at liberty to exercise necessary power if it deems proper as per the settled law.

19. Revision is disposed of.

20. Rule is discharged.

[S. M. MODAK, J.]

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