



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO.923 OF 2024

Anil s/o Daulatrao Tidke

Vs.

State of Maharashtra, through Police Station Officer, Police Station,
Andhera, Taluka Deulgaon Raja, District Buldhana

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R. N. Ghuge, Counsel for the petitioner.

Mr. S. V. Narale, APP for respondent /State.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 25/11/2024

1. Heard.
2. Learned APP waives service of notice for the State.
3. By this petition, the petitioner has challenged the order passed by the Sessions Court i.e. Additional Sessions Judge, Buldhana below Exhibit 1 in Sessions Trial No.60/2023 dated 11.10.2024 by which the learned Sessions Judge has issued the summons to the panch witnesses who are acted as a panch on the house search panchnama by invoking the power under Section 311 of the Code of Criminal Procedure (in short "Cr.P.C.").

4. Learned Counsel for the petitioner submitted that the order passed by the Sessions Judge without affording any opportunity to the accused and without assigning any reason that the evidence of these witnesses is essential for disposal of the trial. He submitted that at least an opportunity of hearing to the defence while passing the impugned order ought to have been given by the Sessions Judge and therefore, the order passed by the Sessions Judge is illegal and liable to be set aside. In support of his contention he placed reliance on **Rajaram Prasad Yadav Vs. State of Bihar and another** reported in **(2013) 14 SCC 461**.

5. Per contra, learned APP strongly opposed the said petition on the ground that the Sessions Judge has ample power in view of Section 311 of Cr.P.C. As the Sessions Court has assigned the reason that the examination of these witnesses is essential for the just decision of the case and therefore, summons are issued and no prejudice is caused to the accused. In view of that, the petition is devoid of merits and liable to be dismissed. In support of his contention, he placed reliance on the decision of the Hon'ble Apex Court in a case of **Varsha Garg vs. The State of Madhya Pradesh and others** reported in **2023 ALL MR (Cri) 720 (S.C.)**.

6. After hearing both the sides and on perusal of the impugned order passed by the learned

Sessions Court, it reveals that the present petitioner is the original accused, who is facing trial for the offence punishable under Section 306 of the Indian Penal Code. The trial was already fixed for the Judgment and subsequently order was passed on 11.10.2024 by the learned Sessions Judge by observing that while going meticulously through the record of the case, this Court found house search panchanama dated 28.02.2023 on record being not put to the Investigating Officer. Moreover, witnesses to the said panchanama also appear to have neither cited nor examined. As such, in the fitness of things, this court would like to invoke the powers vested in its by Section 311 of Cr. P.C. and recall the witness PSI Manoj Vilasrao Wasade and issue the summons to the witnesses namely, Shrinivas Chadidar and Bhushan Vinod Panhale who acted as panch witnesses as the Court finds that their examination is essential to the just decision of the case.

7. Considering the submissions made by both the sides and perusing the provision i.e. Section 311 of the Cr.P.C., it is necessary to reproduce the said provision:

"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 every re-examine any such person if his

evidence appears to it to be essential to the just decision of the case.”

8. “The first part of the statutory provision which uses the expression “may” postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “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.” Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.”

9. “The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice.”

10. Learned APP rightly placed reliance in the case of **Varsha Garg vs. The State of Madhya**

Pradesh and others referred supra wherein para No.32 it is observed by the Hon'ble Apex Court that the power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. At the same time, in the case of **Rajaram Prasad Yadav Vs. State of Bihar and another** referred supra the Hon'ble Apex Court has issued the guidelines as far as the use of this provision is concerned and the principles which are laid down are as under:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) 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 for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any

inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

11. Thus, keeping in view the principles underlined under Section 311 Cr.P.C., it appears that the first part of Section 311 is a discretionary power, whereas the second part is obligatory. Admittedly, while exercising the powers, the Court has to assign the reason why the evidence of these witnesses is essential and no prejudice will be caused to the accused if the witnesses are summoned or recalled.

12. As far as the impugned order is concerned, admittedly, the Court has only observed that while going through the record it came to his notice that the Investigating Officer is not examined as far as the house search panchanama is concerned and the panch witnesses are also not examined to prove the said panchnama. While passing order, the Sessions Judge was under obligation to give an opportunity to the prosecution as well as to the accused to satisfy the Court, whether it would cause prejudice to the accused or whether the said evidence is essential. Besides that, the Court has assigned the reason that without the evidence which the Court wants to take the just decision of the case is not possible.

13. Thus, in the absence of all these reasons, the order passed by the learned trial Court deserves to be set aside with directions that the learned trial Court shall give an opportunity to the prosecution as well as the defence as to examination of these

witnesses and thereafter, pass an appropriate order by recalling the Investigating Officer as well as by issuing the summons to these witnesses.

14. With these directions, the petition is disposed of.

Order accordingly.

(URMILA JOSHI-PHALKE, J.)