

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

CRIMINAL WRIT PETITION NO.4382 OF 2025

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Afzal Abdullah Shaikh }
Age : 44 Years, Occupation : Business, }
Residing at : A Wing, Room No.301, }
Punam Estate, Cluster Van Srushti, }
Mira Road, District : Thane. } **...Petitioner**

Versus

1. **Sayyad Salim Shahid Ali** }
Block No.99,2/3, V.P. Nagar, }
Guilab Shah Baba Marg, Worli, }
Mumbai – 18. }
2. **The State of Maharashtra** }
Tardeo Police Station, C.R.No.127 of 2009 } **...Respondents**

Mr.Deepak V.Dere a/w Mr.Atharva Dere:-	Advocates for Petitioner.
Mr.H.J.Dedhia:-	APP for Respondent No.2-State.
Mr.Dhumal (PSI-Pairavi):-	Tardeo Police Station – Mumbai.

CORAM : S. M. MODAK, J.
DATE : 14th AUGUST 2025

P.C. :-

1. Heard learned Advocate for the Petitioner / Accused No.4 and learned APP.
2. He along with other Accused persons are charge sheeted by

Tardeo Police Station for the offence under Section 392 read with 34 of the Indian Penal Code, 1860 (“IPC”). **The trial is going on** before the Court of then Additional Metropolitan Magistrate–Girgaon, Mumbai. The prosecution has closed its evidence and even the trial Magistrate has recorded the statement of the Accused persons under Section 313 of the Code of Criminal Procedure, 1973 (“Cr.P.C.”).

3. When it was the turn of the Accused persons to examine witness, the present Petitioner has filed an Application on 24th February 2025 for issuing a summons to examine the Dr.Vishakha Joshi. Her certificate is there on Page No.33. The wife of the present Petitioner was admitted in her hospital from 16th May 2009 upto 19th May 2009 and the date of incident is 19th May 2009. The Petitioner has taken a defense that at the time of incident, he was not present on the spot but he was present along with his wife in the hospital.

4. When such Application was made, the learned Magistrate initially rejected it on 1st March 2025. The Revision Application is also dismissed on 27th June 2025. These orders are under challenge.

5. The reasoning given by both the Courts below are improper. Both the Courts below have forgotten the basic principle of criminal trial, that is to say, **even though the burden is on the prosecution to**

prove the offence beyond reasonable doubt and involvement beyond reasonable doubt. When a particular Accused is coming with a specific defense, he needs to be given an opportunity to prove it. This is the principle recognized in Section 106 of the Indian Evidence Act, 1872. That is to say, the act within the special knowledge of a particular person needs to be proved by him. **I am inclined to allow Writ Petition.**

6. I have read both these orders. The learned Magistrate in the order dated 1st March 2025 has granted an opportunity to the Petitioner to produce those medical documents along with the written statement. He observed there is no need to examine the doctor. The learned Magistrate has overlooked the fact that mere production of document is not sufficient to prove a fact. There is a difference between production of document and proving a particular fact. No doubt, it is true, burden on Accused is not heavy as that of the prosecution. But still the stage is of recording of evidence and the Petitioner needs to be given an opportunity to prove the fact which is pleaded by him.

7. Learned Additional Sessions Judge has also overlooked the principles of criminal trial. **For examining a witness by the defense, there is no need to take a recourse to the provisions of Section 311 of Cr.P.C.** In fact, as per the provisions of Section 315 of the Code, the

Accused is a competent witness. No doubt, in this case, he wants to examine the medical officer. **So, the recourse to Section 311 of the Code need not be taken.** That is permissible only in the contingency mentioned in that Section occurs. **So even the learned Additional Sessions Judge committed a wrong in rejecting the request.**

8. It is true that the matter is pending since 2015 and it needs to be given priority. It is for the Accused / Petitioner to secure the presence of the witness and simply he cannot rely upon the Police to secure his presence. In view of that, the following order is passed:-

ORDER

- (i) **The Writ Petition is allowed.**
- (ii) The order dated 1st March 2025 passed by the learned Chief Additional Magistrate, 4th Court, Giragaon – Mumbai and the order dated 27th June 2025 passed by the Additional Sessions Judge – Mazgaon, Greater Mumbai dated 27th June 2025 **are hereby set aside.**
- (iii) The Application made by the Petitioner for examining the medical officer – Dr.Vishakha Joshi – Joshi Nursing Home is allowed.
- (iv) The necessary orders for issuing a summons to her be passed by the trial Court.
- (v) It is made clear that the Petitioner will try to secure her presence without any delay and it is made clear that if the

learned Magistrate finds that the Petitioner is prolonging the matter, the learned Magistrate is justified in regulating the dilatory tactics of the Petitioner, if any, either by imposing an exemplary cost or by closing the evidence.

9. With these observations, the Writ Petition is disposed of.

[S. M. MODAK, J.]