

(2011) 08 BOM CK 0045

In the Bombay High Court

Case No : Criminal Application No. 416 of 2011

Mangesh Kisanrao Dahe

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Evidence Act, 1872 — Section 165

Citation : (2012) BomCR(Cri) 114

Hon'ble Judges : Bhangale A.P., J

Bench : Single Bench

Advocate : Anil S. Mardikar, for the Appellant; Kalyani Deshpande, Assistant Public Prosecutor, State, for the Respondent

Judgement

Bhangale A.P., J.—Heard learned Counsel for the applicant. Admit. Ms Kalyani Deshpande, learned Additional Public Prosecutor waives service for respondent No. 1-State. Notice to respondent No. 2 dispensed with. By consent of parties, taken up for final disposal forthwith. By this application, applicant has prayed for quashing and setting aside order dated 18.7.2011 passed by District Judge-2 and Additional Sessions Judge, Achalpur in Sessions Trial No. 100 of 2010. By the impugned order the prosecution is allowed to re-examine P.W. 4 Nanda Narayanrao Nandane on limited question of ambiguity. P.W. 4 Nanda first stated that she saw the incident and later, she deposed that she came to the spot after the incident. Learned APP appearing in the trial, therefore, sought permission from the trial Court to re-examine P.W. 4 Nanda to clear the ambiguity.

2. Learned Counsel for the applicant submitted that there was no ambiguity in the deposition of P.W. 4 Nanda. He contended that re-examination cannot be allowed to fill up lacunae and to wash away the admissions. Reliance is placed on the ratio laid down in the case of Pannayar Vs. State of T. Nadu by Inspector of Police, .

3. Learned Additional Public Prosecutor supported the impugned order and

submitted that no prejudice would be caused to the applicant-accused if P.W. 4 Nanda is allowed to re-examined.

4. There is no dispute about the preposition of law laid down in the case of Mohanlal Shamji Soni Vs. Union of India and another, . It is laid down thus :

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of section 540 of the Code (section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute, because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

5. Section 311 of the Code of Criminal Procedure runs thus :

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.

6. Section 311 of the Criminal Procedure Code consists of two parts, viz. (1) giving discretion to the Court to examine the witness at any stage; and (2) the mandatory portion which compels a Court to examine a witness if his evidence appears to be essential to the just decision of the case. The section enables and in certain circumstances, imposes on the Court the duty of summoning witnesses who would have been otherwise brought before the Court. This section confers a wide discretion on the Court to act as the exigencies of justice require. The power of the Court u/s 165 of the Evidence Act is complementary to its power under this section. These two sections between them confer jurisdiction on the Court to act in aid of justice. There is no manner of doubt that the power u/s 311 of the Code is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It

hardly needs to be emphasized that power u/s 311 should be exercised for the just decision of the case. The wide discretion conferred on the Court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the section, power to summon any person as a witness can be exercised if the Court forms an opinion that the examination of such a witness is essential for just decision of the case. 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 the Code and the principles of criminal law. The discretionary power conferred u/s 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously.

7. A Judge in order to discover or to obtain proof of relevant facts is empowered u/s 165 of the Indian Evidence Act to exercise all the privileges and powers subject to the proviso to that section which power he has under the Evidence Act. Section 311 of the new Code and section 165 of the Evidence Act may be said to be complementary to each other and as observed by the Apex Court in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, , these two sections between them confer jurisdiction on the Judge to act in aid of justice.

8. Section 165 of the Indian Evidence Act, 1872 reads thus:

165. Judge's power to put questions or order production. - The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order nor without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question, provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved; provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer to produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party, nor shall the Judge ask any question which it would be improper for any other person to ask under sections 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

9. In *Mohanlal Vs. Union of India*, reported in 1991 DGLS (s) 122 : 1991 DGLS (Cri.) s 750 : 1991 Supp. 1 S.C.C. 27 the Apex Court has observed while considering the scope and ambit of section 311, that the very usage of the words such as, "any Court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the

section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion, but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the Court to arrive at the truth irrespective of the fact that prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of section 311 but only to sub-serve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

10. After having heard the parties, I find that the impugned order cannot be sustained. Relevant observations of the Apex Court in Pannayar's case (supra) in paragraphs 25 and 26 read thus :

25. In his cross-examination, PW 1 admitted that the chain was made out of the old jewelleryes and he could not remember the date, on which the chain was made. This slipshod evidence, therefore, is very hopelessly insufficient in establishing the fact that the so-called ornaments belonged to and were on the person of Thilagavalli.

26. We do not know what was the Public Prosecutor doing at the time of the examination-in-chief and why he did not confront the witness on these ornaments. We do not know as to how the trial Court permitted these questions in re-examination. The purpose of the re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination. The trial Court has obviously faulted in allowing such a re-examination. Be that as it may, even if we accept that the trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in our firm opinion, is nil.

11. The observation of the trial Court that no prejudice would be caused to the applicant-accused if re-examination is allowed, is not correct. Further observation of the trial Court that ratio laid down by the Apex Court in Pannayar's case (supra) is not applicable to the facts of the case, is again not correct. The prosecution cannot be allowed to render the admission elicited through the cross-examination of the witness in futility. The purpose of re-examination is to give an opportunity to the party who called the witness, to explain any part of the cross-examination which is capable of being construed unfavourably to the party who called him. However, new matters cannot be allowed to be introduced in evidence, in re-examination, without taking the Court's permission. In the

present case, learned APP did not make written application before the trial Court to conduct re-examination. If he makes detailed application and if the trial Court deems it fit and proper that re-examination on limited issue should be allowed, it may do so in question-answer form as it may also reap advantage for Appellate Court if the case is carried in appeal. In such case, accused shall be given due and full opportunity to oppose the application. Needless to say, if the said witness is allowed to be re-examined in question-answer form, accused will have a right to cross-examine the witness. In the result, impugned order is quashed and set aside and in view of the observations made above, criminal application stands disposed of.