

(2016) 09 BOM CK 0198

In the Bombay High Court

Case No : Criminal Application (Apl) No. 504 of 2016

Mr. Wasudeo

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-09-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Penal Code, 1860 (IPC) — Section 302

Citation : (2017) 172 AIC 489 : (2017) 2 BomCR(Cri) 126 : (2017) 2 CriCC 17 :
(2017) 1 MhLJ 579 : (2016) 6 MhLJCrI 378

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : Shri R.R. Vyas, Advocate, for the Applicant; Shri N.R. Patil,
Additional Public Prosecutor, for the Non-Applicant

Final Decision : Allowed

Judgement

S.B. Shukre, J.(Oral)—Heard.

2. Admit.

3. Heard finally by consent of learned counsel appearing for the parties.

4. What is challenge in this application is the order dated 24.6.2016 passed by the learned Sessions Judge, Wardha rejecting the application filed under Section 311 of the Code of Criminal Procedure by the applicant, the accused in Sessions Trial No. 94/2014, in which he is being prosecuted for an offence punishable under Section 302 of the Indian Penal Code.

5. Learned Sessions Judge has taken a view that when the opportunity was available to the accused to put necessary questions to witnesses, namely, PW 3 and PW 7, the opportunity was wasted and, therefore, any attempt made as an afterthought to put these questions would amount to filling up the lacuna in the defence. On this ground, the learned Sessions Judge has turned down the request of the applicant.

6. Learned counsel for the applicant submits that this was not the case of filling up the lacuna, but an attempt to correct the error occurred while cross-examining the witnesses and, therefore, the application ought to have been allowed. He also submits that no prejudice would be caused to the prosecution, if two witnesses are recalled for the limited purpose of putting them specific questions and suggestions, as detailed in the Pursis filed today, which is taken on record. In support, he places his reliance upon the case of *Natasha Singh v. CBI (State)*, reported in AIR 2013 SC (Supp) 845.

7. Learned A.P.P. for the non-applicant/ State contends that the order challenged in the application is legal and correct and that it does not cause any prejudice to the accused. He submits that it is well settled law that the power under Section 311 of the Criminal Procedure Code should not be resorted to help a party to fill up the lacuna. He submits that when the opportunity was available, the accused did not put these questions to the witnesses and, therefore, now any attempt made for putting up these questions would only amount to filling up the lacuna in the case of defence. He submits that this is not permissible in law and places his reliance upon the case of *Mannan Shaikh and others v. State of West Bengal and another*, reported in (2014) 13 SCC 59.

8. In the case of *Mannan Shaikh and others v. State of West Bengal and another* the Hon''ble Apex Court has held that the power under Section 311 of the Criminal Procedure Code has to be exercised in a judicious manner so as to ensure that it advances a just decision of the case and that if the Court is of the opinion that in order to arrive at a just decision in the case, it is necessary to recall or reexamine a witness, the power must be exercised. It is also held that the power should be exercised in a manner that no prejudice is caused to the accused if the permission is given to the prosecution to fill up the lacuna.

9. In the case of *Natasha Singh*, the Hon''ble Apex Court has reiterated the view taken by the Hon''ble Apex Court in the case of *Rajendra Prasad v. Narcotic Cell*, through its Officer-in-Charge, Delhi, reported in AIR 1999 SC 2292. The view is to the effect that the lacuna in the prosecution is something which is inherent weakness or a latent wedge in the prosecution case, the advantage of which ordinarily must go to the accused and that there is a difference between inherent weakness i.e. lacuna in the prosecution case and a mistake or oversight in asking certain questions as a part of management of the prosecution case. The later category of mistake or over sight does not fall in the category of inherent weakness or fundamental lacuna in the prosecution case and that, it is a curable defect.

10. Thus, it is clear to us that when the witnesses can be recalled to correct the errors occurred in the management of the prosecution case, same principle can be applied to the defence case as well. In the instant case, certain questions, due to inadvertence, were not put to PW 3 as well as PW 7 and a look at these questions, as detailed in the Pursis dated 22.9.2016, would reveal that they are not in the nature of any attempt to fill up the lacuna as understood in law, in the

defence case. These questions and suggestion are as follows :

"Question to Witness No. 3 :

Question ? Is it true that deceased was of quarrelsome nature and due to same she was on inimical terms with the other villagers ?

Question to PW 7 (Investigating Officer) :

Question ? Can you tell during course of investigation statement of how many witnesses along with their names, were recorded ?

Question ? On which date statements were recorded ? Suggestion ? You have not sent any weapon for examination and without sending the weapons got prepared the report from Doctor."

Even otherwise, there is a difference between what is called as an attempt to fill up the lacuna in the prosecution case and what is called as an attempt to strengthen the defence. While the former, if allowed, may cause prejudice to the accused, the later, if allowed would not cause any prejudice to the prosecution and would only strengthen the right of the accused to fair trial.

11. Having considered the nature of questions and suggestion sought to be put to PW 3 and PW 7, I am of the view that the impugned order cannot be seen as consistent with the settled principles of law. It needs to be quashed and set aside.

12. In the result, the application is allowed.

13. The impugned order dated 24.6.2016, passed by the learned Sessions Judge, Wardha is quashed and set aside.

14. The prosecution witnesses i.e. PW 3 and PW 7 be recalled for the limited purpose of putting them the questions and suggestions mentioned in the Pursis dated 22.9.2016.