

(2001) 02 BOM CK 0041

In the Bombay High Court

Case No : Criminal Revision Application No. 2 of 2001

Popatlal Jethabhai Shah

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-02-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311

Evidence Act, 1872 — Section 165

Penal Code, 1860 (IPC) — Section 376

Citation : (2001) ALLMR(Cri) 429 : (2001) BomCR(Cri) 672 : (2001) 2 BOMLR 372 : (2002) CriLJ 794 : (2002) 2 RCR(Criminal) 427

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : Mr. Prakash Naik, for the Appellant; Mr. F.R. Shaikh, Assistant Public Prosecutor, for the Respondent

Judgement

Dr. Pratibha Upasani. J.

1. This Criminal Revision Application is filed by the applicant/accused - Popatlal Jethabhai Shah, being aggrieved by the Order dated 8.11.2000 passed by the III Addl. Sessions Judge, Kalyan, whereby his application for recalling of all seven prosecution witnesses for further cross-examination was rejected by him.

2. The accused is facing trial for offence punishable u/s 376 of the I.P.C. It appears from the proceedings that all the seven prosecution witnesses have been examined. Their cross-examination is over. At this stage, the accused made an application dated 28.1.2000 praying for recalling of all the prosecution witnesses for further cross-examination whose deposition was already over. It was contended in the said application that the Advocate Mr. Kotwal, whom the accused himself had appointed as per his own choice to represent him, could not cross-examine the prosecution witnesses effectively and certain material contradictions remained to be brought on record. It was stated that in the absence of certain material, which has remained to be brought on record, case of

accused would be seriously prejudiced and therefore, he be permitted to recall all the prosecution witnesses as he is facing the serious charge of Section 376(2)(f) of the Indian Penal Code.

3. The learned Addl. Sessions Judge by his reasoned order and after hearing both the sides, rejected the said application of recalling the prosecution witnesses on this ground, and, in my opinion, rightly so Section 311 of the Cr.P.C.: 1973 states as follows :

"311. Power to summon material witnesses 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."

4. No doubt Section 311 of the Code of Criminal Procedure, 1973 gives power to any Court at any stage of any inquiry, trial or other proceeding under this Code to 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, if it is of the opinion that the evidence of that witness is essential to the just decision of the case. It is also true that there is no limitation on the power of the Court arising from the stage to which the trial may have reached for examination of a witness, provided the Court is bona fide of the opinion that for the just decision of the case the step must be taken. It is clear from the language of the Section that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. However, the Court is required to exercise its discretion properly and judiciously. This is a very wide discretion conferred on the Court, to act as the exigencies of Justice require. Another aspect of this power which is complementary to it is to be found in section 165 of the Indian Evidence Act.

Section 165 of the Indian Evidence Act, 1872 states as follows :

"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 a 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;"

5. In the present case at hand, however, it seems that the applicant/ accused, inspite of engaging Advocate of his choice and after depositions of alt the seven prosecution witnesses were recorded, vide this application, is taking frivolous

contentions for recalling of all the prosecution witnesses. It appears that the Advocate appointed by the applicant, probably did not effectively bring out certain material on record, which in the opinion of the applicant was necessary, to weaken the prosecution case. The intention of the applicant was therefore, to appoint another Advocate to effectively carry out this job and therefore, this application for recalling of all the prosecution witnesses was made. This certainly is not permissible. Therefore, the lower Court by its reasoned order, rightly rejected that application which certainly was not a bona fide application. I find to infirmity In the impugned order. The intention in invoking the provisions of Section 311 of the Cr.P.C. is to further the cause of justice. But in the present case at hand, the intention of the applicant certainly appears to abuse the process of law. This is deplorable. Hence, the following order :

"Criminal Revision Application No. 2 of 2001 is rejected. The proceedings in the lower Court to proceed In accordance with law."