

(2015) 10 BOM CK 0127

In the Bombay High Court

Case No : Criminal Writ Petition No. 3327 of 2015 and Criminal Application No. 375 of 2015 in Criminal Writ Petition No. 3327 of 2015

Sanjay Vasant Kadam and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 29-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 161(1), 161(3), 173(8), 254
Evidence Act, 1872 — Section 165

Citation : (2015) 10 BOM CK 0127

Hon'ble Judges : Anuja Prabhudesai, J.

Bench : Single Bench

Advocate : Prakash Naik, Sr. Advocate and Jagdish Reddy, for the Appellant;
R.V. Newton, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

Anuja Prabhudesai, J.—Rule. Rule made returnable forthwith. With the consent of parties

2. The petitioner herein who is an accused in C.C. No. 107 of 2005, has challenged-(i) the order dated 14.8.2015 allowing the application at Exhibit 142 filed by the prosecution for recall of the Investigating Officer for further examination and (ii) the order dated 14.8.2015 allowing Exhibit 143, filed by the prosecution, and thereby directing the Investigating Officer to record the statement of Dyaneshwar Khutwad, and further permitting the prosecution to examine the said witness.

3. Mr. Prakash Naik, the learned Sr. Counsel for the petitioner has submitted that the prosecution has sought to examine the Investigating Officer for adducing evidence in respect of the photographs produced by PW9 even though such photographs have not been referred to by any witness other than PW9. Learned Sr. Counsel Shri Naik submits that this is nothing but an attempt to fill up the lacuna.

4. Learned Sr. Counsel Shri Naik has further submitted that in the course of the evidence, PW9 had for the first time deposed that one Dnyaneshwar Khutwad was present at the time of the incident. Based on the said statement prosecution filed an application at Exhibit 143 seeking leave to examine said Dnyaneshwar Khutwad as a witness. Learned Sr. Counsel Shri Naik submits that neither PW9 nor the other witnesses had made reference to Dnyaneshwar Khutwad in their statements under Section 161 of Cr.P.C. He has submitted that based on the improvised version of PW9, the learned Magistrate has not only allowed the prosecution to examine the witness Dnyaneshwar Khutwad, but has also directed the Investigating Officer to record his statement under Section 161 of Cr.P.C. The impugned order, according to learned Sr. Counsel Shri Naik, is on the face of it not sustainable.

5. Mrs. Newton, the learned APP and Shri Shekhar, the Counsel for the intervenor have submitted that the witness PW9 Pravin Gedam, is an IAS Officer who was the victim of the incident. They have submitted that the evidence of PW9 amply proves the presence of Dnyaneshwar Khutwad at the place of the incident and in the light of the said statement the prosecution had made an application under Section 311 of Cr.P.C. to examine said Dnyaneshwar Khutwad as a prosecution witness. The learned APP and the learned Counsel for the intervenor have submitted that Section 311 of Cr.P.C. confers wide powers in the court in the matter of examination or re-examination of a witness in order to arrive at a just decision. The learned APP contends that the evidence of PW9 proves that the witness sought to be examined had witnessed the incident and therefore his evidence is relevant to arrive at the just decision.

6. Having heard learned Sr. Counsel Shri Naik for the petitioner, as well as the learned APP for the State, and the learned Counsel for the intervenor, I shall now bestow my consideration to the issue involved. Both the impugned orders have been passed under Section 311 of Cr.P.C. it will therefore be advantageous to refer to and consider the scope of Section 311 of Cr.P.C. which reads as under:

"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."

7. A plain reading of Section 311 would show that this section vests powers in the court to summon any person as witness or to recall and re-examine any witness at any stage of the inquiry, trial or other proceedings under the code, provided such evidence is essential for just decision of the case.

8. In *Natasha Singh Vs. CBI (State)*, the Honourable Supreme Court has examined the scope of section 311 of Cr.P.C. and has held that:

"7. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under the Cr.P.C., or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the Cr.P.C. has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case."

9. In *Vijay Kumar Vs. State of U.P. and Another*, the Honourable Supreme Court has held that:

"This Section 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 under Section 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."

10. The issues raised in the case are required to be examined keeping the above principles in mind. The facts of the case reveal that sometime in the year 2005, some places in Khed District were flooded and as a consequence thereof, on 25.7.2005 a meeting was called at the office of the Tahsildar to assess and survey the loss and damage suffered by the villagers. It is alleged that while the said process was going on, the accused entered the office and damaged the public property and threatened the public officers who were on duty. Shri Mohan Gopal Gelne, Naib Tahsildar at Khed therefore lodged a FIR dated 29.7.2005, pursuant to which crime No. 120/2005 was registered. The said crime was investigated and the investigation culminated in filing of the chargesheet in the same year i.e. 2005. The charge was framed and explained, and the petitioner accused having pleaded not guilty, the trial commenced and several prosecution witnesses were examined.

11. The examination-in-chief of the investigating officer PW8 Sunil Bhoite was recorded on 14.3.2013, however at the request of the prosecution his cross-examination was deferred and the evidence of PW9 was recorded. In the course of his evidence, PW9 produced certain documents which necessitated the prosecution to seek re-examination of the investigating officer in order to

elucidate the evidence on the documents referred to by PW9.

12. The documents sought to be produced, relate to the alleged incident and therefore germane to the issue involved in the case. The evidence relating to the said documents though relevant to ascertain the truth, could not have been elucidated through the investigating officer as the evidence of PW9 was recorded subsequent to the evidence of the Investigating Officer. It is to be noted that the cross examination of PW9 has not yet commenced and the petitioner accused will have ample opportunity to cross examine the investigating officer on all the facts to discredit and discard the said documents. Hence, permitting the prosecution to re-examine the investigating officer would not cause any prejudice to the petitioner-accused. The impugned order Dt. 14.8.2015 on Exh. 142 therefore does not warrant any interference.

13. By order Dt. 14.8.2015 on Exhibit 143, the learned Magistrate relying upon the decision of this Court in *Kishor Singnapurkar & Ors. v. The State of Maharashtra & Ors.* (Cri. Application No. 346 of 2012) has directed the Investigating Officer to record the statement of the witness Dnyaneshwar Khutwad and has further permitted the prosecution to examine him as a prosecution witness. Suffice to say that Section 311 of Cr.P.C. neither mandates recording of the statement under Section 161 of Cr.P.C. nor does this section provides any embargo on summoning any person as a witness, whose statement has not been recorded under Section 161 of Cr.P.C. The only mandate of Section 311 of Cr.P.C. is that the evidence of such person is essential for the just decision of the case.

14. At this stage it would also be relevant to consider the provisions of Section 161 of Cr.P.C. Sub sec.(1) of Section 161 Cr.P.C. empowers the police officer investigating the crime to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Sub sec. (3) of Section 161 provides that the police officer may reduce into writing any statement made to him in the course of the examination under this section. A plain reading of the sub section indicates that the police officer is not bound to reduce the statement into writing, and failure to record the statement in writing would not render the testimony of such witness inadmissible, though it might finally affect the probative value of the evidence of the witness. Reliance is placed on the case of *Zahira Habibullah Sheikh and Another etc. Vs. State of Gujarat and Others etc.*, wherein the Apex Court has held that:

"Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the concerned police officer. Sub-section (3) is relevant, and it requires the police officer to reduce into writing any statement made to him in the course of an examination under this Section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statement made by a witness to the police officer during investigation may be reduced to

writing. It is not obligatory on the part of the police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the Section is a truthful disclosure by the person who is examined"

15. It is also to be noted that in summons triable cases, under Section 254 of Cr.P.C. the Magistrate is required to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence. Sub sec.(2) of Section 254 enables the Magistrate, if he thinks fit, on the application of the prosecution or the accused, to issue summons to any witness directing him to attend or produce any document or other thing. This section does not prohibit examining any witness whose statement has not been recorded under Section 161 of Cr.P.C.

16. A combined reading of Sections 161(1) and (3), 254 and 311 of Cr.P.C. leaves no doubt that the prosecution is not precluded from calling any witness at the enquiry or trial who has not been examined by the Police orally or whose statement has not been reduced into writing under Section 161(3) of the Cr.P.C. The prosecution can neither be confined to the evidence of only those persons whose statements had been reduced into writing under Section 161(3) nor can the recording of such statement cannot be a precondition for examining any person as a witness under section 311 Cr.P.C. This section confers a wide discretion on the court to act as the exigencies of justice require. The court can exercise this power either suo moto or upon the grounds spelt out in the application of the prosecution or the accused, provided the Magistrate is satisfied that recall or re-examination of a witness, or examination of any person as a witness is essential to the just decision of the case.

17. This being the position, in my considered view, the law neither mandates recording of statement under Section 161 of every such person who is proposed to be examined as a prosecution witness nor bars examination of any persons as a witness, whose statement has not been recorded under Section 161 of Cr.P.C. Needless to state that provisions of Section 161 and 311 of Cr.P.C. have got different object, scope and operate in different spheres. Therefore, preventing the prosecution from examining any person whose statement is not recorded under Section 161 of Cr.P.C. would in my view, render the provisions of Section 311 Cr.P.C. nugatory.

18. The decision of this Court in Kishor Singnapurkar (supra) also does not enunciate a proposition that it is mandatory to record the statement of the person sought to be examined as a witness under Section 161 of Cr.P.C. or that there is a prohibition to examine a witness whose statement has not been recorded. That was not the true purport of the order passed by this court. This is evident from the fact that the single Judge of this Court has observed that -

"6. Though there cannot be a general prohibition for examining the witness whose statement had not been recorded during the course of investigation,

propriety requires that the statement of such a person should be recorded atleast before he is permitted to enter the witness box. ...".

19. It was on the peculiar facts of the said case, that the learned Single Judge of this court had felt it necessary to direct the police to record the statement of the witness under Section 161 of Cr.P.C. Furthermore, the said order was passed with the consent of the parties. The said judgment therefore does not lay down any proposition of law that it is mandatory to record section 161 of Cr.P.C. before a person is summoned as witness under Section 311 of Cr.P.C. Needless to state that a judgment must be read as a whole and it is not permissible to pick out a sentence from the judgment, divorced from the context of the question under consideration and treat it to be the enunciation of law. It also need not be emphasized that when a order is made by consent of the parties, the court does not adjudicate upon the rights of the parties nor lays down any principle of law. The learned Magistrate has therefore erred in following the decision mechanically and further directing the investigating officer to record the statement of said Dayanand Khutwad.

20. Now coming to the question whether the evidence of this witness was essential for just decision of the case, the material on record indicates that the crime was registered in the year 2005, and upon completion of the investigation, chargesheet was filed in the same year. The Investigating agency, for the reasons best known, had not recorded the statement of Dnyaneshwar Khutwad, in the course of the investigation nor any leave was sought under Section 173(8) of Cr.P.C. for further investigation. None of the witnesses, whose statements were recorded under Section 161 of Cr.P.C., had referred to the presence of Dnyaneshwar Khutwad at the place of the incident. Similarly, the witnesses who were examined before the court had also not referred to the presence of Dnyaneshwar Khutwad at the place of the incident.

21. The statement of PW 9 was recorded under Section 161 of Cr.P.C in the course of the investigation. He had not made any reference to the witness Dnyaneshwar Khutwad in his statement recorded under Section 161 of Cr.P.C. This witness had for the first time in his evidence recorded on 11.8.2015, had referred to the presence of Dnyaneshwar Khutwad at the place of the incident. It was on the basis of this improvised version which had come forth after a lapse of 10 years, that the prosecution had filed the application at Exh. 143 and sought to examine Dnyaneshwar Khutwad as a witness. The learned Magistrate had allowed the said application by merely observing that no prejudice would be caused if the statement of Dnyaneshwar Khutwad is recorded under Section 161 of the Cr.P.C. and he is examined as a prosecution witness. Apart from quoting the relevant paragraphs from the judgment cited before him, the learned Magistrate has not assigned any reasons either for summoning Dnyaneshwar Khutwad as a prosecution witness or for concluding that the accused would not be prejudiced by such action.

22. It has to be borne in mind that Section 311 of the Cr.P.C. confers vast

discretionary powers on the Court to receive additional evidence which is germane to the issue involved in the case. The Apex Court in *Natasha and Vijay Kumar* (Supra) while considering the scope and object of Section 311 of the Cr.P.C., has emphasized that the power under this section must be exercised judiciously with great care and circumspection. These wide discretionary powers must be invoked to receive the evidence i.e. essential for the just decision of the case. It, therefore, follows that the power under Section 311 of the Cr.P.C. cannot be exercised arbitrarily or capriciously. The application under Section 311 of the Cr.P.C. cannot be allowed to fill up lacuna in the case of the prosecution or of the defence. Such additional evidence must not be received to the disadvantage of the defence of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the other party. The only determinative factor in exercising the discretionary power under this section is that summoning/recalling of the witness is essential for the just decision of the case.

23. In the instant case, the learned Magistrate has not considered whether the evidence of Dnyaneshwar Khutwad was germane to the issue or whether it was essential for the just decision of the case. On the contrary, under the garb of exercising the powers under Section 311 of the Cr.P.C., the learned Magistrate has allowed the prosecution to introduce the new witness as to fill up the lacuna in the case of the prosecution. Such exercise of power gives unfair advantage to the prosecution and further causes prejudice to the defence of the accused. In my considered view, the learned Magistrate has not exercised the discretion judiciously but has exercised the same arbitrarily to the disadvantage of the accused. The said order, therefore, cannot be sustained.

24. Under the circumstances, and in view of the discussion supra the petition is partly allowed. The impugned order passed on application at Exhibit 143 directing the Investigating Officer to record the statement of Dnyaneshwar Khutwad under Section 161 of Cr.P.C. and further allowing the prosecution to examine said Dnyaneshwar Khutwad as a prosecution witness is hereby quashed and set aside.

Anuja Prabhudesai, J.

At this stage, the learned Counsel for the intervenor prays for stay of the order. The request is rejected.