
(1986) 08 BOM CK 0051

In the Bombay High Court

Case No : Criminal Application No. 658 of 1958

Shridhar Waman Surushe

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 27-08-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Penal Code, 1860 (IPC) — Section 484, 494

Citation : (1987) 1 BomCR 533 : (1986) MhLj 942

Hon'ble Judges : G.G. Loney, J

Bench : Single Bench

Advocate : V.S. Sirpurkar and K.V. Sirpurkar, for the Appellant; Habibuddin Ahmed, Assistant Public Prosecutor for non-applicant No. 1, for the Respondent

Final Decision : Allowed

Judgement

G.G. Loney, J.

1 Scope of recalling and re-examination of a witness under the provisions of section 311, Cri.P.C. arise for consideration in this criminal application.

2. The applicant has approached this Court against an order dated 11-9-1985 passed by the J.M.F.C., Buldana in Criminal Case No. 81 R/83 granting permission to the complainant to recall and re-examine her in her complaint case against her husband u/s 494 I.P.C.

3. The relevant facts are that Narmada filed a complaint case against Shridhar and 21 others for an offence u/s 494 read with section 34, I.P.C. She alleged that she is the legally wedded wife of Shridhar and during the subsistence of their first marriage, Shridhar performed second marriage with accused No. 16. She further alleged that the other accused person abetted the offence by bringing about the second marriage. It is her case that after her marriage with Shridhar in February, 1972, she was deserted for some time and there were certain legal proceedings between them. It appears that Narmada examined herself as

witness No. 1 and also examined other witnesses and closed her case. Thereafter, the accused was also examined u/s 313, Cri.P.C. During his examination as an accused, he completely denied his marriage with Narmada. At this stage, an application u/s 311 Cri.P.C. was filed by her for recalling and re-examining her in the trial. It was her contention in the said application that she never expected denial of her marriage and it came as a surprise to her. She further stated that she is an illiterate lady and was not knowing the legal consequences of denial of the marriage and therefore, she was compelled to make the aforesaid application for recalling and re-examining her. She stated in her application that she had filed an application for restitution of conjugal rights during the strained relation with her husband, but the matter was reconciled and a pursis was filed by the parties to that effect in Court and the husband had expressed his readiness and willingness to reside and cohabit with her. She further stated in her application that she was cross-examined and during her cross-examination, the suggestion of denial of marriage was also introduced by the accused. Thus, she claimed to be recalled and re-examined for the aforesaid reasons by application at Exhibit 50. It gives impression that probably, she wanted to prove the pursis in which terms of reconciliation were stated. On hearing the parties the learned trial Court allowed the application on the ground that, in the interest of justice and for the just decision of the case, it was essential to recall and re-examine the complainant. It is this order of the trial Court which has been challenged in this criminal application.

4. Shri Sirpurkar appeared for the applicant Shri Habibuddin Ahmed, A.P.P., appeared for non-applicant No. 1 State. The respondent No. 2 though served, remained absent. I have heard the Counsels of the point of recalling and re-examining a witness.

5. Shri Sirpurkar, the learned Counsel for the applicant, submitted before me that the provision u/s 311 Cri.P.C. for recalling and re-examination of a witness is not meant to fill up the gap which a party has created. According to him, by virtue of the order passed by the trial Court, the non-applicant No. 2 is seeking to fill up the gap of prosecution which should not be allowed. According to Shri Sirpurkar, the complainant was examined and cross-examined by the Counsel for the accused. She was examined as witness No. 1 in the beginning and a suggestion was also given to her about the denial of her marriage with the accused. This suggestion, according to him, was sufficient hint to put her on guard to arrange her strategy in the prosecution. But the application Exhibit 50 which is filed after the examination of the accused, is obviously with purpose to fill up the gap. As stated earlier, it is therefore, necessary to see the scope and application of section 311 Cri.P.C. Powers of a Criminal Court u/s 311 Cri.P.C. are very wide. This very width suggests the necessary utility and importance of this provision. This provision aims to arm a Court with vast discretion to find out the truth in a given case by summoning any person as a witness or examine any person present in Court or recall and re-examine any person already examined if his evidence appears to it to be essential for the just decision of the case. The entire

purpose of this enabling provision is to arrive at the truth or otherwise of the fact under investigation. Thus section 311 confers a wide discretion to the Court to act as the exigencies of justice require.

6. The aforesaid provision was in existence u/s 540 of the Old 1898 Code. However, there is little change in the wording of corresponding section 311 under new Code of 1973. The words "to be" have been added after the words "appears to it" and before the words "essential to". Although this little change has not brought about any significant change in the principle law applicable to this section, but it adds to emphasis that the evidence of a witness sought to be examined under this section must be essential to the just decision of the case. However, the discretion given u/s 311 Cri.P.C. has to be invoked in relation to the facts of a particular case. But the discretion cannot be allowed to be used to fill up the gaps in the evidence of a party who seeks recourse to the use of this provision. The following decisions can be usefully referred in the behalf : 1972 Criminal Law Journal 994, State v. Ulfatia, in which it has been held that :

"First part of section 540 empowers a Court either to examine a witness or not to examine him and this discretion, has to be judicially exercised, but the second part of the section is mandatory and the Court trying an accused has to take recourse to the second part of the section it appear to it that it is essential to examine a witness in order to be able to do justice in the case."

Next authority is Phulloo and Others Vs. State, Phulloo and others v. State, in which Allahabad High Court had held:

"In a case instituted on police report, after framing of the charges against the accused certain date was fixed for prosecution evidence. On that date the witnesses did not turn up and the case was adjourned to next date on which date the witnesses for prosecution were present in Court but the Assistant Public Prosecutor was not available to examine them. The Magistrate closed the prosecution case and proceeded to record the statement of the accused u/s 342, Cri.P.C. Subsequently the Magistrate allowed the application of the Assistant Public Prosecutor, for the examination of the prosecution witness u/s 540 of the Code.

Held, that the impugned orders of the Magistrate were wholly illegal and must be quashed."

In Jamatraj Kewalji Govani Vs. The State of Maharashtra, in the matter of Jamatraj Kewalji Govani v. State of Maharashtra, the Supreme Court has held :

"Chapter 21 of Cri.P.C. does not restrict the powers of Criminal Court u/s 540. Criminal P.C. and section 165 Evidence Act between them confer a wide discretion on the Court to act as the exigencies of justice require, section 540 is intended to be wide as the repeated use of the word any throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word "may" in the first

part and of the word "shall" in the second firmly establishes this difference. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, 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 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. There are, however, two aspects of the matter which must be distinctly kept apart, The first is that the prosecution, cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly, and unexpectedly. There is, however, the other aspect namely of the power of the Court which is to be exercised to reach a just decision. This power is exercisable at any time."

Shri Habibuddin Ahmad the learned Assistant Public Prosecutor, for the non-applicant No. 1-State also relied on the proposition of law in the last case. In the aforesaid authority, it has been laid down that the action of recalling a witness is equally beneficial to both the sides, the prosecution and the accused. But the prosecution cannot be allowed to rebut the defence evidence, unless the prisoner brings forward something suddenly and unexpectedly. According to Shri Sirpurkar by filing an application at Exhibit 50 the prosecution wanted to demolish the defence of the accused in as much as he has denied that he is legally married with the complainant. According to Shri Sirpurkar, the accused has suggested his defence at the initial stage when complainant Narmada was cross-examined as prosecution witness No. 1 in this case. Accused also denied his marriage with Narmada in his examination u/s 313 Cri.P.C.

In view of the defence suggested by accuse as aforesaid, the complainant should have taken a hint as to which direction the wind was blowing and should have placed on record the relevant material to establish her prosecution case. But she has not taken enough care at the initial stages and made the application in question at the end of trial.

7. Shri Habibuddin Ahmad, the learned A.P.P. for the State, submitted that the denial of marriage by the accused with the complainant was unexpected. When he stated so in his examination as an accused, it was sudden and unexpected and therefore, on the basis of the aforesaid authority the permission to recall and re-examine the witness was rightly granted by the trial Court.

8. With reference the facts in the instant case, it has to be seen that the statement of the accused about the denial of his marriage with the complainant cannot be said to be sudden and unexpected. The accused had at the initial stage, suggested his defence by denying his marriage with the complainant by giving suggestions to her when she was cross-examined. It is clearly stated in Exhibit 50 that such questions were put to her during her cross-examination. Thereafter, other witnesses were examined and lastly, the accused was examined u/s 313 Cri.P.C. Thereafter, his denial of his relationship with the complainant cannot be said to be sudden and unexpected looking to the facts of this case.

The complainant should have understood the defence of the accused when she was cross-examined in this behalf. It was, therefore, expected from her to place on record all the evidence which she possessed to establish her marriage with the accused. In a criminal trial normally, there is no burden on the accused and the prosecution has to stand on its own legs. Keeping this legal position in mind, one has to reasonably anticipate that the accused may not admit the fact which implicate him, exposing him for the punishment provided for the offence. Under these circumstances, it cannot be imagined that denial of marriage was sudden and unexpected in the instant case. Accused denied his relationship with the complainant as a defence in this case. The Supreme Court in the aforesaid decision *Jamtraj's* case has clearly laid down that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. In my view, looking to the facts of the instant case, the denial of the marriage by accused with applicant cannot be said to be sudden and unexpected. Therefore, the permission granted by the trial Court to recall and re-examine the complainant after the close of the trial is apparently to fill up the gap and this is contrary to the view taken by Supreme Court in this behalf. It has been clearly laid down that the purpose of recalling and re-examination of a witness is not to fill up the gap. It is however to be seen that it depends on the facts of each case as to whether the recalling and re-examination of a witness is with a view to fill up the gap in the evidence of a party who invokes the provision of recalling. Allowing the complainant to re-examine her in the instant case, would clearly amount to permitting her to fill up the gap. A mere look at Exhibit 50 would show that she wanted to prove the contents of a pursis containing conditions of reconciliation. That by itself, even if proved, may not constitute a valid proof for her valid marriage with the applicant. But, by granting permission it would certainly mean to permit her to fill up the gaps in her prosecution case. I am firmly of the view that the trial Court has clearly committed an error of law in allowing Exhibit 50, by permitting, recalling and re-examination of the complainant.

In view of the legal proposition stated above, the order of the trial Court requires to be quashed and set aside. I, therefore, quash and set aside the order of the trial Court dated 11-9-1985. The criminal application is allowed. Rule is made absolute.