

(2017) 06 GUJ CK 0048
In the Gujarat High Court
Case No : 795 of 2016

VALU LAKHMAN SOHLA & ANR.

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 23-06-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 397](#), [Section 401](#), [Section 311](#) - Calling for records to exercise powers of revision - High Courts powers of revision - Power to summon material witness, or examine person present
[Indian Penal Code, 1860](#), [Section 302](#), [Section 147](#), [Section 324](#), [Section 323](#), [Section 148](#), [Section 325](#), [Section 149](#), [Section 427](#), [Section 143](#) - Punishment for murder - Punishment for rioting - Voluntarily causing hurt by dangerous weapons or means - Punishment for voluntarily causing hurt - Rioting, armed with deadly weapon - Punishment for voluntarily causing grievous hurt - Every member of unlawful assembly guilty of offence committed in prosecution of common object - Mischief causing damage to the amount of fifty rupees - Punishment

Citation : (2017) 06 GUJ CK 0048

Hon'ble Judges : S.H.Vora

Bench : Single Bench

Advocate : ASHISH M DAGLI, MAITHILI MEHTA

Judgement

1. By way of present revision application filed u/s 397 r/w section 401 of the Code of Criminal Procedure, 1973 (for short "the Code"), the applicants have challenged order dated 21.9.2016 passed by the learned 6th Additional Sessions Judge, Rajkot, whereby the learned Judge allowed the application Exh.208 preferred by the prosecution under the provisions of section 311 of the Code.

2. It appears that after conclusion of trial of Sessions Case No.11/2013 for the offences punishable u/s 302, 143, 147, 148, 149, 323, 324, 325, 427 of the IPC and u/s 135 of the B.P. Act, the applicant - original complainant through prosecution made an application at Exh.208 seeking recall of the witnesses i.e.

PW 9 - Dr. Vinod Sukhalal Chavda as well as PW 25 Mr. Dilip Jilubha Rathod for the purpose of their further examination-in-chief on the ground that in the report Mark 44/22 for addition of the offence punishable u/s 302 of the IPC, it has been mentioned therein that the deceased was brought to the Civil Hospital for his treatment. Vide affidavit Exh.206, it is stated on oath that the deceased was brought to the Civil Hospital in dead condition and therefore, no dying declaration has been recorded. Similarly, the prosecution side also made a reference of deposition of PW 9 and more particularly, cross-examination recorded in para 15, inasmuch as he admitted that he did not bring the treatment papers of deceased Mr. Govindbhai Lakhubhai and for want of papers, he could not state whether he treated Mr. Govindbhai or not.

3. At the time of hearing of the present revision application, learned APP Mr. Rakesh Patel made a statement at bar that deceased Mr. Govindbhai Lakhubhai was treated by PW 9 and such treatment papers are available with the Civil Hospital, but PW 9 did not bring the case papers of treatment given to deceased Mr. Govindbhai Lakhubhai. No question pertaining to said aspect was brought on record in the examination-in-chief of PW 9. It is also a matter of fact that defence side agreed to admit and accept report praying addition of offence u/s 302 of the IPC after conclusion of trial as per application Exh.203.

4. Upon considering the submissions made at bar, the Court has noticed that the purpose and object behind admitting the document, namely, report to add offence u/s 302 of the IPC to bring on record that no dying declaration of deceased Mr. Govindbhai Lakhubhai was taken though he was alive as per report Mark 44/22 and therefore, the defence moved an application Exh.203 to admit such report. Similarly, concerned investigating officer PW 25 also filed an affidavit at Exh.206 inter alia declaring on oath that deceased Mr. Govindbhai Lakhubhai was brought to the Civil Hospital in dead condition and therefore, the dying declaration was not recorded. The admission of report on the part of the defence side and filing of affidavit by concerned investigating officer after conclusion of arguments before the learned Sessions Judge surfaced on record and therefore, the prosecution moved an application Exh.208 to recall PW 9 and PW 25 with a view to bring true and correct facts on record as to whether the deceased was brought to the Civil Hospital in dead condition or not.

5. Before the matter is considered on its merits, the power of the Court to recall and re-examine any person already examined is found in section 311 of the Code, 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."

6. Needless to say that request for recalling of the witness either for further

cross-examination or for examination-in-chief is not to be routinely granted, but justifiable reason has to be made out to satisfy the Court whether recalling of the witnesses for further evidence is warranted or has become essential for the just decision of the case. The purpose and object of provisions of section 311 of the Code for recalling the witnesses appears to be for conducting fair trial.

7. It is a matter of fact that the matter is at the stage of arguments or it appears that the arguments have been concluded. Normally, the Court would not open up a closed trial once again, but looking to the development that took place after conclusion of evidence, namely, accepting the document at the instance of the defence side i.e. report Mark 44/22 requesting to add section 302 and certain contents leading to infer that no dying declaration of deceased Mr. Govindbhai has been recorded or could have been recorded and simultaneously, filing of affidavit by Mr. Dilip Rathod below Exh.206 on 29.8.2016 to the effect that as deceased Mr. Govindbhai was brought in dead condition, no dying declaration was recorded, necessitated filing of the application Exh.208. It is relevant to note here that PW 25 in his deposition in terms stated that the dying declaration has been recorded, but subsequently, he filed an affidavit Exh.206, inter alia, stating that the deceased was brought in dead condition. Such affidavit is impermissible. Apart from it, learned APP made a statement at bar that deceased Mr. Govindbhai was treated at Civil Hospital, by PW 9 and he placed on record treatment papers for Court's perusal. Under these circumstances, it cannot be said that the prosecution is trying to fill up any lacuna in the case, but attempt is made to correct the errors occurred in the evidence of PW 9 and 25. In other words, the relevant evidence, namely, treatment papers of deceased Mr. Govindbhai was not brought on record due to inadvertence and therefore, the learned trial Judge has rightly permitted to rectify such mistakes. At this juncture, it is relevant to refer a decision in case of *Rajeswar Prasad Misra Vs. State of West Bengal* reported in 1965 AIR SC 1887 and in the judgment, the Hon'ble Apex Court observed as under: "...the criminal Court has ample power to summon any person as a witness or recall or reexamine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

8. At this stage, learned advocate Mr. Dagli pressed into service decision rendered in case of *Menashi Rajabhai Kathad Vs. State of Gujarat* reported in 2017(2) GLR 1412, so as to contend that the application u/s 311 cannot be allowed to fill up lacuna in case of prosecution or to the disadvantage of the accused or caused serious prejudice to the defence of the accused. In that case, the petitioner accused made an application to recall the witness Nos.1 & 3 for the purpose of their further cross-examination since some important questions were left to put them by inadvertence. In the factual background of the said case, the learned trial Judge rejected the application and refused to recall the witness for

further cross-examination holding that further crossexamination are not connected to any subsequent development or on finding any important or relevant material which may be helpful in elucidating truth by further crossexamination of two witnesses of the prosecution. Remotely, no such fact exists in the case on hand and therefore, decision cited at bar by learned advocate Mr. Dagli is misplaced both on law and facts.

9. In Court's considered opinion, if PW 9 and 25 are not recalled and reexamined by the prosecution side, then it may not be a fair trial, because fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the Society.

10. In view of above and for the reasons stated above, the Court finds that there is no illegality or impropriety committed by the learned Sessions Judge while accepting application Exh.208 and therefore, the Court finds that no interference is required in the impugned order and therefore, present Criminal Revision Application stands rejected. Rule discharged.

11. While parting with this order, this Court finds that learned PP before the trial Court is not well conversant with the facts of the prosecution case. Not only that the Court also feels that either PW 9 and/or PW 25 or other investigating officers, who are not examined, are trying to conceal relevant materials so as to keep them out of consideration of the Court. No effort is made to place on record as to who brought deceased Govindbhai to Civil Hospital and which police officer accompanied him or reached at Civil Hospital at first point of time. The Court hopes that the learned trial Judge would take care of such collusive tactics, if any, adopted by either of any witnesses examined or not examined and shall take active participation in the matter, wherein serious offence of murder is involved, so that no one is deprived of fair trial.