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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1128 OF 2019

Shailesh Vinayak Chavan]
Age- 40 Years, Occ- Business]
Having address at Ish Chayya Society]
Gavanipada, Nahur Road, Mulund,]
(West), Mumbai.] ...Petitioner
]]
Versus]]
]]
The State of Maharashtra]
(Being represented by Mulund Police]
Station)] ...Respondent

Mr. H.V. Kanjalkar, for petitioner.
Mr. A.R. Patil, APP for State.

CORAM : S. S. SHINDE, J
DATE : 24th June 2019

JUDGMENT:

1. This petition takes an exception to the impugned order dated 22nd October 2018 passed on Exhibit "2" in Criminal Appeal No. 964 of 2018 by Sessions Court, Mumbai. There is further prayer to direct the said Court to recall Jagannath Shriпти Pawar (PW 6) and allow the petitioner to cross examine him on the point of omissions in the statements of Janardhan Lohar (PW 5) and more specifically portions marked 'A', 'B' & 'C' as per provisions of Section 391 of the Criminal Procedure Code (for short 'Cr.Pc'). In the alternative, it is also prayed that, the petitioner may be permitted to record further evidence of Jagannath Pawar (PW 6) and allow the petitioner to cross

examine him on the point of omission in the statements of Janardhan Lohar (PW 5).

2. The petitioner herein was tried in C.C. No. 376/P/2001 and Trial Court relying upon the evidence of eye witnesses including injured witnesses Keshav Vane (PW 1) & Mrs. Kusum Lohar (PW 6) coupled with the medical evidence convicted the petitioner for the offence punishable under Section 324 of Indian Penal Code. Being aggrieved by the said judgment and order dated 23.11.2016, the petitioner filed Criminal Appeal No.964 of 2016 before the Sessions Court for Greater Bombay. In the said appeal the petitioner on 3rd May 2016 preferred an application vide Exhibit-2 under section 391 Cr.Pc for recalling the investigating officer Janardhan Pawar (PW 6) in order to confront him with the omissions and contradictions, which portion was marked in the testimony of Janardhan Lohar (PW 5) at the stage of the trial. The said application came to be rejected, hence the present petition.

3. Learned counsel appearing for the petitioner submits that, due to inadvertence during the course of trial, the portions marked in the evidence of Jnardhan Lohar (PW 5) have not been exhibited for not being confronted with the investigating officer. The said factum also finds place in the judgment and order passed by the learned Magistrate. It is submitted that the portion marked 'A', 'B', & 'C' in the testimony of Janardhan Lohar (PW 5) has been noticed by

the learned Magistrate. If the evidence of Mr. Janardhan Lohar (PW 5) is perused, it can be noticed that, there are formal errors in his testimony in so far as his presence on the spot of incident is concerned. Mr. Janardhan Lohar (PW 5) claims to be an eye witness and the omissions that have already been made by him in his testimony go to the very root of the matter and therefore, with at most importance, it is necessary to confront the IO Mr. Janardhan Pawar (PW 6) with the portion marked 'A', 'B' and 'C' in the testimony of Janardhan Lohar (PW 5) for adjudication of the Appeal pending before the Sessions Court. It is submitted that the learned Metropolitan Magistrate while passing impugned order fails to take into consideration the law settled by Hon'ble Supreme Court as well as Bombay High Court especially dealing with an application moved under section 391 Cr.Pc specially when it concerns with curing technical and formal defects in recording of evidence. In support of aforesaid submissions learned counsel appearing for the petitioner relied upon ratio laid down in the case of *Ashok Tshering Bhutia Vs. State of Sikkim reported in CDJ 2011 SC 170, Rambhau Vs. State of Maharashtra, reported in CDJ 2001 SC 294 & Babu Choudhary & Ors. Vs. The State of Bihar & Ors. Reported in SCC Online Jhar 379: (2012) 3 AIR Jhar R 185: 2013 Cri Lj (Noc 37) 14.*

4. On the other hand learned APP submits that even if the evidence of Janardhan Lohar (PW 5) is excluded from the consideration, there is

evidence of Keshav Vane (PW 1) and Vijay Gujar (PW 2) who are injured witnesses. It is submitted that, the medical evidence fully supports the prosecution case and therefore, the Trial Court has rightly convicted the petitioner. It is further submitted that, the provision of Section 391 Cr.Pc cannot be invoked to fill up the lacuna as it is made clear by the Hon'ble Supreme Court as well as various High Courts including in aforesaid reported judgment relied upon by the learned counsel appearing for the petitioner.

5. Heard learned counsel appearing for the parties, with their able assistance perused pleadings and grounds taken in the petition, annexures thereto, impugned order and also reported judgments of Hon'ble Supreme Court & High Court relied upon by the learned counsel appearing for the petitioner. Admittedly, the petitioner during the course of trial did not file any application praying therein to allow the petitioner to examine the investigating officer in relation to portion marked 'A', 'B' & 'C' in the testimony of Janardhan Lohar (PW 5). It further appears that, the Trial Court relying upon the evidence of prosecution witnesses including injured witnesses Keshav Vane (PW 1) and Vijay Gujar (PW 2) and coupled with the medical evidence convicted the petitioner. At belated stage when the appeal is filed by the petitioner, petitioner filed an application to allow him to confront investigating officer so as to prove the omissions i.e. portion marked 'A', 'B' & 'C' in the testimony of Janardhan Lohar (PW 5), such prayer by the petitioner is only to

fill up the lacuna, and there was no attempt on his part to file such application during the course of trial. It is true that in appropriate cases the Court can invoke provisions of Section 391 Cr.Pc so as to cure errors, omissions, irregularities however, the Hon'ble Supreme Court in the case of **Ashok Tshersing Bhutia Vs. State of Sikkim** in para 15 held that:-

Additional Evidence:-

15. *Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity. The primary object of the provisions of Section 391 Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the Court of for vindication of an innocent person wrongfully accused, where the court omitted to record circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. (Vide Rajeswar Prasad Misra V. The State of West Bengal & Anr., AIR 1965 SC 1887; Ratilal Bhanji Mithani V. The State of Maharashtra & Ors., AIR 1971 SC 1630; Rambhau & Anr. V. State of Maharashtra, AIR 2001 SC 2120; Anil Sharma & Ors. V. State of Jharkhand, AIR 2004 SC 2294; Zahira Habibulla H. Sheikh & Anr. V. State of Gujarat & Ors. (2004) 4 SCC 158; and Sidhartha Vashist @ Manu Sharma V. State (Nct of Delhi), AIR 2010 SC 2352).*

6. On perusal of aforesaid observations of Hon'ble Supreme Court, it is crystal clear that, the power under section 391 Cr.Pc must be exercised sparingly and only in exceptional cases where the Court is satisfied that additional evidence would serve interest of justice. In the present case, Sessions Court has given cogent reasons for rejecting the application filed by the petitioner. The Sessions Court has observed that, granting permission to appellant to cross examine the investigating officer to prove portion mark 'A', 'B' & 'C' in the evidence of Janardhan Pawar (PW 5) would amount to giving an opportunity to fill up the lacuna, and it cannot be said to be irregular or formal defects.

7. The view taken by the Sessions Court is reasonable, plausible and is in consonance with the material placed on record. There is no reason to interfere with the impugned order. Hence, petition stands rejected.

[S. S. SHINDE , J]