

MHBU010004802018

**Spl.(ACB) Case No.1/2018**

State of Maharashtra

Vs.

Madan Kappusing Jarwal &amp; Anr.

**Operative order below Exh.76.**

(Dated : 01-10-2024)

1. This is an application under Section 311 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") to recall P.W.1 complainant Raju Ramdas Wagh and P.W.2 panch witness Vishnu Dnyaneshwar Kanadje.
2. Perused the application and say at Exh.77.
3. Heard learned Special Public Prosecutor Shri. S.P. Hiwale for State and learned Advocate Shri. Nitin D. Runwal for accused.
4. In short, the prosecution had examined P.W.1 complainant and P.W.2 panch witness and the accused had opportunity to cross-examine them. It is contended that during the evidence by prosecution, the witnesses were shown memory card (Article-D) regarding verification panchanama and trap panchanama; and the memory card (Article-F) of natural voice recorded by Police of accused Nos. 1 & 2 and the informant. However, the prosecution forget to run the memory card wherein the conversation between the complainant and accused Nos.1 & 2 were recorded. The said conversation is referred in verification

panchanama (Exh.34) and trap panchanama (Exh.36). It is further submitted that the natural voice recording is at Exh.38 and *Wachan Tipani* is at Exh.39 between the complainant and both the accused. Therefore, it is necessary to recall P.W.1 and P.W.2 for limited purpose i.e. to run memory card drive and get proved the same.

5. The learned Advocate for the accused strongly opposed the application on the ground that the application is filed at belated stage without any proper reason. Further, the prosecution has not brought to the notice of the witnesses when they were recorded. Thus, now after the evidence of other witnesses is closed to fill up the lacuna, the present application is filed to recall the witnesses. It is further submitted that earlier the accused moved an application to recall the witnesses and to supply the clone copies of the memory card and also to recall those witnesses for cross-examination, but as the prosecution strongly opposed the said application, the witnesses could not be recalled and the accused not pressed the said application. It is submitted that earlier when the accused preferred an application to recall the same witnesses, the prosecution has strongly opposed, but after the said application was not pressed, the prosecution, at belated stage, filed this application.

6. I have given my thoughtful consideration to the

submissions of both the parties with the evidence recorded. The accused is facing trial under Section 7 of the Prevention of Corruption Act. From the material on record, it could be seen that during the verification panchanama and trap panchanama, the conversation between complainant as well as accused Nos.1 & 2 were recorded and of it's memory card was produced alongwith the charge-sheet. It is worth to note that earlier the applicant-accused preferred application (Exh.71) to recall the same witnesses. But, as the prosecution strongly opposed, the same was not pressed.

7. It is well settled that exercise of power under Section 311 of Cr.P.C. cannot be used for filling up lacuna in a prosecution case, unless the facts and circumstances of the case, make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused or resulting in miscarriage of evidence. Further, by way of recalling the witnesses additional evidence must not be received or to change the case of the parties.

8. In the present case at hand, it could be gathered from the F.I.R. as well as verification panchanama and trap panchanama that allegedly the accused has made demand of which the voice recording was done. Both the prosecution as well as accused intend to again examine P.W.1 and P.W.2. The accused

want to further cross-examine P.W.1, whereas prosecution intends to get proved the memory card, which are already marked Article-D and F. In case, inadvertently there is mistake or latches had occurred while conducting the matter the same cannot be termed as lacuna. It is well settled that a criminal law is vough for discovery of truth and though they are required to be conducted as per the procedure prescribed for such a trial, still the procedure being for guiding both the parties receiving fair and equal opportunity. The violation of the procedure or mistake, even if, occurred, but not causing prejudice to the other side, then when the best evidence regarding the relevant issue cannot be allowed to be kept away from the Court.

9. In the present case at hand, if the application is allowed, it would not only the prosecution will get opportunity to run the memory card, but as already by filing application (Exh.71), the accused want to cross-examine those witnesses, he will get opportunity to cross-examine further. Therefore, in my considered view, considering the fact and circumstances of the present case, it is proper to allow the application. However, it has been brought on record that the copy of the memory card was not provided to the accused. Hence, it is necessary to direct to provide the clone copies of the memory card. Accordingly, I pass the following order.

ORDER

1. Application (Exh.76) is allowed.
2. P.W.1 complainant Raju Ramdas Wagh and P.W.2 panch witness Vishnu Dnyaneshwar Kanadje be recalled and accordingly issued summons.
3. Before issuance of summons to the witnesses, the prosecution is directed to provide clone copies of the memory card, which they want to run before those witnesses.
4. Accordingly, the application (Exh.76) stands disposed of.

Dt. 01-10-2024.

(Shridhar M. Bhosale)  
Sessions Judge, Buldana