

**Order below exh.73 in Sessions Case No.68/2019**

(CNR No. MHRT010010382019)

1. Present application is given by accused No.1 for recalling prosecution witnesses under section 311 of the Code of Criminal procedure for their further cross examination.
2. Accused No.1 Rushikesh Vijay Sangare is an under trial prisoner facing prosecution under section 302, 341 of Indian Penal Code, under section 3(1) r.w.25(1)(B)(a) of Arms Act and under section 37(1)(v) of Maharashtra Police Act 1957. He was initially represented by Adv. M.C. Nalawade and now he has engaged new lawyer Adv.P.P.Nene. It is contended in the application that cross examination of few witnesses was conducted earlier by Adv. Nalawade. But he did not ask material questions. It is also contended that defence is also not put forth to those witnesses. Therefore in the interest of justice these witnesses are required to be cross examined again on certain aspects.
3. APP Shri.PS.Shetye objected the application and filed say (Exh.80). He contended that cross examination of witnesses was conducted appropriately by earlier advocate and to fill up the lacuna said application has been moved by accused with ulterior motive. It would be very improper to give such opportunity only because of engagement of new lawyer.

4. Heard APP Shri.PS.Shetye for the prosecution and Adv. P.P. Nene for the accused.

5. APP P.S.Shetye for prosecution relied mainly on the precedent of **Hon'ble Bombay High Court** in the matter of Lawrence Dias Vs. State of Goa, 2019 ALL MR (Criminal) 2342 and contended that recall of witnesses should not be routinely permitted on the ground that earlier cross examination was not proper. However in this case law prayer of accused was found apparently wrong. In that matter accused was charged for assault on one of doctors on duty. He sought examination of such doctors to confront them with a discharge card which was showing that accused was not present at the time of incident. However said discharge card itself was showing that in the night of incident accused was present in the hospital. Considering such factual position, Hon'ble Bombay High Court has held that such recall of witnesses should not be routinely permitted. APP P.S.Shetye for the prosecution again relied on the precedent of **Hon'ble Bombay High Court** in the matter of Madanmohan Chandak Kundanlal Vs. State of Maharashtra, 2008 (2)B.Cr.C. 169 wherein it is held that change of lawyer cannot be a ground to invoke section 311 of the Code. It has to be kept in mind that case of Lawrence Dias (cited supra) was in respect of assault and case of Madanmohan (Cited supra) was in respect of dishonour of cheque. Comparatively in present case in hand accused is facing trial of murder. Law prescribes sentence of death to said offence. Therefore considering the graveness of offence, in my view, fair opportunity of defending

the charge should be given to the accused. I rely on the precedent of **Hon'ble Bombay High Court** in the matter of Prashant Wasudeorao Zore Vs. State of Maharashtra, 2015 ALL MR (Criminal) 4687, wherein junior counsel who had conducted the cross examination was not thoroughly prepared and by considering the gravity of the offence opportunity was granted to cross examine the witness by recalling him apprehending the serious prejudice if no effective cross examination is conducted.

6. APP Shri.Shetye also contended that this application is a lame effort of the accused to fill up the lacuna in the case. However while analyzing this aspect firstly it has to be seen, what is the meaning of lacuna? While handling aspect of lacuna, **Hon'ble Supreme Court** has opined in the matter of Rajendra Prasad Vs. Narcotic Cell, 1999 (6) SCC 110 that a lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses the adage “to err is human” is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as the relevant witness or latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case. But an oversight in the management of the prosecution cannot be treated as irreparable

lacuna. By observing these views Hon'ble Supreme Court has allowed the application of prosecution filed under section 311 of the Code and witnesses were recalled.

7. Adv. Shri.PP.Nene for accused also relied on the precedent of **Hon'ble Bombay High Court** in the matter of Vasudev Gulabrao Dhoke Vs. State of Maharashtra, 2017 ALL MR (Criminal) 4117. In that matter also, due to inadvertence some questions were not put to witnesses. At that time while analyzing the provision of section 311, it was held that when witnesses can be recalled to correct errors in prosecution case, same principle can be applied to defence case. It is further held that even otherwise there is difference between what is called as an attempt to fill up the lacuna in the prosecution case and what is called as an attempt to strengthen the defence. While the former, if allowed may cause prejudice to the accused, the later, if allowed would not cause any prejudice to the prosecution and would only strengthen the right of the accused to fair trial.

8. **Hon'ble Bombay High Court** in the matter of Mansaram Shaligram Savalkar Vs. State of Maharashtra, 2011 ALL MR (Criminal) 3651 held that, object of the criminal trial is to find out truth and it is the right of the accused to have fair opportunity. By observing such views, in this case also sufficient opportunity of cross examination of witnesses was given by holding that accused may suffer serious accusation because of inefficiency of the lawyer.

9. Considering the graveness of the charge every opportunity of fair trial should be given to the accused without looking towards technical aspects. With this I pass following order.

**Order**

1. Application is allowed.
2. Witness No.1 to 4 and 6 are recalled under section 311 of the Code for their further cross examination on behalf of accused No.1.
3. Issue witness summons to witnesses on payment of bhatta by accused No.1.

Date-17-11-2021

**(L.D.Bile)**

Additional Sessions Judge, Ratnagiri

I affirm that the contents of this P.D.F. file order are same, word to word, as per the original order.

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| Case Number                        |    | Sessions Case No.68/2019              |
| Name of Stenographer               | :- | Mrs.V.S.Kulkarni.                     |
| Name of Court                      | :- | Additional Sessions Court, Ratnagiri. |
| Dictated on computer by the P.O.on | :- | 17/11/2021                            |
| Order signed by the P.O. on        | :- | 17/11/2021                            |
| Order uploaded on                  | :- | 17/11/2021                            |