

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1658 OF 2021

Nayna Rajan Guhagarkar,
Age: 48 , Address : Chawl No. 479/2707,
Mahesh Nagar Chowk,
Near Maruti Mandir,
Sant Tukaram Nagar,
Pimpri, Pune

...Petitioner

Versus

The State of Maharashtra,
Through Yerwada Police Station,
Vide C.R. 3021/2015

...Respondent

Mr. Aashish Satpute for the Petitioner

Mr. S. S. Hulke, A.P.P for the Respondent–State

CORAM : REVATI MOHITE DERE, J.

TUESDAY, 13th JULY 2021

JUDGMENT :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith with the consent of the parties and is taken up for final disposal. Learned APP waives service on behalf of respondent–State.

3 By this petition, the petitioner has impugned the order dated 2nd February 2021 passed by the Additional Sessions Judge, Pune, below Exhibit 1 in Special Case (ACB) No. 70 of 2015. Learned counsel for the petitioner submits that it was impermissible for the learned Judge to recall the complainant Sujata Sutar, to prove the memory card seized in the present case, in the peculiar facts of this case. He submits that the impugned order dated 2nd February 2021 was passed taking recourse to Section 311 of the Code of Criminal Procedure (`Cr.P.C`), after the petitioner had disclosed his defence in the written notes of arguments submitted on his behalf under Section 314 of Cr.P.C. He submits that the impugned order was passed after the learned Judge had completed recording of evidence of witnesses; after recording 313 statement of the petitioner and after hearing the arguments in the said case. He submits that it was not permissible for the learned Judge to summon the complainant-Sujata Sutar to fill in the lacunae in the prosecution evidence, more particularly, after the petitioner had placed on record her written arguments. Learned counsel relied on the judgments in the cases of ***B. D. Goel v. Ebrahim Haji Husen Sanghani & Ors.***¹; ***Shankar Lotlikar v. Pundalik***

1 2001 Cri.L.J. 450

Venktesh Verlekar² and Nayana Rajan Guhagarkar v. The State of Maharashtra³.

4 Learned A.P.P opposes the application.

5 Perused the papers. The petitioner is facing prosecution for the offence punishable under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act. After investigation, charge-sheet was filed as against the petitioner. The prosecution in support of its case, examined its witnesses. After prosecution closed its evidence, the statement of the petitioner was recorded under Section 313 Cr.P.C. and her written say was filed. Thereafter, the prosecution advanced arguments on behalf of the State and the advocate for the petitioner also advanced his submissions on 6th January 2021. On 7th January 2021, written notes of arguments were filed by the petitioner's advocate alongwith a list of citations. On 8th January 2021, learned A.P.P replied to the arguments and as such the arguments of both the parties had concluded by 8th January 2021. The noting of 8th January 2021 as reflected in the Roznama annexed to the petition shows that the matter was adjourned for judgment on 11th January 2021. On 11th January 2021, the matter was again adjourned for judgment

² AIR Online 2020 Bom 1359

³ Cri. APL/1496/2016 dated 24/01/2018

on 21st January 2021. On 2nd February 2021, the impugned order was passed, by which, the learned Additional Sessions Judge issued summons to Sujata Sutar and panch Nayna Rishikesh Patil and the Investigating Officer/ D.C.P, ACB, Pune was directed to provide appropriate instruments for playing of memory card in the Court, with speakers. A perusal of the impugned order shows that the learned Judge whilst perusing the evidence, noticed that the memory card which allegedly contained the conversation between the complainant and the accused before and at the time of the trap, was not placed on record/verified during trial. The Court, on its own, took recourse to Section 311 Cr.P.C and passed the impugned order stating therein that since the memory card seized in the case was essential evidence, it was necessary to recall the witnesses for proving the said memory card. It is not in dispute that recording of evidence was over and so were the arguments advanced by the prosecution as well as the petitioner's advocate. As noted earlier, even written arguments were placed on record by the petitioner's advocate which document is also annexed as Exhibit `C' to the petition. In point No. 6 at page 66 (written notes of arguments), specific defence has been taken. The relevant portion of point No. 6 reads as under :

“POINT NO. 6 : TAPE RECORDER EVIDENCE

That, in the present case the tape recorded conversation has not been played in the open court and the same was not heard by any witness and the voice has not been identified by any witness.

The report of voice expert which is directly Exhibited as Exh. 58 cannot be read in evidence. The report is not covered u/s. 293 of Cr.P.C. and therefore without examining such expert the report cannot be read in evidence.

.....”

6 No doubt, under Section 311 Cr.P.C, any Court may, at any stage of any inquiry, trial or other proceeding 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, if it is essential to the just decision of the case, however, at the same time, the said power under Section 311 cannot be used to fill in the lacunae in the prosecution evidence. Having regard to the peculiar facts of this case that the impugned order issuing witness summons for recalling the complainant and panch was passed after arguments were advanced and written submissions were filed, on the aspect of memory card not being proved, it was not permissible for the learned Judge to pass the impugned order. The same, in the facts, would clearly tantamount to filling up the lacunae in the case. It would also result in causing serious prejudice to the petitioner.

7 Having regard to the aforesaid, the impugned order dated 2nd February 2021 passed by the learned Additional Sessions Judge, Pune, below Exhibit 1 in Special Case (ACB) No. 70 of 2015, is quashed and set-aside.

8 Rule is made absolute and petition is disposed of in the aforesaid terms.

REVATI MOHITE DERE, J.