IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No. 3558 of 1994

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHRI BALKRISHNA TIWARI

Versus

NANJI S PATEL & 3

Appearance:

MR R.J OZA with SUNIL C PATEL for Petitioner

MR VIPUL S MODI for Respondent No. 1

MR SR DIVETIA for Respondent No. 4

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 31/07/98

ORAL JUDGEMENT

Heard learned advocate Mr. R.J Oza for the applicant and Mr. V.S Modi for the Opponent No. 1 and Mr. S.R Divetia, learned APP for Respondent No. 4-State. Respondents Nos. 2 & 3 though served are not represented before me.

Applicant before this Court is the Intelligence Officer of the Directorate of Revenue Intelligence, Jamnagar. It appears that the Directorate of Revenue Intelligence, Jamnagar, on certain information received by it, on 17th July, 1986 carried out a raid in an agricultural field situated on Deesa-Dhanera Road and recovered 182 Kgs. of Opium. Pursuant to the said search and seizure, an investigation was made and a Criminal Case, being Sessions Case No. 11 of 1991 was instituted against the accused persons; the present Opponent Nos. 1 to 3. In the course of investigation, Opponent Nos. 1 to 3 were summoned on 18th July, 1986, 19th July, 1986 and 20th July, 1986 and their statements were recorded. The charge against the accused persons was framed on 22nd October, 1992. The prosecution examined its witnesses from 7th December, 1992 to 13th April, 1995. The accused entered their defence on 26th April, 1993 and examined their witnesses on 19th December, 1993. It appears that in the course of trial, on 18th November, 1992, the accused moved an application Exh. 26 for production of certain documents which were produced under list Exh. 58. Alongwith the said list, three documents, being the case papers of Medical case No. 1170 and 1169 and the copy of Entry No. 930 and 931 were produced and marked as 58/1, 58/2 and 58/3 respectively. Upon application given by the accused on 4th December, 1993, a witness summons was issued upon one Dr. L.K Rathod. However, said Dr. Rathod could not remain present on account of his having been transferred out of Jamnagar District. No attempt was made by the prosecution to examine either said Dr.L.K Rathod or the Jailor of the District Jail, Jamnagar. On 26th April, 1993, accused entered the evidence and stated before the court that their statements recorded on 18th July, 19th July and 20th July, 1986 were secured by coercion and undue pressure. Thereupon, prosecution moved the Court and requested to exhibit documents Mark 58/1, 58/2 and 58/3 which was rejected by the Court. The prosecution, feeling aggrieved, approached this Court by filing Criminal Misc. Application No. 526 of 1994, which was rejected on 25th January, 1994. However, liberty was reserved to the prosecution to move a separate application under Section 311 CrPC. In view of the said order, the prosecution filed Application Exh. 187 and prayed for issuance of witness summons upon Dr. L.K Rathod and the Jailor of the Jamnagar District Jail, who was incharge on the relevant dates. The said application came to be rejected by the learned Addl. Sessions Judge, Banaskantha on 30th April, 1994. Feeling aggrieved, the

prosecution has preferred the present application.

Mr. Oza has submitted that it was on 26th April, 1993 that the accused raised a defence of torture and that the statements were exacted from the accused by coercion and under undue pressure. The same being the new defence, the prosecution has a right to rebut the same and it is essential to examine the above referred witnesses to get the documents Mark 58/1, 58/2 and 58/3 exhibited. He has submitted that no period of limitation has been prescribed under Section 311 CrPC and an application under Section 311 can be made at any time of the trial. In support of his contention, he has relied upon Supreme Court judgment in the matter of Amarchand Agarwalla v. Shanti Bose & Anr. {(1973) 4 Supreme Court Cases 10}. He has particularly relied upon paragraph 18 of the judgment wherein the Court has held that, "....there is no limitation on the power of the Court arising from the stage to which the trial may have reached for examination of a witness under Section 540 provided the Court is bona fide of the opinion that for the just decision of the case the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. Refusing to examine a witness under Section 540 on the ground that it may prejudice the accused is a wrong approach." Mr. Oza has therefore emphatically submitted that to come to a just and correct decision, it is essential to examine the above referred witnesses and to bring the aforesaid documents on the record of the matter. The learned Judge was, therefore, not right in rejecting the application Exh. 187 made by the prosecution.

The application has been contested by Mr. Vipul Modi. Mr. Modi has submitted that it is not true that a new defence was raised by the accused on 26th April, 1993 while entering their defence. He has referred to the reply dated 9th February, 1987 given by the accused No. 1 to the show cause notice {Exh. 168}. Mr. Modi has read paragraph 4 of the said reply and has submitted that even prior to the lodging of the prosecution, at a very early stage on 9th February, 1987, the accused had raised a defence that the statements purported to have been recorded on 18th July, 19th July, and 20th July, 1986 were obtained by coercion and under undue pressure. He has further relied upon the cross-examination of the prosecution witness 12, one Ashok Kumar, the Asstt. Director of Revenue Intelligence, Jamnagar, and Prosecution Witness 13, one Devisinh Hathisinh Rahevar,

an Intelligence Officer in the Directorate of Revenue Intelligence, Jamnagar. Even in the said cross examination, it was suggested that the said statements were exacted from the accused under coercion and undue pressure. Mr. Modi has, therefore, submitted that the contention that a new defence was raised on 26th April, 1993 is baseless. The prosecution was aware of the defence of the accused atleast since 9th February, 1987, even after production of Documents exh. 58/1, 58/2 and 58/3, the prosecution did not take any step to get the concerned witnesses examined or to bring the said documents in evidence. Prosecution has, thus, failed to establish its case and the application Exh. 187 has been made only with a view to filling in the lacuna left by the prosecution. Such an application, therefore, could not have been granted by the learned Judge and has rightly been rejected.

In support of his argument, Mr. Modi has relied upon a judgment in the matter of Jamatraj Kewalji Govani v. State of Maharashtra {AIR 1968 SC 178}. In paragraph 10 of the judgment, the Court has held that, "....There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly." He has also relied upon judgment of this Court in the matter of Mohanlal Shamji Soni v. Union of India, {32 (2) GLR 974}. In the said case, the Court had a occasion to examine the scope and ambit of Section 311 CrPC. While doing so, in paragraph 18 of the judgment, the Court held that, ".....that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means.....Further, it is incumbent that due care should be taken by the Court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties." The principle laid down in the above referred two judgments of the Supreme Court has been followed by this Court in the matter of State of Gujarat v. Patel Naran Devji {1991 (1) GLR 530}.

It is not in dispute that Section 311 CrPC can be

invoked at any stage of the trial with a view to arriving at a just decision. Further, there is no period of limitation provided for invoking Section 311 CrPC. However, as decided in the above referred Supreme Court judgments, due care has to be taken and the said power should not be exercised unless the Court feels it necessary to come to a just decision. Further, the said power cannot be exercised for giving an opportunity to the prosecution to rebut the defence unless such defence is being raised suddenly or unexpectedly.

In the present case though the prosecution has contended that it was for the first time that on 26th April, 1993 a defence of torture and undue pressure was raised by the accused which necessitated the prosecution to examine the said witnesses, the same does not appear to be true. There is no dispute that on 9th February, 1987 accused-Opponent No. 1 had given a reply to the show-cause notice wherein specific statement was made that the statements purported to have been recorded on 18th, 19th and 20th July, 1986 were secured under undue pressure and coercion. That during those three days, accused were condemned in the custody of the Directorate of Revenue Intelligence. It is also not disputed that the defence of the accused was also suggested while cross examining the prosecution witnesses Nos. 12 & 13. In my view, the prosecution is not right in contending that it was for the first time on 26th April, 1993 the defence of undue pressure and coercion was raised by the accused. The attempt to bring the said documents in evidence at a belated stage i.e., after the accused entered the defence, is clearly with a view to filling in the lacuna left in the prosecution's case. Such an endeavour could not have been permitted by the learned trial Judge. The application Exh. 187 has, therefore, been rightly rejected by the learned Addl. Sessions Judge, Banaskantha.

In view of the above discussion, the present application is dismissed. Rule is discharged. Registry is directed to send the writ forthwith.

****

Prakash*