

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Criminal Appeal No. 123/2018

Asharam @ Ashumal, S/o Shri Thewardas @ Thaumal, By caste
Sindhi, R/o Sant Asharam Babu Ashram Motera Sabarmati,
District Ahmedabad, Gujarat.
(Presently lodged in Central Jail, Jodhpur)

----Appellant

Versus

State, Through PP

----Respondent

Connected With

D.B. Criminal Appeal (Sb) No. 622/2018

Miss Sanchita @ Shilpi D/o Mahendra Kumar Gupta, By Caste
Vaishy, R/o 35-Molshri Vihar, Vip Road, Raipur, Chhattisgarh.
Presently Lodged At Central Jail, Jodhpur

----Appellant

Versus

State Of Rajasthan

----Respondent

D.B. Criminal Appeal (SB) No. 665/2018

Sharad Chandra @ Sharat Chandra

----Appellant

Versus

State Of Rajasthan

----Respondent

For Appellant(s) : Mr. Devadatt Kamat, Sr. Advocate
assisted by Mr. Rajesh Inamdar,
Mr. Karan Khanuja, Ripul Swati
Mr. Ramendra Singh Saluja,
Mr. Pradeep Choudhary
(All through VC).

For Respondent(s) : Mr. R.R. Chhapparwal, PP.
Mr. P.C. Solanki (through VC).

**HON'BLE MR. JUSTICE SANDEEP MEHTA
HON'BLE MR. JUSTICE VINOD KUMAR BHARWANI**

J U D G M E N T

Judgment pronounced on ::: **10/02/2022**
Judgment reserved on ::: **25/01/2022**

BY THE COURT : (PER HON'BLE MEHTA, J.)

1. The appellant-applicant Asharam @ Ashumal (undergoing imprisonment at the Central Jail, Jodhpur) has been convicted and sentenced as below vide judgment dated 25.04.2018 passed by the learned Judge, Special Court, POCSO Act Cases, Jodhpur in Sessions Case No.116/2016 (152/2013) (NCV No.129/2016):

Offences	Sentences	Fine	Fine Default sentences
Section 370(4) IPC	10 Years' R.I.	Rs.1,00,000/-	1 Year's R.I.
Section 342 IPC	1 Year's R.I.	Rs.1,000/-	1 Month's R.I.
Section 506 IPC	1 Year's R.I.	Rs.1,000/-	1 Month's R.I.
Section 376(2)(f) IPC	Life Imprisonment (The remainder of Natural Life of the Accused)	Rs.1,00,000	1 Year's R.I.
Section 376D IPC	Life Imprisonment (The remainder of Natural Life of the Accused)	Rs.1,00,000	1 Year's R.I.

2. While the appeals of the appellant-applicant and the other co-accused persons were listed for hearing, an Interlocutory Application No.01/2021 came to be filed on behalf of the appellant Asharam @ Ashumal under Section 391 Cr.P.C. for taking additional evidence by way of summoning the police officer Shri

Ajay Pal Lamba, posted as DCP (West), Jodhpur at the time of the alleged incident, as a Court witness and to allow the applicant to cross-examine him.

3. The foundation of the application is based on the contents of a book authored by the said Shri Ajay Pal Lamba titled as **"GUNNING FOR THE GODMAN, THE TRUE STORY BEHIND ASARAM BAPU'S CONVICTION"**. The substratum of the grounds as set out in the application for summoning Shri Lamba as a court witness and to record his evidence in this appeal is based on certain excerpts of the said book.

4. It is asserted in the application is that the entire prosecution case is false and fabricated. In the handwritten complaint submitted at the Police Station Kamla Market, Central District, Delhi on 19.03.2013 (Ex.P/4), the victim Mst. 'S' (PW-5) claimed to have been ravished inside a hut like room (hereinafter referred to as 'the *Kutia*') in the *Aashram* of the appellant-applicant situated at Jodhpur. Neither in this handwritten complaint nor in the statement of the victim recorded on 20.08.2013 (Ex.P/7), was any description of the interiors of "the *Kutia*" given. Shri Ajay Pal Lamba, visited the crime scene on 21.08.2013 and conducted extensive site inspection and also undertook videography of the crime scene which fact has been described at length in the book, *referred to supra*.

Advancing his arguments in support of the prayer for summoning of Shri Lamba by way of additional evidence at the appellate stage, Shri Kamat, learned Senior Counsel representing

the appellant, drew the Court's attention to the following excerpts of the book, referred to *supra*, wherein, Shri Lamba, wrote:

"I immediately swung into action and sent a team to the location to scan and examine it thoroughly. I also gave clear instructions to the Station House Officer (SHO) of Soorsagar, Sub-Inspector Madan Beniwal, within whose jurisdiction the Scene of Crime (SoC) fell, to seal and secure the entire campus until investigations were completed. The investigating team would be required to visit the SoC multiple times and the evidence, any that remains, would need to be safeguarded. In any case, one would not be very wrong to assume that not much of the Forensic evidence would be found at the SoC because of first, the sheer delay in filing the FIR, and second, whatever important forensic evidence there was, which would have proven crucial for the case, would have most likely been destroyed by now.

....

..... While I was there, I thought it would be prudent to film a video of the place on my mobile phone, should I need to refer to it at some point during the course of the investigation. And so, I did."

(Emphasis Supplied).

5. Shri Kamat referred to the findings of the trial court at para No.191 of the impugned Judgment wherein, it is recorded that the victim had given extensive description of the situation inside 'the *Kutia*'. Shri Kamat urged that the trial court treated the evidence of the victim to be reliable as she had given a graphic description of the crime scene in her testimony. Reference was also made to the findings recorded at para No.230 of the impugned Judgment where a pertinent argument was raised by the defence that

videography of the crime scene was conducted beforehand and was shown to the victim and also towards the conclusion at para No.297 of the Judgment that no videography was undertaken of the crime scene by the SHO Shri Madan Beniwal. Shri Kamat urged that the circumstances unequivocally support the contention of the defence that the victim never entered 'the *Kutia*' as alleged in the FIR and in the subsequent statements including her sworn testimony. She was shown the video recorded by Shri Ajay Pal Lamba on 20.08.2013 whereafter, her police statement (Ex.D/2) was recorded on 21.08.2013 wherein, a detailed description of the *Kutia* was set out for the first time after the alleged incident. Shri Kamat further drew the Court's attention to the sworn statement of the victim Mst. 'S' (PW-5) where, she was confronted with a news item published in "*Dainik Bhaskar*" Newspaper on 22.08.2013 and was given a suggestion that she was made familiar with the crime scene by aid of the photographs and that is why, she could describe the same at a later point of time. Shri Kamat pointed out that the trial court disallowed the question. Till the publication of the book (*supra*), the defence had no idea regarding the video recorded by the DCP Shri Ajay Pal Lamba. No sooner, the book was published and came out in the market, this important fact came to light whereupon, the instant application has been preferred.

In support of his arguments, Shri Kamat placed reliance on the Supreme Court Judgment in the case of ***Zahira Habibulla H. Sheikh & Anr vs. State of Gujarat & Ors.***, reported in **(2004)4 SCC 158** and to be specific the observations made in the following paras of the said judgment:

"31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court," Vice-Chancellor Knight Bruce said :

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination. Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price for truth". This is a formulation which has subsequently been frequently invoked, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest

and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

47. Section 391 of the Code is another salutary provision which clothes the Courts with the power of effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of

further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. The legislature intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions."

Reliance was also made on the following Supreme Court Judgments:

(i) *Ajay Gupta vs. State through CBI, reported in (2005) SCC OnLine Del 1112;*

- (ii) Asim alias Munmun alias Asif Abdulkarim Solanki vs. State of Gujarat, reported in 2020 SCC OnLine SC 1098;**
- (iii) Rambhau & Anr. vs. State of Maharashtra, reported in (2001)4 SCC 759;**
- (iv) Union of India & Ors. vs. Haresh Virumal Milani, reported in (2017) SCC OnLine Bom 1705;**
- (v) Atma Ram vs. State of Rajasthan, reported in (2019)20 SCC 481;**
- (vi) V.N. Patil vs. K. Niranjan Kumar, reported in (2021)3 SCC 661 and**
- (vii) State Vs. Tr. N. Seenivasagan, reported in (2021) SCC OnLine SC 212,**

and it was fervently contended that summoning Shri Ajay Pal Lamba as a court witness and recording his evidence in appeal by invoking powers under Section 391 Cr.P.C. is absolutely essential in the interest of justice and for fair and just decision of the appeal. He thus implored the Court to exercise its powers under Section 391 Cr.P.C. by accepting the application and to direct summoning of the witness Ajay Pal Lamba in this Court for recording his evidence.

6. Per contra, learned Public Prosecutor and Shri P.C. Solanki, learned counsel representing the complainant opposed the application vehemently. They drew the Court's attention to the following disclaimer on first page of the book, publication whereof is attributed to Shri Ajay Pal Lamba:

"Some parts of the story have been dramatized for the purpose of lucidity and the enhancement of the narrative."

It was contended that undoubtedly, the book contains a dramatized description and since the narrative has been enhanced by the author, there is no sanctity in the argument that the author has given a true narrative in the book which actually is a fictional story telling and nothing beyond that. It was vehemently and fervently contended that the courts cannot be persuaded by fictional recollections of an author so as to impeach the evidence of the victim who is still suffering from the agony of the sexual assault made on her by the appellant and reopening of the proceedings in garb of this frivolous application would refresh her wounds. On these grounds, learned Public Prosecutor and the learned counsel representing the complainant sought dismissal of the application preferred under Section 391 of the Cr.P.C.

7. We have given our thoughtful consideration to the submissions advanced at bar and, have carefully gone through material placed on record.

8. Law is well settled by a catena of Supreme Court Judgments that power of recording additional evidence during the course of trial by virtue of Section 311 Cr.P.C. and at the appellate stage by virtue of Section 391 Cr.P.C., is to be exercised sparingly and should be resorted to only if recording of such evidence is considered essential for the just decision of the case.

In the case of ***V.N. Patil Vs. K. Niranjan Kumar, reported in (2021)3 SCC 661***, Hon'ble the Supreme Court, extensively

analysed the concept of recording additional evidence in a criminal trial and observed as below:

"14. The scope of Section 311 Cr.P.C. which is relevant for the present purpose is reproduced hereunder:

"311. Power to summon material witness, or examine person present

15. The object underlying Section 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code." It is, however, to be borne in mind that the discretionary power conferred under Section 311 Cr.P.C. has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion."

16. The principles related to the exercise of the power under Section 311 Cr.P.C. have been well settled by this Court in *Vijay Kumar vs. State of Uttar Pradesh and Another*, 2011 (8) SCC 136:

17. This principle has been further reiterated in *Mannan Shaikh and Others vs. State of West Bengal and Another*, 2014 (13) SCC 59 and thereafter in *Ratanlal vs. Prahlad Jat and Others*, 2017 (9) SCC 340 and *Swapan Kumar Chatterjee vs. Central Bureau of Investigation*, 2019 (14) SCC 328. The relevant Paras of *Swapan Kumar Chatterjee* (supra) are as under:

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

18. The aim of every Court is to discover the truth. Section 311 Cr.P.C. is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by

procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.”

9. Having deliberated upon the submissions advanced at bar and, after going through the record of the case to be precise, the FIR and the statements of the material prosecution witnesses, we feel that it would be premature for this Court to comment that for describing the crime scene, the victim was tutored on the basis of some videography.

Irrespective of the disclaimer, referred to *supra*, factum of recording of the video of the crime scene, some time before the victim’s statement under Section 161 Cr.P.C. (Ex.D/2) was recorded, is no longer in doubt in view of the above referred excerpts from the book written by Shri Ajay Pal Lamba. We are rather of the view that it was absolutely unwarranted for Shri Lamba to have published the book while the matter was still pending consideration at the stage of appeal and it may be viewed as an attempt to influence the Judicial proceedings.

10. Be that as it may. Now, the cat is out of the bag and the book has been published wherein, Shri Lamba, who was posted as DCP (West), Jodhpur at the relevant point of time, has emphatically written his memoirs and mentions that he visited the crime scene on 21.08.2013 and recorded a video thereof with his mobile phone so that it could be used for future references. He also emphasised on the need to protect the crime scene for future references and investigational purposes. The video would definitely be a valuable piece of evidence because it was recorded

during first visit by a police officer to the crime scene. Shri Lamba was not examined in evidence at the trial. The defence has given definite suggestions to the victim as well as the Investigating Officer Smt. Chanchal Mishra (PW-43) that a video recording of the crime scene was shown and on the basis thereof, the victim was familiarized with the crime scene and that is why, contradictions exist inter-se between the first set of versions i.e. (a) the FIR (Ex.P/4) and (b) statement of the prosecutrix recorded under Section 164 Cr.P.C. (Ex.P/7) recorded by the Metropolitan Magistrate, Delhi on 19/20.08.2013 *vis-a-vis* the police statement under Section 161 Cr.P.C. (Ex.D/2), which was recorded on 21.08.2013 at Jodhpur, contains a graphic description of the place of incident. A specific argument was raised before the trial court that videography of the crime scene was done by the police on 21.08.2013 and was shown to the victim and that is why, she was able to vividly describe the crime scene on 21.08.2013 when her statement (Ex.D/2) was recorded. This argument is noted at para No.230 of the judgment. The trial court did not accept the said contention of the defence for the obvious reason that there was no significant evidence to support this defence theory.

Now with the publication of the book, *referred to supra*, the defence has right to claim that video of the crime scene was unquestionably recorded which fact is sufficient to convince the Court that it is absolutely essential in the interest of justice and for a just decision of the case to exercise the power under Section 391 Cr.P.C. for summoning and examining Shri Ajay Pal Lamba as a court witness in this case while giving access of cross-examination to the defence as well as the prosecution.

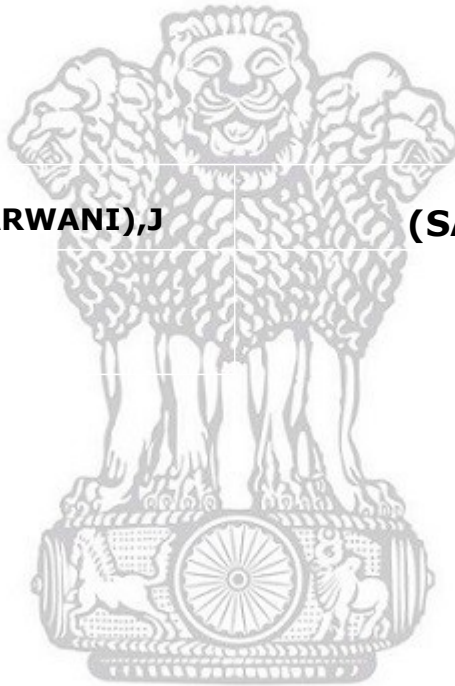
11. In wake of the discussion made herein above, the Interlocutory Application No.01/2021 has substance. Accordingly, it is directed that the witness Shri Ajay Pal Lamba, the then DCP (West), Jodhpur shall be summoned in this Court for recording his evidence as a court witness at the appellate stage for the limited purpose of extracting the truth about the video recorded, with the book published at his behest with the title "**GUNNING FOR THE GODMAN, THE TRUE STORY BEHIND ASARAM BAPU'S CONVICTION**".

The application under Section 391 Cr.P.C. is allowed accordingly.

(VINOD KUMAR BHARWANI),J

(SANDEEP MEHTA),J

1-/Tikam Daiya/-



सत्यमेव जयते