interference on the facts and the conviction of the accused should not be interfered with.

5. This Court has gone through the entire records and proceedings. The manner of incident clearly indicates that the assault was totally unintended and the appellant was already under grave and sudden provocation against his own father and due to intervention of his uncle, the appellant-accused made unintentional assault which resulted into the death of his uncle-victim. In that view of the matter, this Court deems it appropriate to reduce the sentence from ten years to three years.

6. For the reasons recorded above, present Criminal Appeal succeeds in part. The judgment and order of conviction dated 28.02.2019 passed by learned Sessions Judge, Bhavnagar in Sessions Case No.40 of 2017 recording conviction under Section-304(II) of the IPC stands modified and his sentence is reduced from ten years to three years while maintaining other directions as regards to sentence and fine as well as default sentence as directed by learned trial court.

Appeal stands disposed of in terms of above order.

R & P be sent back to the learned trial court, forthwith.

Result **:-** Sentence reduced.

ABC 2019 (II) 274 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(S. S. Shinde, J.)

Criminal Writ Petition No 1279 of 2019 With Criminal Writ Petition No.1282 of 2019

Decided on 13 June, 2019

SHRI KETAN KRISHNAKANT AMIN ***- Petitioner(s).***

Versus

M/S. THIRUMALAI CHEMICALS LIMITED & ORS.- Respondent(s).

Law Covered:- ***(A) Code of Criminal Procedure, 1973 — Section 311 — Power to summon material witness or examine person present — Request by complainant to produce documents through witnesses — Held, if the complainant is not allowed to produce those documents, a prejudice would be caused to him — the accused would get an opportunity to cross examine the witnesses at length & no***

prejudice would be caused to the accused—Negotiable Instruments Act, 1881 — Section 138. (Para 14)

(B) Code of Criminal Procedure, 1973 — Section 311 — Power to summon material witness or examine person present — Ambit — Held, the section does not prevent the Court to summon or even recall the witness— Negotiable Instruments Act, 1881 — Section 138. (Para 15)

(C) Evidentiary Law — Cardinal rule — in the law of evidence the best available evidence should be brought before the Court to prove a fact or the points in issue. (Para 15)

Facts:- *The complainant filed two complaints against the Petitioner and his company being u/s 138, NI Act. In the said complaints, the Petitioner was summoned to appear before the Trial Court. It was alleged, in the complaint that the accused had placed orders with the complainant company, and for that purpose, he issued four cheques in favour of the complainant. It is alleged the complainant presented three cheques to their bankers which were returned with remarks "Payment Stopped".*

After the matter was closed for arguments, the applications u/s 311, CrPC came to be filed by the Complainant to recall the witness and allow the complainant to produce the relevant documents through its witness. It is stated in the said applications that the complainant has found certain relevant documents which will go to the root of the matter. The accused opposed the said applications and filed a reply stating that the applications are frivolous and mischievous. Considering the particular stage of the matter, the Trial Court did not deem it appropriate to recall the witness and consequently rejected the applications.

Against the said order the Complainant filed Criminal Writ Petition in the High Court. The honourable Court dismissed the said Petitions, however, a liberty was given to the complainant to move appropriate application with specific averments and pleadings before the Trial Court. Pursuant to the liberty granted the complainant filed fresh applications u/s 311, CrPC before the Trial Court praying that the Complainant may be allowed to examine witnesses and to produce and prove documents through them. The trial Court allowed the said applications and recalled the three witnesses to produce the documents. Against the said order the present Writ Petitions were filed. The honourable High Court observed that if the complainant is not allowed to produce those documents, a prejudice would be caused to him and the accused would get an opportunity to cross examine the witnesses at length & no prejudice would be caused to the accused. Petitions were dismissed.

Held:- If the complainant examines the aforesaid three witness and produced the documents on record through them, the accused will get an opportunity to cross examine them, but if the complainant is not allowed to produce those documents, which would help the Court to find out the truth and decide the matter appropriately, a prejudice would be caused to the complainant. Hence in my view, the accused would get an opportunity to cross examine the witnesses at length and no prejudice would be caused to the accused if the documents relating to the transaction are allowed to be produced on record, which would help the trial Court to decide the matter correctly. (Para-14)

In so far as Section 311 of the Criminal Procedure Code is concerned, it does not prevent the Court to summon or even recall the witness. In this context a useful reference could be made to the judgment of the Apex Court in the matter of ***Mohan Lal Shamji Soni V/s. Union of India & ors.*** reported in ***AIR 1991 SC 1346*** wherein the Apex Court had considered the scope of Section 540 of the Criminal Procedure Code which is similar to Section 311 of the Code. The Apex Court observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. (Para-15)

Counsel:- ***For Petitioner(s):*** *Mr. Atul Pande, Mr. Wasim Ansari, Advs.*
For Respondent(s): *Mr. Yashpal Thakur, Mrs. Uma Sharma, Mrs. M R Tidke, Advs.*

Cases Referred:-

1. *Smt. Gurmeet v/s. Smt. Renusingh & Anr., 2009 Cri.L.J. 443, (Para-11)*
2. *Tomaso Bruno & Anr v/s. State of U.P., 2013 Cri. L. J (NOC) 293 (ALL), (Para-11)*
3. *Mannan Shaikh and others v/s. State of West Bengal and another, (2014) 13 SCC 59, (Para-12)*
4. *Mohan Lal Shamji Soni V/s. Union of India & ors., AIR 1991 SC 1346, (Para-15)*

JUDGMENT

S. S. SHINDE, J.: - 1. Rule, with the consent of the learned counsel for the parties returnable forthwith and heard.

2. These Writ Petitions take exception to the order dated 21/02/2019 passed by the learned Metropolitan Magistrate, 33rd Court at Ballard Pier, Mumbai by which order the applications filed on behalf of Respondent No.1 herein i.e. the original Complainant under Section 311 of the Criminal Procedure Code came to be allowed

and resultantly three witnesses have been recalled and the complainant was allowed to produce the documents.

3. The facts giving rise to filing of the present Writ Petitions can, in brief, stated thus :

> Respondent No.1 herein is the original complainant who has filed two complaints against the Petitioner and his company being Complaint Nos.3277/SS/2015 and 11511/SS/2015 under Section 138 of the Negotiable Instruments Act, 1881. In the said complaints the Petitioner i.e. the original Accused was summoned to appear before the Trial Court i.e. the learned Metropolitan Magistrate, 33rd Court at Ballard Pier, Mumbai. It is alleged in the complaint that the accused had placed orders for Phthalic Anhydride with the complainant company, and for that purpose the accused issued four cheques in favour of the complainant. It is alleged that out of the said four cheques, the complainant presented three cheques to their bankers which were returned with remarks "Payment Stopped". The complainant sent notices to the accused. Thereafter the Complainant has filed the complaints under Section 138 of the Negotiable Instruments Act against the accused.

4. The Petitioner Accused was summoned by the Trial Court. The Accused pleaded not guilty and granted bail. Thereafter the complainant filed affidavit in lieu of evidence of its Manager. The said manager stepped into witness box to depose and was cross examined by the advocate for the Petitioner Accused. The advocate for the Complainant filed a pursis submitted that no further witness on behalf of the complainant to be examined. Thereafter on 05/09/2018 the Trial Court recorded the statement of the Accused under Section 313 of the Criminal Procedure Code and posted the matter for final argument as the accused chose not to examine himself.

5. It is after the matter was closed for arguments, that the applications in the both the complaints under Section 311 of the Criminal Procedure came to be filed by the Complainant on 14/09/2018 to recall the witness (CW1) and allow the complainant to produce the relevant documents through its witness. It is stated in the said applications that the complainant has found certain relevant documents which will go to the root of the matter.

6. The accused opposed the said applications and filed a reply stating that the applications are frivolous and mischievous. It is also

stated that after cross examination of the witness is over and after the matter is fixed for arguments, the Court should not allow the complainant to fill up the lacuna by recalling the witness and surreptitiously bringing on record the fabricated documents. The accused therefore prayed that the applications filed under Section 311 of the Criminal Procedure Code be dismissed.

7. The Trial Court after perusing the cross examination of the witness, who has admitted that the complainant company has no concern with M/s. BMG Chemicals Pvt. Ltd. which is a separate company, and after hearing the advocates for both the sides, came to a conclusion that the very ground in the application that said company has provided a letter to the complainant company cannot be believed. Considering the particular stage of the matter, the Trial Court did not deem it appropriate to recall the witness and consequently rejected the applications by the order dated 31/10/2018.

8. As against the said order dated 31/10/2018, the Complainant filed Criminal Writ Petition Nos.5439 of 2018 and 5440 of 2018 in the High Court. This Court (Coram : Mrs. Mridula Bhatkar, J) by order dated 21/01/2019 dismissed the said Petitions, however, a liberty was given to the complainant to move appropriate application with specific averments and pleadings before the Trial Court.

9. Pursuant to the liberty granted by this Court by order dated 21/01/2019, that the complainant filed fresh applications under Section 311 of the Criminal Procedure Court before the Trial Court. By the said fresh applications the Complainant prayed that the Complainant may be allowed to examine Mrs. Sejal Shah, who is the authorized representative of the complainant company, to produce on record the minutes of meeting dated 06/05/205; to examine the officer of Axix Bank, Sir P M Road Branch to produce and prove the bank account statements; and to examine Mr. Pankaj Pandya, the authorized representative of M/s. BMC Chemicals, the consignment agent of complainant company to prove and produce the letters dated 19/06/2013 and 31/12/2013 issued by the said company to the accused.

10. After perusing the applications and the order passed by this Court earlier, the trial Court by the order dated 21/02/2019 allowed the said applications in view of paragraph 6 of the order of this Court and recalled the three witness to produce the documents. By the said order the Trial Court also issued summons to all witnesses. It is the said order dated 21/02/2019 passed by the Trial Court allowing the applications filed by the Complainant under

Section 311 of the Criminal Procedure Code which is taken exception to by way of the present Writ Petitions.

11. Heard the learned counsel for the parties. The learned counsel appearing on behalf of the Petitioner Accused Mr. Atul Pande contended that the cross examination of the witness of the complainant is over and the matter is closed for arguments. The documents sought to be produced through the witnesses were within the knowledge of the complainant and the same should have been produced before the evidence was closed. It is contended that by the earlier applications the complainant sought to recall the witness (CW 1) and the Trial Court has rejected the earlier applications of the complainant as also this Court has dismissed the Writ Petitions filed against the said rejection and now it is only in view of the liberty granted by this Court, the Complainant filed the fresh applications to fill up a lacuna through three witnesses by bringing on record some fabricated documents, which cannot be allowed. It is also contended that the Trial Court should not have changed its earlier view and allowed the fresh applications. It is contended that the subsequent applications came to be allowed by the Trial Court under the influence of the order of this Court and not on merits. It is contended that the Trial Court misconstrued the liberty given to the Complainant by this Court. It is further contended that the Complainant should have produced the documents before filing of the complainant against the accused and it was the onerous duty of the complainant to bring the documents before the court earlier. The learned counsel for the Petitioner Accused lastly contended that there is no explanation from the complainant as to what prevented the complainant from filing such documents, and therefore, the fresh applications under Section 311 of the Cr.PC. filed by the Complainant are nothing but an attempt to fill up the lacuna. The learned counsel for the Petitioner sought to place reliance upon the judgment of this Court of Nagpur Bench in the matter of ***Smt. Gurmeet v/s. Smt. Renusingh & Anr*** reported in ***2009 Cri.L.J. 443*** and the judgment of Allahabad High Court in the matter of ***Tomaso Bruno & Anr v/s. State of U.P.*** reported in ***2013 Cri. L. J (NOC) 293 (ALL).*** The learned counsel for the Accused prays that the present Petitions be allowed and the impugned orders dated 21/02/2019 passed by the Trial Court be set aside and quashed.

12. The learned counsel for the Respondent Complainant Mr. Yashpal Thakur submitted that the complainant has found certain

relevant documents which would go to the root of the matter. He also submitted that the Complainant has filed fresh applications pursuant to the liberty granted by this Court to move appropriate application to examine witness/es with specific averments and pleadings before the trial Court. The learned counsel for the Complainant further submitted that if the applications are allowed, no prejudice would be caused to the accused as the accused would get an opportunity to cross examine the said witnesses, and if the applications are rejected, grave prejudice would be caused to the complainant which would not be compensated. He further submitted that on the basis of the observations made by this Court in paragraph 6 of the order dated 21/01/2019, the trial Court was right in allowing the applications filed by the complainant. The learned counsel for the Respondent No.1 Complainant sought to rely upon the judgment of the Apex Court in the matter of ***Mannan Shaikh and others v/s. State of West Bengal and another*** reported in ***(2014) 13 SCC 59.*** He therefore prays that the Petitions be dismissed.

13. Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. It is required to be noted that earlier applications filed by the Complainant under Section 311 of the Criminal Procedure Code came to be rejected by the trial Court. As against the said rejection the complainant had filed Criminal Writ Petition before this Court. As indicated herein above, this Court by order dated 21/01/2019 dismissed the said Writ Petitions, however, liberty was granted to the Complainant to move appropriate application with specific averments and pleadings before the trial Court. It is in pursuance of the said liberty, that the complainant has filed the fresh applications. It is pertinent to mention at this stage that while disposing of the earlier Writ Petitions, this Court in paragraph 4 of the order dated 21/01/2019 has recorded the submissions of the learned counsel for the complainant, which for the sake of ready reference, is reproduced as under :

> "4 The learned counsel for the petitioner/complainant fairly submits that the application made under section 311 is a defective one as no substantial application is made for production of the minutes/resolution of the board meeting of the complainant company directors, which is required to prove authority given to any of the directors to give evidence. He submits that the said minutes of the board meeting which were in existence could not be produced. He further submitted

that instead of the complainant, he wants to examine a person from M/s. BMG Chemicals, the consignment agent, to prove the acknowledgement of the goods and authority to deliver the goods."

This Court in the said order dated 21/01/2019, after perusing the orders of the trial Court, the applications and considering the submissions of the learned counsel for the parties, has observed in paragraph 6 of the said order as under :"

> 6. Perused the orders, the applications and considered the submissions. What is written in the application and what is now prayed in the Writ Petition are different. The documents of acknowledgement or delivery now cannot be proved from the complainant who is already cross examined on this point. The submissions of the learned counsel that he wants to examine the officer from the consignment agent, however, can be considered as it appears from the submissions that the issue of privity of contract between the complainant and the accused is raised. On this point, the person from M/s. BMG Chemicals is the correct witness and is required to be examined in order to find out truth"

This Court has clearly observed that the documents of acknowledgement or delivery now cannot be proved from the complainant who is already cross examined, and on this point the person from M/s. BMG Chemicals is the correct witness and is required to be examined in order to find out the truth. In my view, it is in the context of the aforesaid observations, this Court though dismissed the Writ Petitions, has granted liberty to the Complainant to file appropriate applications. It is required to be noted that the Trial Court passed the impugned order in view of the paragraph 6 of the order of this Court and allowed the complainant to recall three witness and to produce the documents. The order passed by this Court (Coram : Mrs. Mridula Bhatkar, J) dated 21/01/2019, referred herein above, has attained finality.

14. As indicated herein above the cross examination of the witness of the complainant is over and the matter is closed for arguments. Now the complainant wants to bring on record certain documents which, according to the complainant, would go to the root of the matter. The accused had placed orders for goods with the complainant and the cheques issued as against the said orders when represented to the bankers were returned with remark "Payment

Stopped". The present complaints are under Section 138 of the Negotiable Instruments Act. The complainant wants to bring on record certain documents, which according to the complainant, are relevant to the transaction between the complainant and the accused and go to the root of the matter. The documents want to be produced by the complainant through the witnesses are, minutes of meeting dated 06th May 2015, the bank statements and the documents relating to delivery through consignment agent M/s. BMG Chemicals. Though this Court, as referred to above, has recorded the submissions of the learned counsel for the complainant as regards minutes/ resolution of the board meeting and examination of a person from M/ s., BMG Chemicals, in addition, the complainant wants to produce the bank statements of the relevant period which according to the complainant, relate to the transaction in question. If the complainant examines the aforesaid three witness and produced the documents on record through them, the accused will get an opportunity to cross examine them, but if the complainant is not allowed to produce those documents, which would help the Court to find out the truth and decide the matter appropriately, a prejudice would be caused to the complainant. Hence in my view, the accused would get an opportunity to cross examine the witnesses at length and no prejudice would be caused to the accused if the documents relating to the transaction are allowed to be produced on record, which would help the trial Court to decide the matter correctly.

15. In so far as Section 311 of the Criminal Procedure Code is concerned, it does not prevent the Court to summon or even recall the witness. In this context a useful reference could be made to the judgment of the Apex Court in the matter of ***Mohan Lal Shamji Soni V/s. Union of India & ors.*** reported in ***AIR 1991 SC 1346*** wherein the Apex Court had considered the scope of Section 540 of the Criminal Procedure Code which is similar to Section 311 of the Code. The Apex Court observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. Paragraph 10 of the said judgment is relevant and is reproduced herein under

> 10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not

empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functionswhether discretionary or obligatoryaccording to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and reexamine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate,, inconclusive and speculative presentation of facts, the ends of justice would be defeated. (emphasis supplied)

16. The exposition of law in the aforesaid authoritative pronouncements in the case of **Mohan Lal Shamji Soni** (supra) had been followed in various subsequent pronouncements by the Supreme Court such as in the case of **Mannan Shaikh** (supra).

17. In the result, the Petitions stand dismissed. Rule stands discharged. However it is made clear that if the complainant examine the witnesses as afore stated, the accused will be at liberty to cross examine them and rebut the evidence.

Result:- Petitions dismissed.

July 2019