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**(2024) 11 GUJ CK 0005**

**Gujarat High Court**

**Case No:** Special Criminal Application (Quashing) No.11932 of 2024

Tehmul Burjor Sethna

APPELLANT

Vs

Vs State of Gujarat

RESPONDENT

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**Date of Decision:** Nov. 18, 2024

**Acts Referred:**

- Code of Criminal Procedure, 1973 - Section 243, 311, 313, 391
- Bharatiya Nagarik Suraksha Sanhita, 2023 - Section 432
- Indian Penal Code, 1860 - Section 406, 418, 420, 465, 467, 468, 471
- Constitution of India, 1950 - Articles 226

**Hon'ble Judges:** Nirzar S. Desai, J

**Bench:** Single Bench

**Advocate:** Zubin F Bharda, Mitesh Amin, Manan Mehta

**Final Decision:** Dismissed

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**Judgement**

Nirzar S. Desai, J

1. By way of the present petition, the petitioner has challenged the order dated 14.08.2024 passed by learned Additional Sessions Judge, Court No.4,

City Civil & Sessions Court, Ahmedabad below application Exh.13 in Criminal Appeal No.564 of 2023 by which the learned Sessions Judge has

rejected the application Exhibit 13 filed by the petitioner under Section 391 of the Code of Criminal Procedure, 1973 corresponding to Section 432 of

the Bharatiya Nagarik Suraksha Sanhita, 2023 praying for recording further evidence and/or direct it to be taken by the trial Court.

2. The facts leading to filing of the present petition can be summarized as under :-

2.1 The petitioner came to be arraigned as an accused in an offence registered vide CR. No. I - 187 of 2017 for the offences punishable under

Sections 406, 418, 420, 465, 467, 468 and 471 of the Indian Penal Code with Navrangpura Police Station, District " Ahmedabad, inter alia alleging

that the complainant, her sister Parul P. Modi and her father Pannalal K. Modi had got registered one Trust on 01.08.2000 bearing Sr. No.E/13116 in

the office of the Charity Commissioner, Ahmedabad and the Trust was allotted on lease hold land by the Government for the period of 15 years vide

lease deed dated 10.06.2002. On 31.03.2006, the father of the complainant expired and as the accused was known to family of the deceased since a

long time and because of a cordial relations, the complainant sought help of the accused who in turn helped them in managing the Trust in the name

and style of Environment Research and Development Center, Ahmedabad and in that process the accused opened a Bank Account in the name of the

Trust with South Indian Bank and as per the complainant, the accused without authority operated the aforesaid Bank account and effected

transactions in the said account and also issued cheques from the said account, which according to the complainant and her sister were not signed by

them and thereby, the accused committed the alleged offence.

2.2 The petitioner came to be arrested upon registration of the FIR and the court of learned Magistrate released the petitioner on bail which order was

challenged before the Sessions Court which was overturned. The petitioner challenged the said order before this Court but the order passed by the

Sessions Court was upheld, against which the petitioner approached Hon<sup>ble</sup> the Supreme Court which directed the petitioner to remain present

before the City Sessions Court and pray for bail and further directed the Sessions Court to decide the bail within 48 hours of the surrender of the

petitioner. The City Sessions Court, thereafter, ordered release of the petitioner on bail.

2.3 The Investigating Officer filed charge-sheet before the Court of learned 23rd Additional Chief Metropolitan Magistrate, Ahmedabad, which

registered Criminal Case No.14089 of 2019 and issued process against the petitioner. The complainant being aggrieved approached this Court by way

of Special Criminal Application and further investigation was ordered through a high-ranking officer and therefore, Assistant Commissioner of Police carried out further investigation and filed additional charge-sheet. Upon the petitioner pleading not guilty, charge came to be framed and thereafter the prosecution was called upon to adduce evidence. The prosecution examined 39 witnesses whereas 12 witnesses were dropped to which the petitioner had objected. At this stage, it is pertinent to point out that the prosecution did not examine the Investigating Officer who had filed the charge-sheet nor any application is there on record submitted by the prosecution dropping the said Investigating Officer as a witness in the trial. The Court of learned Additional Chief Metropolitan Magistrate Court No.23, Ahmedabad, after completion of the recording of the evidence called upon the prosecution as well as the defence to make final arguments and thereafter vide judgment and order dated 09.10.2023 convicted the petitioner for the offences punishable under Sections 418, 420, 465, 467 and 471 of the Indian Penal Code and acquitted the petitioner for the offences punishable under Sections 406 and 468 of the Indian Penal Code whereby the petitioner has been sentenced to undergo simple imprisonment for three years for the offence punishable Section 418 of IPC along with fine of Rs.5 lakhs and in default to further undergo simple imprisonment of two months. The petitioner has been sentenced to undergo simple imprisonment for three years for the offence punishable section 420 of IPC along with fine of Rs.10,000/- and in default to further undergo simple imprisonment of 10 days. The petitioner has been sentenced to undergo simple imprisonment for two years for the offence punishable section 465 of IPC along with fine of Rs.10,000/- and in default to further undergo simple imprisonment of 10 days. The petitioner has been sentenced to undergo simple imprisonment for five years for the offence punishable section 465 of IPC along with fine of Rs.10,000/- and in default to further undergo simple imprisonment of 10 days. The petitioner has been sentenced to undergo simple imprisonment for two years for the offence punishable section 471 of IPC along with fine of Rs.10,000/- and in default to further undergo simple imprisonment of 10 days. The petitioner has been directed to undergo the sentences concurrently, whereas, for every breach in deposit of fine the petitioner has been directed to undergo

sentence consecutively.

2.4 The petitioner challenged the judgment and order of conviction and sentence recorded by the trial Court by filing Criminal Appeal No.564 of 2023

before the City Sessions Court, Ahmedabad which admitted the appeal vide order dated 21.10.2023 and suspended the order of sentence

and the petitioner came to be released on regular bail pending the hearing of the appeal.

2.5 The petitioner pending hearing of the Criminal Appeal, upon realizing that the prosecution has deliberately omitted evidence by dropping material

and vital witnesses and by not examining them although they were required to be examined as witnesses so as to bring out the truth and by not doing

so the right of the petitioner to be afforded a fair trial having come to be grossly prejudiced, the petitioner submitted an application Exhibit 13 under

section 391 of the Code of Criminal Procedure in Criminal Appeal No.564 of 2023 pending before the City Civil and Sessions court, Ahmedabad and

prayed for directing recording of additional evidence of witnesses who according to the petitioner, were material witnesses and who came to be

dropped deliberately by the prosecution to suit its convenience. The complainant objected to the application. The Additional Sessions Judge, Court

No.4, City Civil and Sessions Court, Ahmedabad vide judgement and order dated 14.08.2024 rejected the application Exhibit 13 filed by the petitioner.

2.6 Hence the present petition.

3. Mr. Zubin Bharda, learned advocate appearing for the petitioner made the following submissions :-

3.1 That the prosecution indulged into adopting a pick and choose method when the time came to examine witnesses as the entire case of the

prosecution was based on denial by victim Parul Modi / sister of the complainant, who claimed before the Investigating Officer during the course of

investigation that the petitioner misrepresented and got the bank account opened by obtaining the signature of Parul Modi and after opening the Bank

account, the petitioner put signatures of Parul Modi and indulged into transactions worth crores of rupees in the Trust of which Parul Modi,

complainant and her father were the trustees. However, the prosecution when the time came to prove the allegations levelled by it very calculatively

submitted an application to drop Parul Modi as witness of the prosecution in the trial. Even though the petitioner objected by putting up an endorsement against the grant of the application, however, the Public Prosecutor remained a mute spectator and became a party to the grant of the application made by the prosecution for dropping Parul Modi who according to the petitioner was a material witness and whose examination and cross examination was absolutely material for the purpose of determining the genuineness and veracity of the complaint as the entire complaint consisted of the allegations pertaining to the petitioner having forged the signatures of Parul Modi. Therefore, the prejudice that has been caused to the petitioner was that the prosecution case commenced with the allegation that by misrepresentation, the signature of Parul Modi were obtained by the petitioner for the purpose of opening the account and thereafter, the petitioner put signature of Parul Modi on the cheques. Moreover, the points of determination Nos.1, 4, 5 and 6 revolved around the allegation that the petitioner had misused the trust reposed in him by Parul Modi and had got opened the Bank accounts through Parul Modi and had forged signatures of Parul Modi on the cheques and thereby committed the alleged offence. Therefore, when the case of the prosecution all throughout was concerning the false signatures of Parul Modi being made by the petitioner and when the Investigating Officer had obtained at least 500 signatures of Parul Modi, which were sent to the FSL for examination, according to the petitioner, Parul Modi would be the best witness who would be justified and by offering herself for cross examination, truth could have been unearthed. However, by citing schizophrenia, Parul Modi was dropped by the prosecution and the learned Magistrate also without appreciating the objection raised by the petitioner merely put an endorsement recorded which was an error apparent on the face of the record of the learned magistrate and also public prosecutor who ought to have objected to the dropping of such a vital witness who was the centre stone of trial as all allegations in the prosecution case revolved around Parul Modi who was clandestinely dropped.

3.2 That on one hand, Parul Modi was capable enough of giving 500 signatures before the Investigating Officer for them to be sent to the FSL in the

year 2018, but the very same Parul Modi became incapable and schizophrenic when the time came to justify and prove the allegations levelled against

the petitioner beyond reasonable doubt. The signatures were sent to the FSL, on the other hand, the allegations levelled by Parul Modi against the

petitioner were not allowed to be contradicted or challenged by ultimately dropping Parul Modi as witness so as to deliberately deny the opportunity to

the petitioner to disprove the false allegations levelled against him. In fact, it is a clear case of gross and severe prejudice suffered by the petitioner by

allowing the material witness to be dropped and by not allowing the material witness to be offered for cross examination. ]

3.3 That the basis for dropping Parul Modi as witness is a medical certificate produced by the complainant along with the application for dropping the

witness. A bare perusal of the application which is produced by the petitioner at Page 177 with the petition indicates that the certificate is issued by

Dr. Shailesh M. Desai M.D., Consulted Cardiologist and physician which is dated 30.06.2023 wherein it has been mentioned that Ms. Parul P. Modi is

under his treatment since 2006 for depression, anxiety and schizophrenia and post covid, she is also suffering from severe debility and breathlessness

â€" long covid syndrome. It has been further stated that due to long standing severe psychiatric treatment and long-term use of schizophrenic drug she

had developed significant memory loss, incoherence and disorientation and is advised rest, proper care and confinement at her home. It has been

further stated that due to her unstable health condition, she is advised not to undergo any stressful condition, undue physical exertion or entering into

arguments which would be detrimental to her health. It is required to be appreciated that the certificate of the doctor states that he is a cardiologist

and since 2006, he is treating Parul Modi for schizophrenia. Therefore, for 18 years she has been undergoing psychiatric treatment from a cardiologist

which is unheard of. Therefore, taking into consideration this certificate, the Investigating Officers who recorded her statements were specifically

asked as to whether she had disclosed her mental condition before them, and both of them denied that they were not aware of her mental condition

nor Parul Modi disclosed to them about her mental condition. Therefore, another question which was a pointed question asked to the Investigating

Officers who obtained 500 signatures of Parul Modi as to whether they would have still proceeded to obtain 500 signatures, if she would have disclosed about her being schizophrenic and both of them said they would not have obtained her signatures and sent them for handwriting experts report. Therefore, the courts below have completely ignored that gross and severe prejudice has been suffered by the petitioner for being denied the cross examination of Parul Modi and the judgement of conviction and sentence being recorded on conjectures and surmises which has led to the petitioner who is a reputed Chartered Accountant being convicted, powers vested under section 391 ought to have been and are required to be exercised for the purpose of bringing out truth and uphold the interest of justice.

3.4 That no valid justification had been offered by the City Sessions Judge in disallowing the application filed by the petitioner under section 391 of the Code of Criminal Procedure, which empowers the appellate Court to take further evidence or direct it to be taken while dealing with an appeal, if the appellate court thinks that additional evidence is necessary and therefore, by recording reasons either take such evidence itself or direct it to be taken by the Magistrate. In the facts and circumstances of the present case, the City Sessions Judge has not assigned any cogent reason except for referring a judgement passed by this Court in Criminal Appeal No.1664 of 2024, where it has been held by this Court that powers under section 391 of the Code of Criminal Procedure should only be exercised when party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non recording of such evidence may lead to failure of justice. The City Sessions Court has emphasised more on the first part of the observations made by this Court, which held that the powers should be exercised only when party making such request was prevented from presenting the evidence in the trial. If the objections raised by the petitioner on the application submitted by the prosecution for dropping the witnesses are perused, then the petitioner did not leave any stone unturned to object to the grant of the application as according to the petitioner, the prosecution was not acting fair as

when it wanted to misuse the allegations with respect to the witness Parul Modi as the prosecution continued to allege that the petitioner had misrepresented and obtained the signatures of Parul Modi on the account opening form and thereafter, the petitioner put the signatures of Parul Modi on the cheques and entered into unauthorised transactions. Therefore, when it was the specific case of the prosecution that Parul Modi has not signed the cheques and that they were signed by the petitioner and misused them, the Courts ought not to have accepted the application of the prosecution to drop Parul Modi as a witness as the petitioner lost the chance of contradicting the said witness and on the other hand, her allegations remained uncontroverted as the Trial Court relied upon the FSL report which stated that the signatures on the cheques were not that of Parul Modi. Therefore, not offering the witness for cross examination and not asking her to enter the witness box has caused serious failure of justice so far as the petitioner is concerned.

3.5 That the City Sessions Judge has rejected the application filed by the petitioner on the ground that if the application for adducing additional evidence is allowed and if the additional evidence is brought on record, then the matter will have to be remanded to the concerned Trial Court and the evidence that would emerge will have to be appreciated again. According to the petitioner, such a reason cannot be a ground to rejecting an application under section 391 of the Code of Criminal Procedure when the law permits exercise of powers under section 391 of the Code of Criminal Procedure to allow recording of additional evidence or directing of taking of additional evidence when the court feels that it is necessary and in the interest of justice. The judgement relied upon by the prosecution also clearly holds that when the court feels that it has occasioned into failure of justice, powers under section 391 can be exercised.

3.6 That another ground assigned by the learned Sessions Judge to reject the application filed by the petitioner being that petitioner while recording his further statement under section 313 of the CRPC had declared that he did not want to give his deposition on oath. However, he has declared in his further statement that he intended to examine some witnesses in his defence. But he or his learned advocate had failed to produce any list of



witnesses nor any witnesses have been examined though sufficient opportunity was given and therefore, there was no question of prevention from examining defence witnesses during the trial and according to the sessions court the petitioner was trying to fill in a lacuna. As against that, in the judgment of the trial court clearly mentioned that the petitioner examined one Niteshkumar Rajkumar Singh as his defence witness and had also produced documentary evidence which were received from the Income Tax Department by way of certified copies. Therefore, the impugned orders passed by the Sessions court is absolutely without non application of mind as without taking into consideration the powers vested in the appellate court under section 391 of the CRPC, the application has come to be rejected. Moreover, if the law that is sought to be settled by the Sessions court is examined then the petitioner ought to have examined under 313, these witnesses who are dropped by the prosecution as his defence witnesses, it would lead to mockery of the code and the procedure prescribed as the petitioner cannot under any circumstance examine a victim of a crime as his witness nor the petitioner can examine an Investigating Officer as his defence witnesses. Therefore, in totality of the facts and circumstances of the case, the order passed by the sessions court is laconic and unsustainable.

3.7 That the Sessions Judge has also failed to appreciate that the Investigating Officer Shri H.B.Patel who carried out most of the investigation and who submitted the charge-sheet was also not examined. It is absolutely unheard that the Investigating Officer is not called for examination in a case wherein the petitioner who is a reputed Chartered Accountant who is facing serious charges of misappropriation of funds, forgery and criminal breach of trust. This action of the prosecution of not calling upon the Investigating Officer who has submitted the charge-sheet has also caused serious prejudice to the petitioner and has resulted into miscarriage and failure of justice.

3.8 That the learned City Sessions Judge is also not justified in rejecting the application filed by the petitioner under section 391 of the Code of Criminal Procedure on the ground that the petitioner ought to have submitted an application to examine the witnesses who were dropped and not examined by the prosecution as his defence witness and as the petitioner has failed to do so and the petitioner did not challenge the order allowing the

application for dropping the witnesses, at the relevant point of time, the court was justified in rejecting the application. According to the learned City Sessions Judge, the petitioner ought to have led additional evidence by examining those witnesses as defence witnesses but as the petitioner did not avail of this opportunity, the learned City Sessions Judge rejected the application. As against that it is submitted that it is a cardinal principle of criminal jurisprudence that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt. According to the petitioner, therefore, it was the obligation of the prosecution to examine the witnesses based on whose statements and material collected by the Investigating Officer, the charge-sheet was filed and the charge to proceed with the trial against the petitioner came to be framed and the petitioner has the privilege to remain silent and extract contradictions and denials by cross examining those witnesses. In the facts and circumstances of the present case, when it is the case of the prosecution that the petitioner made false signatures of witness Parul Modi on cheques and indulged into misappropriation of funds of the trust and when Parul Modi denied to have signed on the cheques and alleged that it was the petitioner who had signed those cheques, then Parul Modi was under an obligation to offer herself for examination as well as cross examination to bring home the charge against the petitioner. In the present case, the learned Magistrate has because the FSL has opined that the cheques do not contain the signatures of Parul Modi, has believed the prosecution case and proceeded to convict the petitioner without affording and allowing the petitioner an opportunity to cross examine the said witness who is a material witness on whom the entire case of the prosecution is revolved and led to the conviction of the petitioner despite the petitioner being absolutely innocent and being made the victim by the prosecution who tried to save their skin and wriggle out of the consequences of the case registered by the Income Tax Authority.

3.9 That according to the petitioner, witness Parul Modi who according to the petitioner would be the prosecution witness around whom the entire case of the prosecution would revolve, Investigating Officer Shri H.B.Patel who had carried out the investigation and filed the charge-sheet and

prosecution witness no.26 one Aartiben who was the witness to Memorandum of Understanding, whereas one Nitin Parekh prosecution witness no.38

who happens to be the financial controller of Cadila Group were the material witnesses who ought not to have been dropped by the prosecution as

they were vital in bringing the prosecution launched against the petitioner to a logical conclusion, however, dropping and not examining those witnesses

deliberately by the prosecution has caused serious prejudice to the petitioner and has also occasioned failure of justice.

3.10 That the learned Counsel for the prosecution had stated before this Court that the petitioner was trying to prolong and delay the hearing of the

appeal by submitting applications such as the application under section 391 of the CRPC. According to the petitioner, it is required to be brought to the

kind attention of this Court that the complainant was continuously making applications for adjournment one after the other before the trial court and

was also filing applications one after the other and one such application being rejected challenged the same before this Court by way of filing Special

Criminal Application in which this Court upon finding that the complainant was trying to delay the trial issued directions for expeditious conclusion of

the trial within a period of six months. Therefore, it is the prosecution which was reprimanded by this Court for laxity in proceeding with the trial and

not the petitioner who was always ready and willing to proceed with the trial. However, according to the petitioner, he is entitled to receive a fair trial

which according to the petitioner was not afforded to him and therefore, the petitioner was constrained to move the application under section 391 as it

empowers the appellate court to direct examination of additional witnesses and evidence if found necessary and in the interest of justice.

3.11 In support of his submissions, Mr. Bharda relied upon the decision of the Honâ€™ble Supreme Court in the case of Brigadier Sukhjeet Singh

(retired) MVC Vs. State of Uttar Pradesh and others, 2019 (16) SCC 712, more particularly Para Nos.15, 16, 21 to 26 and submitted that the Hon'ble

Supreme Court has held that Appellate Courtâ€™s aim should be to reach to truth and justice and accused has rights to take steps and benefits of

powers of appellant court including filing of additional evidence if the legal requirements thereof are satisfied. He, therefore, prayed to allow the

present petition by quashing and setting aside the impugned order.

4. On the other hand, Mr. Mitesh Amin, learned Additional Advocate General assisted by learned Additional Public Prosecutor Mr. Manan Mehta

submitted that the impugned order passed by the learned Additional Sessions Judge, Court No.4, City Civil and Sessions Court, Ahmedabad is just

legal and proper and does not call for any interference by this Court under Article 226 of the Constitution of India. It is settled law that the Public

Prosecutor is not bound to examine all the witnesses who would not support the Prosecution case. He further submitted that if by examining the

witness, the Prosecution Case would not be further enhanced and/or the Prosecution case would be damaged by examining such witness and / or the

Prosecution case cannot be qualitatively enhanced by examining such Witness, the Learned Public Prosecutor could drop such Witness. It is,

therefore the prerogative of the Public Prosecutor as to which witness is to be examined and which witness is to be dropped for establishing the case

of the Prosecution.

4.1 He further submitted that at the time of recording further statement, an opportunity was available with the petitioner to examine the witnesses in

his defence. The petitioner has not availed the said opportunity which was available to him under Section 243 of the Code of Criminal Procedure.

Furthermore, although endorsed by the Petitioner that he intended to examine dropped witness as his defence witness, the petitioner has failed to

examine the said witness, despite sufficient opportunity having been given to him.

4.2 He further submitted that an application was given by the complainant, through learned Public Prosecutor before the Learned Additional Chief

Metropolitan Magistrate Court No. 23, Ahmedabad Court, along with the Expert's Medical Certificate. In the said application, no objection was

raised by the petitioner or by his advocate. The learned Additional Chief Metropolitan Magistrate while passing the order dated 4.7.2023 has recorded

the reason for dropping the said witness and the said reasoning is proper and permission has been granted by the said order to drop the said Witness

after hearing the submissions of the Learned Additional Public Prosecutor. Further, the petitioner has not challenged the said order granting permission

to drop witness Parul Modi. He further submitted that no prejudice has been caused to the petitioner, as even otherwise, the petitioner has never

applied before the Learned Additional Chief Metropolitan Magistrate for examining any of the dropped witnesses or any other witness as a Court

witness by invoking provision of Section 311 of the Code of Criminal Procedure. He further submitted that the intention of the petitioner is to delay

hearing of Criminal Appeal No.564 of 2023 and, therefore, this Court may not interfere with the impugned order and reject the present petition.

5. I have heard learned counsels for the parties and perused the record. On perusal of the record and, more particularly, page 172 to 177 - Annexure

D of the petition, I found that an application was given by the complainant through learned APP in Criminal Case No.14089 of 2019 below Exh.635 (at

page 173) on 4.7.2023 for dropping one of the prosecution witness i.e. Parulben Modi on the ground of the fact that she is suffering from

schizophrenia. The aforesaid application was accompanied by a Medical Certificate of one Dr. Shailesh N. Desai, M.D. dated 30.6.2023. The said

application was received by learned advocate for the original accused - applicant herein and the learned Additional Chief Metropolitan Magistrate

granted permission to drop the said witness Parulben Modi vide order dated 4.7.2023.

6. Thereafter, another application below Exh.642 was given for dropping of few more witnesses. The said application does not bear a specific date,

but bears \_\_.7.2023 as can be seen from the photocopy produced along with the petition at page 172. The said application was objected by the

advocate for the applicant - accused only in respect of three witnesses i.e. witness Nos.26, 38 and 39 i.e. Arti Rajeshbhai Panchal, Nitin Dalsukhram

and Hemant Vishwanath.

7. The record does not indicate that at any point of time, the present applicant has objected the application below Exh.635 for dropping Parulben Modi

as witness which was granted vide order dated 4.7.2023.

8. Further, the record also does not indicate that the present applicant - accused has even at the stage of recording of further statement under Section

313 of the Code declared that he did not want to give deposition on oath and though in his further statement, he declared that he intend to examine

some witnesses in his defence, he could not produce any list of witnesses nor any witnesses were examined by him as recorded by the learned

Sessions Judge in the impugned order dated 14.8.2024.

9. In fact, on perusal of the impugned order, the Court finds that all the submissions advanced on behalf of the applicant while hearing application

under Section 391 of the Code were not only recorded but were dealt with by the learned Sessions Judge. Relevant observations made in paragraphs

6 to 8 in the impugned order by the learned Sessions Judge reads as under :-

6. Upon hearing both the sides and on perusal of present record, it transpires that the present appellant / accused has been held guilty

and the Ld. Trial Court has passed an order of conviction and sentence against the present appellant-accused vide order dated 09.10.2023.

It appears from the record that the Ld. Trial Court has arrived at conclusion only after full-fledged trial of the offence wherein both the

sides were given sufficient opportunities to prove their respective cases. However, as per the contentions made in the present application

filed u/s. 391 of Cr.P.C. by the appellantaccused that some important witnesses were not examined by the Public Prosecutor during the trial

and therefore, his request may be granted and he may be permitted to examine the said witnesses which were dropped by the prosecution.

The submission of the Ld. Advocate is that absence of examinations of such witnesses would cause grave injustice to the appellant-accused

and therefore, for deciding the appeal, examination of the said witnesses are required and helpful to the outcome of the appeal, which

ultimately results into justice.

7. Now, in such situation, if the appellant Court allows such additional evidence to be produced on record then the position would be that

for such examinations of witnesses, the matter should be remanded to the concerned Ld. Trial Court and appreciation of evidence again for

the conclusion of trial. Therefore, on perusal of the impugned judgment and order of conviction and fine by the Ld. Trial Court, this Court

finds that at the time of recording of further statement u/s. 313 of Cr.P.C., there was an opportunity with the present appellant-accused

where he ought to ask that he intends to examine these witnesses in his defence, but he had failed to do so. It also appears from the record

that even the appellant-accused had an opportunity to file revision application at the relevant point of time, but he failed to do so. Thus, this

Court is of the humble view that, at the stage of appeal, the appellant-accused cannot be permitted to lead additional evidence, which he

could have led as defence at the time of trial before Ld. Trial Court but he had failed to avail such opportunity. Thus, the Ld. Trial Court by

relying upon the evidence produced during trial has come to the conclusion and passed necessary orders, therefore, it is the question of

merits or demerits of the present appeal that such appreciation of evidence is rightly or wrongly appreciated.

8. Now, the submission made by the Ld. Advocate on behalf of the present appellant "accused that the important witnesses were dropped

and have not been examined by the prosecution side during trial and therefore, they wish to examine the said witnesses here at the time of

appeal is nothing but the lacuna which want to fill up at the time of appeal and which cannot be permitted in eye of law as held in the case

of Ajitsingh Chehuji Rathod v/s. State of Gujarat in Criminal Appeal No.16641/2024 order dated 29.01.2024 wherein the Hon<sup>ble</sup> Apex

Court has held as under :-

¶9. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional

evidence under Section 391 CrPC should only be exercised when the party making such request was prevented from presenting the

evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during

pendency of the appeal and that non-recording of such evidence may lead to failure of justice.¶

Thus, the law is well settled that power to record additional evidence u/s. 391 of Cr.P.C. should only be exercised when the party making

such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to

such prayer came to light at later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice.

In present case, as noted herein above that in further statement u/s. 313 of Cr.P.C., the appellant / accused himself has declared that he did

not want to give deposition on oath. However, he has declared in his further statement that he intended to examine some witnesses in his

defence, but he or his Ld. Advocate had failed to produce any list of witnesses nor any witnesses have been examined though sufficient

opportunities were given, therefore, there is no question of prevention from examining defence witnesses during the trial. In such situation it

is nothing but the mere lacuna that present appellant / accused wishes to fulfill or fill up at the stage of appeal.

10. In view of the above observation as well as considering the fact that at the time when the witness Parulben Modi was permitted to be dropped as

prosecution witness upon an application below Exh.635, when the learned Additional Chief Judicial Magistrate passed an order on 4.7.2023, the said

order was not challenged by the present applicant at the relevant point of time nor at the stage of recording further statement at the stage of recording

statement under Section 313 of the Code. He availed the opportunity or expressed his desire to examine the said witness Parulben Modi as defence

witness by specifically stating her name that he wish to examine her and, therefore, the applicant was never prevented from examining any material

witnesses and, therefore, the learned Sessions Judge was absolutely justified by giving cogent reasons while rejecting the applicant's application below

Exh.13 in Criminal Appeal No.564 of 2023 preferred under Section 391 of the Code of Criminal Procedure, 1973.

11. Accordingly, I do not see any reason to interfere with the order dated 14.08.2024 passed by learned Additional Sessions Judge, Court No.4, City

Civil & Sessions Court, Ahmedabad below application Exh.13 in Criminal Appeal No.564 of 2023. The petition is required to be dismissed and the

same is dismissed.