

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

Criminal Application No.141/2015 (APPA) in
Criminal Appeal No. 391/2013

State of Maharashtra, through Police Station Officer, Police Station, Nandanwan,
Nagpur ..vs.. Ayush Nirmal Pugaliya.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. R. M. Daga, Special Public Prosecutor for
applicant.
Mr. Asif Rizvy with Mr. A. A. Sonak, Advocate for non
applicant.

CORAM: A.B. CHAUDHARI & P. N. DESHMUKH,JJ.
DATE : FEBRUARY 26, 2015

This Court had, yesterday, i.e. on 25.02.2015 made an order giving reasons asking the learned Special Public Prosecutor to take a stand in the light of defect in the conduct of the proceedings for recording of evidence of Shubham Baid (PW4) and Ridam Puriya (PW5) before the trial Court during the course of cross-examination. Hence, these appeal proceedings were fixed for today at 2.30 p.m.

Today at 3.00 p.m. Mr. Daga, learned Special Public Prosecutor, has tendered present application and Mr. Rizvy, learned counsel for the appellant-accused has tendered reply thereof.

Heard learned counsel for the rival parties on the application for passing appropriate orders made by the learned Special Public Prosecutor. The averments in the

application, in particular paragraphs 4 and 5 are in the nature of pleading of estoppel by conduct against the accused. We are afraid the principle of estoppel by conduct qua the accused does not have any place in the criminal trial, in a case of serious charge of murder.

On the contrary, a Court trying criminal trial has a heavy responsibility and duty to see that fair trial is conducted and, in no way, the established practice and procedure in conducting such trials for serious offence of murder etc. can be given go bye. In yesterday's order, we have found that the trial Judge could not have invented a novel procedure of granting liberty to the defence to put the omissions directly to the Investigating Officer rather than putting omissions to the above named witnesses then and there. We hold that the trial Court committed a serious error in doing so. We, therefore, do not accept the contentions and averments made in paragraphs 4 and 5 of the application and reject the grounds and arguments to that effect pressed into service by learned Special Public Prosecutor.

The next relevant paragraph of the application is paragraph 6, which we quote as under:

“6. In any event, the prosecution submits that the omission in the evidence of PW4 namely “on a road open corner Aayush had stopped the scooter, and at that time Kush sat in his view sight upon a scooter and thereafter accused and Kush

were gone together by scooter” and similarly the omission in the deposition of PW5, namely “on a road open corner Aayush had stopped the scooter and at that time Kush sat upon a scooter and thereafter Aayush and Kush were gone together by scooter” are not significant omissions and do not amount to contradictions in criminal jurisprudence. Even if the aforesaid omissions are treated to be significant, the prosecution submits that witnesses, i.e. PWs 4 and 5 have not stated so in their statements to the police, which aspect is also clear from the deposition of PW31-Sunil R. Jaiswal, the Investigating Officer. Thus, in the humble submission of the prosecution, those omissions have not vitiated the trial. The prosecution further submits that accepting the request of respondent to put questions directly to the Investigating Officer in respect of the omissions found in the depositions of PWs 4 and 5 is at the most a procedural irregularity. It does not cause any prejudice to anybody and has not, therefore, vitiated the trial. In view of these submissions, the prosecution requests this Hon'ble Court to ignore the above quoted omissions found in the evidence of PWs 4 and 5. Prosecution submits that entire evidence of the said witnesses can be taken into consideration in the proceedings of the present appeal by ignoring

the above quoted omissions.”

Reply to this paragraph 6 is to be found in paragraph 5 of the reply filed by accused, which we quote as under:

“5. It is submitted that the omissions are very vital in nature, the theory of last seen is as brought by this witnesses are by way of omission. It is incorrect that the omissions in the evidence of PW4, namely “on a road open corner Aayush had stopped the scooter, and at that time Kush sat in his view sight upon a scooter and thereafter accused and Kush were gone together by scooter” and similarly the omission in the deposition of PW5, namely “on a road open corner Aayush had stopped the scooter and at that time Kush sat upon a scooter and thereafter Aayush and Kush were gone together by scooter” are very and significant omissions amounting to contradictions in criminal jurisprudence.”

In our opinion, the prosecution is preempting about the significance etc. of the omissions or explanations thereto which are proposed to be brought. Unless the omissions are actually allowed to be put to the witnesses; Shubham Baid (PW4) and Ridham Puriya (PW5); nothing can be left to the figment of imagination. The submission in paragraph 6 that even if the omissions are ignored, the prosecution is entitled to rely upon other evidence, is not

acceptable to us. The appreciation and principles in the matter of marshaling of evidence, as contemplated by Section 3 of the Evidence Act, that too in a murder case, can neither be trivialised nor jettisoned. The argument of the prosecution to segregate and then ignore the omissions is neither in the interest of accused nor the prosecution. The ultimate aim is to have a trial fair to both, State as well as accused and, therefore, the segregation, as proposed by prosecution, is wholly impermissible. We, therefore, reject the contentions as raised in paragraph 6 of the application.

Upon reading the last and alternate aspect pleaded in paragraph 7 of the application, we find that both; the prosecution as well as defence are *ad idem* on the issue of recording of additional evidence contemplated by Section 391 of the Code of Criminal Procedure. Having consciously considered the submissions on this aspect, we are of the opinion that power under section 391 of the Cr. P. C. ought to be exercised in order that none of the parties are put to any prejudice. The prosecution has, however, requested this Court to record the evidence as against the reply in paragraph 8 filed by the accused, who says that trial court should be asked to do so. We quote para 8 from the reply, which reads thus:

“8. *The respondent submits that aforesaid omissions are significant and cause prejudice to the respondent-accused, and therefore this Hon'ble Court may kindly invoke the procedure prescribed*

in Section 391, Criminal Procedure Code and either remand the matter back to the trial court to put the above quoted omissions to PWs 4 and 5 or this Hon'ble Court may allow the omissions to be put to the child witnesses directly before this Hon'ble Court."

The accused thus has requested for putting only the omissions in the evidence of Shubham Baid (PW4) and Ridam Puriya (PW5) to them.

Section 391 (1) and (2) of the Cr. P. C. read thus:

"391. Appellate Court may take further evidence or direct it to be taken.

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal. "

We are of the view that it would be appropriate to send the matter to the trial Court for this purpose

namely; to put the omissions, if any in the evidence of Shubham Baid (PW4) and Ridam Puriya (PW5) and to the Investigating Officer. The entire exercise should be completed on the same date. Thus, in exercise of powers under Section 391 of the Cr. P. C., we make the following order:

ORDER

(i) Criminal Application No. 141/2015 is disposed of.

(ii) The Special Prosecutor as well as the Defence Counsel and the accused shall appear before the Principal District Judge, Nagpur on 03.03.2015. The Principal District Judge, shall then fix a date for recording of additional evidence of Shubham Baid (PW4), Ridam Puriya (PW5) and the concerned Investigating Officer, as aforesaid on one single date by taking into consideration convenience of all.

(iii) The appellant shall be produced before the learned Principal District Judge, Nagpur on 03.03.2015 at 11.00 a.m. sharp.

(iv) After appearance of the parties on 03.03.2015, the Court shall fix the next date for recording of additional evidence. The evidence shall

then be certified to this Court on or before 16.03.2015 by Special Messenger. This Court shall consider the matter thereafter.

Stand over to 18.03.2015.

JUDGE

JUDGE

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