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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO. 1322 OF 2013
IN
CRIMINAL APPEAL NO. 755 OF 2013**

Ashish Khetan .. Applicant

In the matter between

Mirza Himayat Baig alias Ahmed Baig
Inayat alias Hasan .. Appellant

Vs.

The State of Maharashtra .. Respondent

**WITH
CRIMINAL APPLICATION NO. 1578 OF 2013
IN
CRIMINAL APPEAL NO. 755 OF 2013**

Shaikh Gous Khurshid Ahmed .. Applicant

In the matter between

Mirza Himayat Baig alias Ahmed Baig
Inayat alias Hasan .. Appellant

Vs.

The State of Maharashtra .. Respondent

CRIMINAL APPLICATION NO. 1579 OF 2013
IN
CRIMINAL APPEAL NO. 755 OF 2013

Abdul Rehan Ahmed Shaikh .. Applicant

In the matter between

Mirza Himayat Baig alias Ahmed Baig
Inayat alias Hasan .. Appellant

Vs.

The State of Maharashtra .. Respondent

Mr. Mihir Desai, Senior Counsel a/w Ms. Lara Jasani i/by Mr. Vijay Hiremath for applicant/Intervener in Criminal Application No. 1322 of 2013.

Mr. Arshad Shaikh i/by Ms. Anubha Rastogi for applicants/Interveners in Criminal Application Nos.1578 and 1579 of 2013.

Mr. Mehmood Pracha a/w Mr. T. W. Pathan a/w Mr. I.A. Khan a/w Mr. V. A. Shaikh i/by Legal Axis for appellant/original accused.

Mr. Raja Thakare, Spl. P.P. a/w Smt. V. R. Bhosale, APP a/w Mr. Sagar Kumbhar a/w Mr. Bharat Maghani for State.

Ms. Mansi Mahida for ATS.

**CORAM: NARESH H. PATIL &
S. B. SHUKRE, JJ.**

March 17, 2016.

P.C:

1. Criminal Application No. 1322 of 2013 is filed by Ashish Khetan, who is a journalist, for allowing him to intervene in Criminal Appeal No. 755 of 2013. By the said application, he mainly prayed as under :-

- (i) Pass appropriate order and/or direction for taking on record the said video recordings/materials obtained by the applicant being (1) Abdul Sayyad Raheem recorded on 15th September, 2013 by the applicant, (2) Shaikh Abdul Rehan recorded on 16th September 2013 by the applicant, (3) Mohammed Ansari recorded on 19th September, 2013 by Soumik Mukherjee, (4) Shaikh Gaus recorded on 15th September 2013 by the applicant and (5) Shaikh Nazir Ateeq recorded on 14th September 2013, and after due examination of the same, pass appropriate orders and/or directions appointing an investigating agency /force other than the ATS to conduct an independent investigation/enquiry into the case under the supervision of a judicial panel specially constituted by this Hon'ble Court;
- (ii) Pass appropriate order and/or direction for constituting a judicial panel for supervision of the said independent investigation/enquiry into the case by the independent agency/force and pass further direction to the said panel

for reporting the progress/report of such investigation to this Hon'ble Court within a period of three months.

- (iii) Pass appropriate order and/or direction for calling the said witnesses (1) Abdul Sayyad Rehan, (2) Shaikh Abdul Rehan, (3) Mohammed Ansari, (4) Shaikh Gaus and (5) Shaikh Nazir Ateeq to this Hon'ble Court and recording the statements of the said witnesses.
- (iv) Pass appropriate order and/or direction for conducting a fresh trial on the basis of the reinvestigation of the case and pass further order/direction that the said video recordings/materials be considered as evidence for the purpose of the said trial, and/or in any manner thought fit in accordance with law.
- (v) Pass appropriate orders and/or directions appointing an independent agency/force for ensuring protection, safety and rehabilitation and providing compensation to the said five witnesses being (1) Abdul Sayyad Rehan, (2) Shaikh Abdul Rehan, (3) Mohammed Ansari, (4) Shaikh Gaus and (5) Shaikh Nazir Ateeq, and directing the said agency/force so appointed to submit timely reports of the same to this Hon'ble Court and/or to a judicial panel specially constituted by this Hon'ble Court for the said purpose.

2. Criminal Application No. 1578 of 2013 is filed by Shaikh Gous Khurshid Ahmed, P.W. No. 92 in Sessions Case No. 771 of 2010. By the said application, he prayed as under :-

- (i) For declaration that the statements made by the Intervener/Applicant before the investigating agency i.e. ATS/court and/or as relied upon in the charge-sheet and/or the evidence led by the Intervener/Applicant in the matter of Sessions Case No. 771/2010 against the Appellant, were coerced, made under compulsion and not of the free will of the Intervener/Applicant, and on account of intimidation /under threat to the Intervener/Applicant by the ATS and consequently be discarded as false.
- (ii) for appointment of any independent central agency such as the Central Industrial Security Force, or agency akin to such, to provide protection to the Intervener/Applicant.
- (iii) For the rehabilitation of the Intervener/Applicant.
- (iv) For fresh examination of the Intervener/Applicant in the matter of Sessions Case No. 771 of 2010 against the Appellant and in order to enable the same, for reinvestigation and retrial in the matter of Sessions Case No. 771 of 2010 against the Appellant.

- (v) For initiation of appropriate legal proceedings against the erring officers of the Anti Terrorists Squad, who have indulged in the aforesaid illegal acts, as more particularly set out below, and who have continued to commit these acts of intimidation and extortion against the Intervener/Applicant.

3. Criminal Application No. 1579 of 2013 is filed by Abdul Rehan Ahmed Shaikh, P.W. No. 94 in Sessions Case No. 771 of 2010. By the said application, he mainly prayed as under :-

- (i) Pass appropriate order declaring the statement/evidence of the Intervener/Applicant in the Sessions Case No.771 of 2010 to have been made under coercion, pressure and against the will of the Intervener/ Applicant and to pass further order and/or direction in pursuance to the same for discarding the statement/evidence of the Intervener/Applicant in the Sessions Case No. 771 of 2010.
- (ii) Pass appropriate order and/or direction for recording statement/evidence of the Intervener/Applicant before this Hon'ble Court afresh and for conducting fresh examination of the Intervener/Applicant.
- (iii) Pass appropriate orders and/or directions appointing an independent central agency/force for ensuring protection, safety and rehabilitation of the

Intervener/Applicant and directing the said agency /force so appointed to submit timely reports of the same to this Hon'ble Court and/or to a judicial panel specially constituted by this Hon'ble Court for the said purpose.

- (iv) Pass appropriate orders and/or direction for initiation of appropriate legal proceedings against the erring officers of the Anti Terrorists Squad, who have indulged in the aforesaid illegal acts and who continue to commit these acts of intimidation and extortion against the Intervener/Applicant.

4. Mr. Mihir Desai, learned Senior Counsel for applicant in Criminal Application No. 1322 of 2013 submitted that some of the witnesses have disclosed that they were coerced and tutored into making deliberately false statements before the court with intention to mala fide securing conviction of the accused. Said witnesses stated that they were all kept sequestered separately for several days and tutored by the ATS personnel as to the nature of the recoveries and statements that were relied on to convict the accused. The learned Senior Counsel referred to the statement made by Abdul Sayyad Raheem, Shaikh Abdul Rehan (PW 94), Mohammed Ansari (PW 97), Shaikh Gaus (PW 92) and Shaikh Nazir Ateeq. It was submitted that all these five witnesses were key witnesses and testimonies of them were relied upon by the trial court while delivering the verdict. The learned Senior Counsel submitted that in the facts and circumstances of the case, it would be prudent to appoint an independent agency for investigation under the supervision of a judicial panel specially

constituted by the High Court. The learned Senior Counsel submitted that the transcription of the excerpts from video recorded versions of the witnesses is also placed on record which would indicate the falsity of evidence led by the prosecution.

5. The learned Senior Counsel submitted that the applicant – Ashish Khethan is not part of the Sessions Case. His application is based on so called sting operation. Thus, he is an outsider. In the facts, he does not have any right to interfere in the proceedings of the criminal case/criminal appeal for seeking relief as prayed in the application. Even if it is presumed that the applicant has any semblance of any right, then it should be seen that his contentions and prayers do not relate to evidence led before the trial court. His contentions are based on extraneous material, which according to him was brought to his notice. The applicant raised an issue as to why Abdul Rehan was not examined. To the said issue, Mr. Raja Thakare, learned Spl. P.P. submitted that it is the choice of the prosecution and it is absolute prerogative of the prosecution to examine a witness or not to examine. The prosecution takes up the consequences of non-examination of some witnesses.

6. Learned Senior Counsel placed reliance on the following judgments :-

- (a) R. Rathinam vs. State by DSP, District Crime Branch Madurai District, Madurai and anr. [AIR 2000 SC 1851].
- (b) Puran etc. vs. Rambilas and anr. [AIR 2001 SC 2023].
- (c) Smt. Shakila Abdul Gafar Khan vs. Vasant Raghunath

Dhoble and anr. [(2003) 7 SCC 749].

- (d) Zahira Habibulla H. Sheikh and anr. vs. State of Gujarat and ors. [AIR 2004 SC 3114(1)].
- (e) R. K. Anand vs. Registrar, Delhi High Court [(2009) 8 SCC 106].
- (f) Natasha Singh vs. CBI (State) [(2013) 5 SCC 741].
- (g) Dr. Subramanian Swamy and ors. vs. Raju, through Member, Juvenile Justice Board and anr. [2013 (10) SCALE 365]

7. The applicant in Criminal Application No. 1578 of 2013 submitted that he was a witness i.e. PW 92 in Sessions Case No. 771 of 2010. The applicant states that illegal acts were committed by the ATS officer for procuring false evidence from the applicant. The applicant seeks declaration that the statement made by the applicant before the investigating agency and relied upon in the charge-sheet were made under coercion and compulsion. He has given the details of his story, which is contrary to the prosecution case. In para 19, the applicant stated as under :-

“19. The Applicant states that in Pune, the Applicant was first taken to the ATS office where Gaekwad who was there gave a parchi of 5-6 pages to the Applicant and asked him to read it and said that the Applicant has to give his statement accordingly. The Applicant states in that statement lot of things were written but the Applicant did not get time to read it. Mr. Milind Gaekwad and Dwarke sir directly started training the

Applicant. Thereafter on the next day the Applicant and Abdul Raheem were taken to Sanjay Latkar's office. Sanjay Latkar started asking the Applicant questions and in the course of this questioning, for the first time he said that the ATS officers had found RDX from the white building. The Applicant states that till then the ATS officers had never mentioned RDX. The Applicant states that he was shocked and said that according to him no such thing was found in the white building. Mr. Ladkar called Reddy and Dwarke and shouted at them questioning the training given by them to the Applicant. Thereafter, Reddy made the Applicant understand that his testimony was the next day and that the Applicant must say exactly as he was told or else it would cause big trouble. The Applicant was also taken out of the office and yelled at, and thereafter was taken to another room. Thereafter Sanjay Ladkar asked the Applicant if he was mad and warned him that if he said anything against their instructions or said that the RDX was not found in the building, he would put the Applicant in with the Appellant and falsely implicate him in the case. The Applicant was threatened a lot not to deviate from the statement provided by the ATS officers. The ATS officers also told the Applicant that some other witnesses did the same thing and they falsely implicated him. The ATS officers told the Applicant that if he acted smart before the court they will put him in with the Appellant. The Applicant also heard the ATS officers tutoring Abdul Raheem to say that the ATS had found white padarth, soldier gun,

pakkad from the coaching classes. However, Abdul Raheem refused to say that. Abdul Raheem was very scared and told the Applicant that the ATS officers were forcing him to say that these items were found and that he was threatened that if he refused, he would be implicated in the case.”

8. The applicant in Criminal Application No. 1579 of 2013 narrated that he was forced to make statement before the police. He was threatened by the ATS officers who were hitting the applicant throughout questioning. The applicant submitted that he was made to state false things to suit prosecution case. At times, the applicant has stated that he was offered Rs.20 lakhs, if he disclosed the name of accused involved in Hyderabad blast. Learned counsel Mr. Arshad Shaikh referred to the provisions of Section 100(4) of Cr. P. C. The learned counsel submitted that Abdul Rehan was the material witness and it is the responsibility of the prosecution to explain as to why he was not examined and in absence thereof adverse inference is required to be drawn. The learned counsel referred to para 48 of the judgment in the case of Zahira Habibulla H. Sheikh and anr. vs. State of Gujarat and ors. [AIR 2004 SC 3114(1)]. It was submitted that no prejudice would be caused to the prosecution if Abdul Rehan was examined. The learned counsel submitted that the investigation was not conducted in fair and transparent manner. The witnesses were forced and coerced to make statements and depose before the court. This appeal being in continuation of trial, the court shall exercise of its power and look into the issue raised by the applicants/interveners in this case. Learned counsel also relied upon the judgments in the case of

Dilip Premnarayan Tiwari and anr. vs. State of Maharashtra [2010 Cri. L.J. 905] and in the case of Shiv Kumar vs. Hukam Chand and anr. [(1999) 7 SCC 467].

9. The learned Spl. P. P. Mr. Raja Thakare submitted that when these witnesses were examined in the court, they did not make any complaint to the court. He submitted that none of these witnesses, who now state before the court that they were coerced to make the statements before the ATS official and the court, made any complaint before the court when their statements were recorded by the police or while they deposed before the trial court. None of these witnesses made any complaint of undue influence put on them by the ATS officers. Even after their evidence was over till the conclusion of the trial, none of the witnesses resiled from the depositions, nor they were declared hostile by the prosecution. These witnesses have approached this court now by filing present applicants after the pronouncement of the conviction and sentence. The applications are filed at a highly belated stage after abnormal delay which is not explained satisfactorily. In the facts and in view of the settled position in law, no interference is warranted by this court at the behest of these applicants.

10. We have heard the learned counsel for the applicants and Mr. Thakare, learned Spl. P. P. for the State. We find substance in the arguments advanced by the learned Spl. P. P. that none of the witnesses made any grievance before the court while they deposed before court and even after conclusion of their evidence before the trial court. In the facts of the case, no interference is warranted now at the behest of these witnesses

who approached this court at a belated stage. In the facts, we find that the witnesses deposed before the court and were cross-examined. In case we allow these applications filed by the witnesses, then the entire case would get reopened which, in the facts of the case, we are not inclined to do so. Appropriate opportunity was provided to both the sides, prosecution and defence, which could be gathered from the record placed before us. The evidence was read over to the witnesses in the trial court and it was agreed by them to be correct. That was the appropriate time for the witnesses to raise their grievances, if they were forced to make false statements before the trial court.

11. As regards the application filed by Ashish Khetan, a journalist, we are of the view that the facts and circumstances of the case do not warrant to reopen these issues. We are, therefore, not convinced to allow the applications filed by the applicants. We have also perused the judgments cited by the learned counsel for the applicants. In the facts of the case, we are not convinced to reopen the issues or allow any of the prayers made by the applicants in these applications.

12. The applications stand rejected.

(S. B. SHUKRE, J.)

(NARESH H. PATIL, J.)