

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

905 CRIMINAL APPLICATION NO. 3170 OF 2017

SHIVRAJ S/O LAXMAN KOTNOD & ANR.

VERSUS

THE STATE OF MAHARASHTRA & ANR.

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Mr. G.G.Suryawanshi, Advocate for Applicants.

Mr. S.Y.Mahajan, A.P.P. for R - 1 - State.

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CORAM : V.L.ACHLIYA, J.

DATE : 8th AUGUST, 2017

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ORDER :

1. Learned counsel for the applicants seeks leave to delete respondent No. 2 as party - respondent to the application. Leave granted. Necessary correction be carried out in the application forthwith.

2. In view of the limited challenge raised in the application, it is not necessary to discuss the facts in detail. The applicants are subjected to face charge u/ss

353,323,504,506 read with section 34 of the Indian Penal Code. On 25/10/2016, Examination-in-Chief of two prosecution witnesses viz. Abdul Rauf Shaikh Ibrahim [P.W.3] and Uttam Nagorao Sondare [P.W.4] was recorded. Said witnesses were offered for cross examination. However, their cross examination could not be recorded due to non appearance of their Advocate. The accused declined to cross examine the witnesses. On 16/11/2016, the Advocate representing the applicants, moved application u/s 311 of the Code of Criminal Procedure seeking recall of P.W. 3 and P.W.4 for cross examination. The application was rejected vide order dated 06/05/2017. Being aggrieved, the applicants have filed this application u/s 482 of the Code of Criminal Procedure.

3. Learned counsel for the applicants strenuously contended that absence of counsel representing the applicants was not deliberate, but it was due to reason beyond his control. He further submits that in the interest of fair trial, trial Court ought to have allowed the application. He further submits that if witnesses are recalled, no prejudice would cause to the prosecution as ultimately the case will be decided on merit.

4. Learned A.P.P. supported the order passed by the trial Court with contention that the order passed reflects that in spite of repeated calls, Advocate representing the applicants failed to appear. So also the application of adjournment was also not filed.

5. On due consideration of the submissions advanced, I am of the view that it is a fit case wherein the Court can use power u/s 482 of Code of Criminal Procedure so as to ensure that the accused be given fair opportunity to meet the case against them. In the application dated 16/11/2016 filed immediately after the order of "no cross" passed by the trial Court, the applicants have made out a case to entertain the application. It has been specifically mentioned that the absence of Advocate was not deliberate but due to his illness. While rejecting the application, learned Magistrate has observed that the witnesses are Govt. servants and to secure their presence, much time of Court will be wasted and the proceeding will be delayed. In my view, the reasons recorded by the learned Judge in rejecting the application are not sustainable. It appears from the face of record that the period of 7 to 8 months have been taken in deciding such application seeking recall of witnesses. The

order of "no cross" was passed on 25/10/2015. The application seeking recall of witnesses was moved on 16/11/2016. Learned prosecutor recorded Say on the same day. However, the order has been passed on 06/05/2017, which reflect that the period of six months have been spent in deciding such application. There was total non application of mind on the part of learned Magistrate in deciding the application. In fact the learned judge has not even taken pains to consider the object of section 311 of the Code of Criminal Procedure. It is expected from the Courts of law that their approach should be pragmatic while conducting the cases. Unnecessary hyper technical approach should not be adopted in conducting the cases. The applicants would have been permitted to cross examine the witnesses, the trial may have been concluded by this time. For the just decision of the case and to meet the ends of justice, it is necessary that accused be given fair opportunity to meet the case against him. I am, therefore, inclined to allow the application subject to costs of Rs. 5,000/- to be deposited by the applicants before the trial Court as condition precedent to cross examine the witnesses.

6. In the result, the application is allowed in terms of prayer clause ' B ' subject to costs of Rs. 5,000/-.

[V.L.ACHLIYA, J.]

KNP/Cr. ApIn. 3170.2017