

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

CRIMINAL WRIT PETITION NO.1292 OF 2017
WITH
CRIMINAL APPLICATION NO.6332 OF 2017

. Sunil s/o Sitaram Dond
Age: 40 years, Occu.: Agril. &
Business, R/o.Matapur,
Tq.Shrirampur, Dist.Ahmednagar. ..Petitioner

VERSUS

- 1) The State of Maharashtra
Shrirampur City Police Station,
Tq.Shrirampur, Dist.Ahmednagar,
- 2) Ajay s/o.Dinkar More
Age: 22 years, Occu.: Nil,
R/o.Prakash Nagar, Near Thatte
Ground, Ward No.7, Shrirampur,
Dist.Ahmednagar.
- 3) Parag s/o. Machhindra Pathare
Age: 20 years, Occu.: Nil,
R/o.Near Borawake College,
Ward No.1, Shrirampur,
Dist.Ahmednagar.
- 4) Dhiraj s/o.Shankar Shinde
Age: 23 years, Occu.: Nil,
R/o.Sanjay Nagar, Near New Water
Tank, Shrirampur, Ahmednagar. ..Respondents

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Advocate for the Petitioner : Mr.R.R.Karpe
Advocate for the Respondent No.1 : Mr.A.A.Jagatkar
Advocate for the Respondent Nos.2 to 4 : Mr.G.R.Sayyed

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CORAM : PRAKASH D.NAIK, J.
DATE : 5.12.2017

ORAL JUDGMENT:-

1) The petitioner has challenged the order dated 6.9.2017 passed by the Sessions Court Shrirampur below Exh.142 in Sessions Case No.40 of 2015.

2) The petitioner is the first informant in Crime No.I-72 of 2015 registered with Shrirampur Police Station. The offences were registered under Sections 363, 385, 387, 302, 201, 120B, 364 and 366 read with Section 34 of the Indian Penal Code. Charge-sheet was filed and the case is pending before the Court of Additional Sessions Judge, Shrirampur, which is numbered as Sessions Case No.40 of 2015. The case relates to the murder of the deceased Ganesh Chandgude. The petitioner is the maternal uncle of the deceased.

3) The charge-sheet has been filed and the trial had

already proceeded. About 25 witnesses are already examined by the prosecution in support of its case. The respondent Nos.2 to 4 are impleaded as accused in the case arising out of the said complaint registered as Session Case No.40 of 2015.

4) The petitioner's contention is that the case is heavily oriented around the electronic evidence, particularly, the conversation recorded and gathered from the Cell Phones, which were allegedly used while commission of the crime along with CCTV footage. It is contended that the charge-sheet indicates that relevance of conversation in the mobile Cell Phones along with CCTV footage, which has been culminated into the Compact Disc (CD), which includes the conversations of the accused since kidnapping of the deceased till commission of murder on the count of non-compliance of demand of extortion amount.

5) It is submitted that, the prosecution preferred an application vide Exh.138 wherein permission was sought from the Court of Additional Sessions Judge for placing the CDS on record, which were received from Forensic Science Laboratory, Mumbai, after due inspection. It was requested that, these two CD's be permitted to be placed on record in the Sessions Case. Vide order dated 19.8.2017 the Sessions Court granted the permission and thereafter these CDS are taken on record and these CDs are part of the Sessions Court proceeding.

6) The petitioner further contends that taking into consideration vital importance of the CDs received from Forensic Science Laboratory, Mumbai, after its verification and scrutiny, the prosecution filed application vide Exh.142 on 1.9.2017. In the said application, it was stated that the recovered mobile cell phone and CCTV footage were sent to Forensic Science Laboratory, Mumbai, and after due verification and

scrutiny of the electronic device, the said Forensic Science Laboratory, Mumbai, has prepared two CDs. It was further stated that the Court had permitted the CDs to be placed on record so as to read in evidence. In the application it was further stated that the evidence with regards to the CDs is relevant to the prosecution's case. It was also stated that it is necessary to issue certificate under Section 65-B of the Evidence Act. It was also stated that it is necessary to ascertain whether the certificate is enclosed in the sealed packet and in the event the certificate is not available, requisite evidence will have to be adduced. It was therefore, prayed that the envelopes of CDs may be permitted to be opened in the presence of the Advocates to ascertain the existence of the certificate and in the event such certificate is not found in the envelopes, the prosecution may be permitted to issue summons to the witnesses.

7) The learned Additional Session Judge on 1.9.2017 ordered that the envelopes be opened in the presence of the Advocates. The Court observed that it would be just and proper to open two envelopes, which contains CDs at this stage and the application was allowed to that extent. The said order was passed on the application preferred by the prosecution vide Exh.142. Thereafter, the envelopes were opened in the presence of both the Advocates. The envelopes were marked as Exh.146 and Exh.147. The Court thereafter, recorded in the Order dated 1.9.2017 that in the envelop Exh.146, there is one CD and in the envelop Exh.147 there are four photographs. The CD and photographs were kept in respective envelopes and they were sealed in the presence of the Advocates for both the parties. The order further states that learned APP sought time to make submission on the point of certificate under Section 65-B of the Evidence Act, hence, time was granted to the prosecution.

8) In pursuant to that the Trial Court heard the parties on the application preferred by the prosecution vide Exh.142. The Trial Court vide order dated 6.9.2017 rejected the said application.

9) While passing the order dated 6.9.2017, it was observed that the application has been filed at the stage when the case is fixed for final argument after evidence of 25 prosecution's witnesses has been recorded. While deciding merit of the application, the opposite party has raised objection for issuance of summons on the ground that the prosecution is prolonging the case. The Trial court however, observed that merely filing application at the belated stage, cannot be a reason to reject the application. Further, the Trial Court has observed that the prosecution has contended that there are two CDs, but after opening envelopes, only one CD is found in one of the envelopes and in other envelop there were positive photographs. While considering the merit of the CD,

report was produced regarding its production with a prayer that CD may be allowed to be produced on record, which was received by the City Police Station, Shirpur, containing mobile and CCTV footage sent for Forensic Science Laboratory, Mumbai, for observations. The Court thereafter observed that on perusal of report dated 15.3.2016, it appears that permission to produce DNA report, mobile examination, and VDR examination report on record which is in the paper form. Thus, it appears that by way of such report Exh.138, it is produced in the form of CD. The Court also recorded the fact that the accused/respondents had filed a written say and submitted that the Forensic Science Laboratory, Mumbai, has filed its report in writing and same is exhibited document. The finding of Forensic Science Laboratory, Mumbai, is narrated on paper regarding mobile details. The accused also contended that the CCTV footage claimed by the prosecution is not an evidence. The purport of legal provision in this regard cannot be claimed at later stage

nor it is ground for examining witness. The application is vague on the point of issuing the summons. The Trial Court thereafter, concluded that without discussing merits of CD or the report as the matter is at the fag end of final argument, there is no just and legal grounds for examination of witness. It was further observed that, the decisions cited by the prosecution were not applicable in the case. Considering the contents of the application, the prayer for issuance of witness summons was rejected.

10) The petitioner, who is the first informant has therefore approached this Court challenging the order dated 6.9.2017. Although the application vide Exh.142 was preferred by the prosecution, the said order is not challenged at the instance of the prosecution. The learned counsel for the petitioner submits that the accused committed serious crime of brutal murder of a child aged about 17 years. It is submitted that the

victim was kidnapped and thereafter there was a demand of ransom and for not fulfilling the same, the victim was murdered. It is submitted that although the prosecution did not choose to challenge the order dated 6.9.2017 before this Court, in the interest of justice, the order of the Trial Court is required to be set aside. The petitioner is the first informant and was closely related to the victim and therefore, he has locus to prefer the present application. It is further submitted that prosecution's case is based on electronic evidence i.e. data collected from the mobile phone wherein messages have been exchanged by the accused from the mobile phone of the deceased by using another SIM card for demanding the extortion amount. The case is also based on the evidence of CCTV footage collected from the concerned hotel. It is submitted that the data collected from Cell Phones and CCTV footage is culminated into CDs by Forensic Science Laboratory, Mumbai. It is submitted that in the interest of justice, the prosecution may be

permitted to examine the witness to prove the electronic evidence.

11) The learned counsel for the petitioner placed reliance on the Judgment of this Court in the case of *Somnath Gangadhar Karale and ors. Vs. State of Maharashtra, reported in 2016(5) Bom.C.R., 185.*

12) The learned counsel for the respondents strenuously opposed prayer sought in this petition. It is contended that the petitioner has no locus to challenge the impugned order. The prosecution has not filed any application challenging the order passed by the Trial Court. The prosecution has examined 25 witnesses and at the fag end of the trial when case was posted for argument, the application was preferred by the prosecution. It is submitted that the electronic evidence, which is sought to be relied upon by the prosecution has no sanctity of law as it is not in

consonance with the provisions of Section 65-B of the Evidence Act. It is submitted that the accused are in custody for a long period of time and the prosecution may not be allowed to be protracted on the basis of such frivolous application. It is submitted that the application preferred by the petitioner was vague and therefore the Trial Court has rightly rejected the application. The reasons assigned by the Trial Court are sound and does not require any interference of this Court.

13) The learned counsel for the respondent has relied on the following decision:-

a) *K.Ramajayam alias Appu V. Inspector of Police, Chennai, reported in 2016 Cri.L.J., 1542.*

b) *Anvar P.V. Vs. P.K.Basheer and ors., reported in AIR 2015, Supreme Court, 180.*

14) Learned APP supported the petition. It is submitted

that the prosecution had preferred an application vide Exh.142 before the Trial Court. In the interest of justice and more particularly, taking into consideration nature of crime committed by the accused and considering the fact that the prosecution's case revolves around the electronic evidence, the prayers made by the prosecution before the Trial Court ought to have been allowed. It is therefore, submitted that the reliefs sought by the petitioner may be granted.

15) On perusal of the documents on record, it is apparent that the case involves the murder of a young boy for ransom and the prosecution is relying upon the electronic evidence. The CD's were produced before the Court. The said articles were however in the sealed envelop, which were opened on 1.9.2017. The application was apparently preferred after the receipt of the said articles and on the report of the Forensic Science Laboratory, Mumbai. The envelopes were opened in the

presence of Advocates for both the sides. The application vide Exh.142 was however preferred on 1.9.2017 before opening of the envelopes, which were containing the CDs and photographs. Only after the envelopes were opened, it could be ascertained that it does not contain the certificate as envisaged under Section 65-B of the Evidence Act. The application dated 1.9.2017 preferred vide Exh.142 was preemptive and apparently it appears to be vague as the prosecution was not sure whether the envelopes contain the certificate or not. The prosecution has not made it clear as to which witness summons are required to be issued. The Trial Court while rejecting the application has observed that the application is vague on the point of issuance of summons. It is pertinent to note that the Trial Court has proceeded with the observation that merely on the ground that the application was preferred belatedly, the same cannot be rejected. However, in the concluding paragraph, it appears that the Trial Court is influenced

by the fact that the application is preferred at the fag end of trial and there appears no reason to allow summons to witnesses. In the circumstances, the application was rejected.

16) It is true that the accused are in custody for a long period of time and the prosecution had examined about 25 witnesses and the application was made in pursuant to order dated 19.8.2017 and thereafter on 1.9.2017, the envelopes were opened and the contents of the said envelopes were revealed to both the parties. Considering the fact that the case of the prosecution is primarily based on electronic evidence, the prosecution must be given an opportunity to prove its case.

17) The learned counsel for respondents had relied upon several decisions with regards to the evidentiary value of the CDs and it was also argued before the Trial Court that such evidence is not admissible in law.

18) I do not wish to make any observation about the admissibility of said evidence. However, it appears that the application preferred by the prosecution vide Exh.142 was vague obviously in the circumstances in which the application was preferred and the Trial Court has observed that there is no ground for examination of witnesses. The application Exh.142 does not specify as to which witnesses the prosecution intends to examine in support of evidence of CD in the event the CD is not accompanied by a certificate. In the circumstances, the impugned order is required to be set aside.

19) The learned counsel for the respondent No.2 to 4 submits that he do not wish to press Criminal Application No.6332 of 2017, however, liberty may be granted to the respondent to prefer application for bail before the appropriate Court.

20) In the circumstances, without expressing any opinion on the merits or evidentiary value of the CD, it would be appropriate to pass the following order:-

ORDER

(I) Criminal Writ Petition No.1292 of 2017 is partly allowed.

(II) The impugned order dated 6.9.2017 passed by the Additional Sessions Judge, Shrirampur, District Ahmednagar, below Exh.142 in Session Case No.40 of 2015 is set aside.

(III) The prosecution is permitted to prefer a fresh application before the Trial Court giving requisite details about the witnesses prosecution wishes to examine and for what reason. Such an application be preferred within a period of two weeks from today.

(IV) The Trial Court shall decide the application, if preferred by the prosecution for issuance of summons to the witnesses etc., in accordance with law and without being influenced by this order or its earlier order dated 29.9.2017.

(V) Considering the fact that accused are in custody, the application preferred by the prosecution, if any, may be decided within two weeks from the date of filing of the application.

(VI) Petition stands disposed of .

(VII) Criminal Application No.6332 of 2017 is allowed to be withdrawn with liberty to the respondents to prefer an application for bail before the appropriate Court.

[PRAKASH D.NAIK, J.]