

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1665 OF 2017

Rajesh Laxman Shirke & Ors. ... Petitioners

vs.

State of Maharashtra ... Respondent

Mr.Satyavrat P.Joshi,Advocate for the petitioners.

Mr. M.K.Irani, Advocate for the respondent.

Ms. Neeta Jain,APP, for the State.

CORAM: SMT.SADHANA S.JADHAV, J.

DATE : 5th May, 2017.

P.C.:

1. Rule. Rule is made returnable with the consent of the parties.
2. Being aggrieved by the order dated 5.4.2017 passed below Exhibit 198 in Sessions Case No.989 of 2013 passed by the Addl. Sessions Judge, Pune, the petitioners have approached this Court under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure.
3. The petitioners have been charge-sheeted for the offence punishable under Sections 420, 170, 395, 465, 468, 471, and 120-B of the Indian Penal Code and are accused of having impersonated as CBI officials and looted an amount of Rs.21,30,000/- from the house of Sohrab Kayani.

4. Charge is framed against the accused for the offences for which they have been charge-sheeted.

5. In the course of investigation, the petitioners were subjected to test identification parade. The T.I. parade was conducted by the Executive Magistrate. The memorandum of the test identification parade forms a part of the charge-sheet.

6. In the course of the trial, the Executive Magistrate was not examined by the prosecution for the reasons best known to the prosecution. The memorandum of the test identification report has been admitted in evidence as contemplated under Section 291-A of Cr.P.C. The accused had filed an application before the Sessions Court below Exhibit 198 requesting the learned Sessions Judge to summon the Executive Magistrate as a Court witness or as a prosecution witness in order to enable the accused to cross-examine the Executive Magistrate and challenge the very memorandum of the test identification parade. The said application was rejected by the learned Magistrate on three grounds. Firstly, that the learned Sessions Judge had invoked sub-section (1) of section 291-A of Cr.P.C. which contemplates that the document be admitted in evidence without examining the Executive Magistrate who is the maker of that document. Secondly,

that no formal proof is required to exhibit and admit the memorandum of TIP under sub-section (1) of Section 291-A of Cr.P.C. Thirdly, the learned Court was of the opinion that it is a discretionary power and therefore the learned Court has observed as follows :-

“It seems that whenever court thinks fit, it can allow the application of the prosecution or accused and summon and examine the said magistrate as to the subject matter of the report. This amended provision nowhere state that accused is entitled to cross-examines the witness as if it is the witness of prosecution, therefore, the Executive Magistrate cannot be summoned as a prosecution witness or the court witness.”

The learned Sessions Judge has observed that accused ought to have moved an application to summon the Magistrate. Liberty was given to examine him as a defence witness.

7. In fact, the accused had filed an application below Exhibit 198 and the prosecution was of the opinion that Section 291A of Cr.P.C. can be invoked and the Magistrate need not be called.

8. The learned counsel for the petitioners vehemently submits that the learned Sessions Judge has not taken into consideration sub-section (2) of Section 291 of Cr.P.C. which reads as follows :-

“(2) The Court may, if it thinks fit and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject-matter of the said report.”

9. The learned counsel rightly submits that in the eventuality that an application is filed by the accused, it is incumbent upon the Court to summon and examine such Magistrate as the Section contemplates a mandate by using the word `shall'. The words “if he thinks fit” are in the alternative and in the eventuality that no application is filed by the accused or the prosecution.

10. The word `shall' as defined in Black's Law Dictionary is :

(1) Has a duty to; more broadly, is required to. This is the mandatory sense that drafters typically intend and that courts typically uphold.”

The intention of the legislature in using the word `shall' preceding on the application would clearly indicate that the application filed by either party summoning a witness to prove the document deserves to be necessarily allowed.

11. In the case of **Khub Chand and others vs. State of Rajasthan and others AIR 1967 SC 1074**, the Hon'ble Court held as follows :-

“The term ‘shall’ in its ordinary sequence is mandatory and the Court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequences or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consensuses that would flow from the infringement of the direction and such other considerations.”

12. Bill No. XXXV of 1994 was introduced in the Rajya Sabha and was passed thereby Section 291-A was inserted in the Cr.P.C.

291-A. Identification report of Magistrate:

“(1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

Provided that where such report contains a statement of any suspect or witness to which the provisions of Section 21, Section 32, Section 33, Section 155 or Section 157, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), apply, such statement shall not be used under this sub-section except in accordance with the provisions of those sections.

(2) The Court may, if it thinks fit, and shall, on the application of the

prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report.]”

13. In the case of **Sheo Raj vs. State reported in AIR 1964 All. 290 (Full Bench)**, the Full Bench of the Allahabad High Court was considering Section 80 of the Evidence Act and was considering as to whether an identification memorandum prepared in respect of test identification parade would be covered under Section 80 of the Act. The issue before the Full Bench was whether by virtue of the provisions of Section 80 of the Indian Evidence Act, the identification memorandum prepared by the Magistrate at the time of holding the test identification parade can be read in evidence, presumed to be genuine and any statements made therein be taken to be made or signed by the persons purporting to have sent it when Magistrate being produced at the trial or what is contained in the identification memorandum or the witness at the trial, who had gone to the test identification parade being asked to state in respect of it. There is no provision either in the Act or the Code of Criminal Procedure or any other statute which contemplating the manner of holding those parades. The

Full Bench has observed as follows :-

“It cannot be held that by not formally proving it and simply filing the memorandum of identification in Court, the position of the party relying upon it is improved and it can raise presumptions mentioned in Section 80 of the Act in its favour, so as to read the identification memorandum as substantive evidence, it becomes imperative that what a person stated or pointed out at the test identification parade must be put to him when he appears as a witness in Court and if he denies it, to have the Magistrate who conducted the identification parade, to prove the identification memorandum. It is settled that evidence of identification furnished by identification parade can only be hearsay except as to the simple fact that the person was in a position to show that he knew a certain suspect by sight.”

The issue was answered in the negative. It is therefore clear that the memorandum of test identification parade is not a document at all as contemplated under Section 80 of the Evidence Act and is to be proved by the substantive evidence.

14. Sub-section (1) of Section 291-A cannot be read in isolation

without giving a thoughtful consideration to sub-section (2) of section 291-A of Cr.P.C. In the present case, firstly this Court is of the opinion that a memorandum of test identification parade will not be a document as contemplated under Section 80 of the Indian Evidence Act. Section 80 of the Indian Evidence Act reads as follows :-

“80. Presumption as to documents produced as record of evidence.—Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume— that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.”

It would not be possible for any Court to presume that the

circumstances in which the test identification parade was held are beyond reasonable doubt, as to whether the contents of the memorandum as ascribed by the Executive Magistrate can be held to be true and genuine in the absence of any substantive evidence. The Court cannot be oblivious of the fact that it would be a hazardous situation in the eventuality that the memorandum of T.I. parade is made admissible at the discretion of the trial Court. By virtue of subsection (2) of Section 291-A, it cannot be said that it is a negative legislation and that Section 291-A is designed to prevent the Magistrate who supervise the test identification parade, the cornerstone of the criminal trial, from being summoned to give evidence in Court. It is not a negative change sought to be introduced by the Criminal Amendment. All that is contemplated by the said insertion of section 291-A is that in the absence of any application by the prosecution or the defence or in the absence of any grounds raised by either of the parties, the Magistrate may in his wisdom admit document captioned as “a memorandum of test identification parade”. However, if the Magistrate has serious doubts, he is not powerless to summon the Executive Magistrate who has

conducted the test identification parade as a Court witness.

15. No doubt, the Addl. Sessions Judge has granted liberty to the accused to move an application to summon the Executive Magistrate as a defence witness.

16. The learned counsel rightly submits that the Executive Magistrate cannot be examined as a defence witness as it would curtail the scope of Sections 145 and 146 of the Indian Evidence Act. The Special Magistrate is also a party to investigation and hence the accused would lose the right to cross-examine. It is, therefore, made clear that the Special Executive Magistrate shall necessarily be summoned as a prosecution witness or Court witness. The learned counsel further submits that the Criminal Manual of State of Maharashtra lays down a procedure to be followed at the time of conducting T.I. parade. It would therefore necessitate to examine Executive Magistrate on oath to substantiate that he had followed the procedure or not.

17. Since this Court is of the opinion that the memorandum is not a document under Section 80 of the Indian Evidence Act, it would

be in the interest of justice to examine the Executive Magistrate as a Court witness by allowing the application filed by the accused as contemplated under sub-section (2) of Section 291-A of Cr.P.C. Hence, the order is quashed and set aside. The trial Court shall summon the Executive Magistrate and record his evidence, as far as possible, within 60 days from the receipt of this order calling upon him to prove the memorandum of test identification parade and record his substantive evidence in accordance with law.

O R D E R

(i) As far as Section 291-A of the Code of Criminal Procedure, 1973 is concerned, the learned Sessions Court shall follow the mandate of Section 291-A of Cr.P.C. The learned counsel assisting the prosecution submits that the accused were absconding and, therefore, non-bailable warrants have been issued against the three accused persons. The non-bailable warrant has been executed against one of the accused and he is taken into custody, probably on 30th April, 2017.

(ii) The petitioners to appear before the learned Sessions Judge, Pune on 11.5.2017 and file an application seeking recalling of the non-bailable warrant. The learned Sessions Judge shall consider the

application on its own merits. In view of the fact that the petitioners have been on bail during the trial and an application was moved for following the statutory mandate, the petitioners had not attended some of the dates and hence, non-bailable warrant has been issued. The learned Sessions Judge shall consider these aspects while deciding their applications seeking recalling of non-bailable warrant.

16. Writ Petition is allowed in terms of prayer clauses (a) and (b).
17. Parties to act on an authenticated copy of this order.

(SMT.SADHANA S.JADHAV, J.)