

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 182 OF 2018

Parvez Iqbal Tak

... Applicant

Vs.

State of Maharashtra

... Respondent

...

Dr. Yug Mohit Chowdhary, Sr.Counsel I/by Mr. Abdul Wahab Khan for the applicant.

Mr. A.R. Patil, APP for the Respondent-State.

...

CORAM : PRAKASH D. NAIK, J.

DATE : 27th JUNE, 2018.

P.C.

1. The applicant is prosecuted for an offences punishable under Sections 302, 397, 363, 364(A), 201 read with Section 34 of Indian Penal Code and Section 120 B of Indian Penal Code. The first information report was registered vide CR No.218/2012 under Section 363, 364-A, 34 of Indian Penal Code on 4th July, 2012. However, on completing the investigation, the chargesheet was filed for the aforesaid offences.

2. The prosecution case is that the complainant Nadir Patel lodged FIR on 4th July, 2012 against the accused alleging that the vehicle belonging to his wife was found within the State of Jammu and Kashmir. It was further alleged that the complainant wife Shelina Patel was residing at Oshiwra. She was also holding

immovable property at Mira Road and Igatpuri, Nashik. The applicant-accused was allegedly seen in the company of family of the complainant somewhere in February, 2012. Subsequently, at the instance of the applicant-accused six skeletons were discovered from the compound of bungalow vide discovery panchanama.

3. The trial proceeded with the case and evidence of several witnesses were recorded. P.W.No.29 was under cross-examination. The evidence of the said witnesses was recorded on 19th March, 2018. The advocate for accused sought permission to refer document viz Statement of Prakash Mengal. During the cross-examination, a question was put to witness by the advocate for the applicant as follows :

“Q. Is it correct copy of this statement annexed by you alongwith writ petition?”

At that point of time learned Special Public Prosecutor objected to the said question on the ground that the statement in question was a statement under Section 161 of Code of Criminal Procedure and the same cannot be identified. It was also contended that the statement in question is of person namely Prakash Mengal and the witness under cross-examination is not an author of the said statement. Considering the objection by the prosecution, the

learned Additional Sessions Judge refused the permission to the defence to refer the document to the said witness and asking the question.

4. Learned advocate for the accused thereafter requested the Court to defer the cross-examination as he intends to challenge the said order before the High Court. The Court therefore observed that considering the stand of challenge by any party to finding is his legitimate right therefore it is necessary to give ample opportunity to the accused. However, at the same time, it is to be seen that the accused is in jail for more than five years. Hence accused was directed to challenge the said decision within reasonable time.

5. While refusing the question as aforesaid, the learned Sessions Judge in his order dated 19th March, 2018 has observed that the statement of Prakash Mengal in respect to which the question was put to PW No.29 was recorded by the police officer and that witness is not the author of the said document. It is further observed that no doubt the witness has admitted that he has annexed statement alongwith writ petition. But at the same time he also answered in the cross-examination that Prakash Mengal has not filed such complaint. The witness is not related to

the incident in question. PW No.29 was being examined in relation to FIR lodged by him and missing complaint. Hence, the document in question cannot be referred to the said witness. It is also observed that it is true to say that it is recorded prior to FIR in respect of another complaint. The statement is recorded by the police and prayer for referring this document to this witness and asking the question is required to be rejected.

6. Dr. Yug Chowdhary, learned counsel appearing for the applicant submitted that the trial Court has erred in rejecting the said question. He submitted that the statement of Prakash Mengal cannot be termed as statement under Section 161 of Code of Criminal Procedure. Taking into consideration the nature of the statement, there is no legal bar even under Section 162 of Code of Criminal Procedure, 1973 to put the said question to the witnesses qua the said document. It is submitted that the witness under cross-examination had admitted that he had annexed the said document viz Statement of Prakash Mengal to the writ petitions filed by him in the High Court. He pointed out the version of the said witness in the cross-examination conducted by the defence advocate and submitted that the accused had a right to ask the question to the witnesses in respect to the said

statement. The defence cannot be precluded from asking such a question when there is no legal bar in that regard. He relied upon the decision of the Hon'ble Supreme Court in the case of Vinay D. Nagar Vs. State of Rajasthan¹ and Balram Prasad Agrawal Vs. State of Bihar and others².

7. Learned APP Shri A.R. Patil urged that there is no infirmity in the order passed by the trial Court. The statement which is referred to by the defence during the cross-examination of PW.No.29 is not connected with the present crime. P.W.No.29 was being examined by the prosecution in respect to the FIR lodged by him. He is not the author of the statement in question. Merely because he had filed the said statement in the Writ Petition before the High Court, the witness cannot be confronted in respect to said document in the cross-examination. He submitted that the Sessions Court has rejected the question by assigning cogent reason which does not require any interference. It is further submitted that the judgments relied upon by the counsel for the petitioner, supports the objection raised by the prosecution and therefore the contentions of the petitioner are devoid of merits.

1. 2008 CRI. L.J.1907

21997 Supreme Court Cases (Cri.) 612

8. P.W.No.29 was being examined by the prosecution being the complainant. It would be relevant to note that in the cross-examination, P.W.No.29 has stated that prior to lodging FIR, he had gone to Igatpuri bungalow with his sister-in-law prior to July, 2011. He also deposed that he met Prakash Mengal at that time. He denied that Prakash Mengal has filed complaint in Igatpuri Police Station regarding fire incident in Igatpuri Bungalow. However, the witness admitted that he filed Writ Petition No. 2507/2012 and Writ Petition No.1514/2013 in the High Court. He had annexed the statement of Prakash Mengal in that Writ Petition. He also admitted that said statement was prior to First Information Report. He also deposed that he filed several complaints against police officers regarding incorrect averments in missing complaints and FIR. He also deposed that he has raised suspicious against several persons. He admitted that he had annexed all the complaints to his writ petitions and the contents therein were true and correct. The trial Court proceeded to record that since the documents were referred in cross-examination and admitted by the witness, they were marked as Exh.393 to 402 and at that point of time learned advocate sought permission to refer the document viz Statement of Prakash Mengal dated 23rd

December, 2011 which is subject matter of the controversy in the present application.

9. It is submitted by the counsel for the petitioner that said Prakash Mengal is reported to be dead and the report in that regard is filed by the prosecution before the trial Court. He was also listed as a witness and during the course of investigation, separate statement was also recorded.

10. On perusal of the deposition as stated above, it is apparent that P.W.No.29 had annexed the statement of Prakash Mengal in Criminal Writ Petition No. 1524 of 2013. The object of the defence to refer the said statement to witness appears to be that statement is contrary to the case of the prosecution with regard to theory of last seen together. The statement of Prakash Mengal was recorded by Igatpuri Police Station on 23rd December, 2011 prior to the registration of the FIR in the present case. The said statement in any manner cannot be said to be statement under Section 161 of Code of Criminal Procedure. In the light of admissions of the witness a question was put to him qua the said statement.

11. In the case of Vinay D. Nagar (supra) it was observed by the Apex Court that bar of Section 162 of Code of Criminal Procedure

is in regard to the admissibility of the statement recorded of a person by the police officer under Section 161 of Code of Criminal Procedure and by virtue of Section 162 of Code of Criminal Procedure would be applicable only where such statement is sought to be used at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. If the statement made before a police officer in the course of an investigation under Chapter XII is sought to be used in any proceeding, inquiry or trial in respect of an offence other than which was under investigation at the time when such statement was made the bar of Section 162 will not be attracted.

The relevant observations are reflected in paragraph 9, 10 and 11 of the said decision which read thus.

9. The question is whether the statement recored under Section 161 Cr.P.C. of the deceased Kalu in a case registered under FIR No. 290/2000 (abduction case) is admissible in the case registered under FIR No. 301/2000 (murder trial) in view of the provisions of Section 162 Cr.P.C. Section 162 Cr.P.C. reads as under:

“162. Statements to police not to be signed: Use of statements in evidence. (1) No statement made by any person to a police officer in the course of an investigation under this chapter, shall, if reduced to writing, be signed by the person making it : nor shall any such statement or any recored thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the

prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner proved by section 145 of the Indian Evidence Act, 1872; and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.”

On account of Section 162 Cr.P.C., a statement made by any person to a police officer in the course of investigation under Chapter XII, if reduced into writing, will not be signed by the person making it, nor such statement recorded or any part thereof be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Such statement may be used by an accused and with the permission of the Court by the prosecution to contradict the witness whose statement was recorded by the police in the manner provided under Section 145 of the Indian Evidence Act and can also be used for re-examination of such witness for the purpose only of explaining any matter referred to in his cross-examination. Bar of Section 162 Cr.P.C. of proving the statement recorded by the police officer of any person during investigation however shall not apply to any statement falling within the provision of clause (1) of Section 32 of the Evidence Act, nor it shall affect Section 27 of the Evidence Act. Bar of Section 162 Cr.P.C. in regard to the admissibility of the statement recorded of a person by the police officer under Section 161 Cr.P.C. and by virtue of Section 162 Cr.P.C. would be applicable only where such statement is sought to be used at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

10. *In the case of Khatri and others v. State of Bihar & Ors. AIR 1981 SC 1068, this Court has held that Section 162 Cr.P.C. bars the use of any statement made before the police officer in the course of an investigation under Chapter XII, whether recorded in the police diary or otherwise, However, by the express terms of Section, this bar is applicable only where such statement is sought to be used at any inquiry or trial in respect of any offence under investigation at the time when such statement was made If the statement made before a police officer in the course of an investigation under Chapter XII is sought to be used in any proceeding, inquiry or trial in respect of an offence other than which was under investigation at the time when such statement was made, the bar of Section 162 will not be attracted.*

11. *When the statement of Kalu was recorded by the police officers under Section 161 Cr.P.C. during the investigation of abduction case of a boy, Kalu was alive and thus that statement could be used in the subsequent investigation that was being made with respect to the alleged murder of Kalu."*

12. In another decision in the case of Balram Prasad Agrawal (supra) relied by the counsel for the petitioner the Hon'ble Supreme Court in paragraph 11 has quoted the observation of Privy Council in the case of *Subramaniam v. Public Prosecutor* where it was observed as follows :-

"11.....

The Privy Council in the case of Subramaniam v. Public Prosecutor observed :

'Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made'"

13. On perusal of the said observations it is pertinent that the evidence of statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. Learned APP stress upon these observations of the Privy Council and submitted that applying the said observation in the present case the accused cannot be permitted to put such a question. However on reading the entire paragraph in relation to the observation of the Privy Council it can be seen that the Privy Council had further observed that it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person in whose presence these statements are made.

14. Dr. Yug Chowdhary has submitted that it is in the light of the legal principles the question was required to be put to the witness which is subject matter of challenge in the present proceeding. It is noted hereinabove that the witness admitted in his cross-examination that the statement of Prakash Mengal was part of the

writ petitions filed by him. Documents were exhibited in evidence except the statement of Prakash Mengal.

15. Statement of Prakash Mengal was not recorded under Section 161 of Code of Criminal Procedure. It was with regard to fire incident in bungalow of Shelina Patel where he was working as watchman. P.W.No.29 has referred to said statement in his Writ Petition. The statement was recorded on 23rd December, 2011.

16. In the circumstances, the defence was justified in putting the question and the trial Court ought to have allowed the question to be put to the witness. For the reasons stated hereinabove, the decision rejecting the prayer for referring the subject document to P.W.No.29 and asking him question in that regard in the cross-examination is set aside. Defence be permitted to refer the statement of Prakash Mengal and put the said question putforth by defence and put further relevant and legally admissible questions to P.W.No.29 qua said statement. Petition is disposed off.

(PRAKASH D. NAIK, J.)