

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

CRIMINAL WRIT PETITION NO. 1514 of 2018.

Kartar s/o Tahelram Makhija,
Age 59 years, Occ. Business,
R/o. Gurukrupa Bhawan,
Barahanpur, (M.P).

... **Petitioner.**

VERSUS.

- 1) Bharat s/o Harish Manani,
Age 35 years, Occ. Business,
R/o. C/o. Inderjeet Kaur, Plot
No. 9, Sindhi Colony, Tq. &
Dist. Aurangabad.
- 2) Akash s/o Harish Manani,
Age 42 years, Occ. Business,
R/o. C/o. Inderjeet Kaur, Plot
No. 9, Sindhi Colony, Tq. &
Dist. Aurangabad.
- 3) Namrata w/o Akash Manani,
Age 41 years, Occ. Household
r/o. C/o. Inderjeet Kaur, Plot
No. 9, Sindhi Colony, Tq. &
Dist. Aurangabad.
- 4) The State of Maharashtra
Through Secretary Home
Department, Mantralaya,
Mumbai.
Police Station Jawaharnagar,
Aurangabad.

... **Respondents.**

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Mr. Zai Ul Mustafa, Advocate for the Petitioner.
Mr. N.S. Ghanekar, Advocate for respondents No. 1 to 3.
Mr. S.P. Deshmukh, APP for the respondent No. 4/State.

CORAM : MANGESH S. PATIL, J.

DATE : 20/02/2019

ORAL JUDGMENT :

. Heard.

2. Rule. Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally at the stage of admission itself.

3. In this Writ Petition under Article 227 of the Constitution of India as well as under section 482 of the Code of Criminal Procedure the petitioner who is the original informant at whose instance the crime was registered and the prosecution and trial has proceeded against accused No. 1 to 3 for the offences punishable under section 304-B, 306, 498A read with section 34 of the Indian Penal Code is impugning the order passed by the learned Additional Sessions Judge-8, Aurangabad in Sessions Case No. 346/2013 dated 15.10.2018 on the application (Exh. 84) filed by the prosecution, rejecting the application seeking to restrict the cross-examination of Prosecution Witnesses only to the extent of suicide note which was subsequently brought on record by the prosecution.

4. The respondents/accused had preferred application under

section 311 of the Code of Criminal Procedure to recall the petitioner who was examined as a Prosecution Witness No. 2 for further cross-examination. The learned Additional Sessions Judge had rejected the application and one of the accused had preferred Criminal Writ Petition No. 1231/2018 before this Court. By the order dated 11.09.2018 this Court had quashed and set aside the order of the learned Trial Judge and had directed the Prosecution Witness No. 2 to be recalled for further cross-examination. It appears that when the petitioner/Prosecution Witness No. 2 entered into the witness box, an attempt was allegedly made on behalf of the respondents/accused to cross-examine him on all aspects, over and above the suicide note. Since they were only permitted to cross-examine the witness touching the suicide note, any such attempt by the defence was inadmissible. Therefore an application (Exh. 84) was filed by the prosecutor bringing to the notice of the learned Trial Judge all these facts and solicited direction to the defence to restrict the cross-examination to the suicide note. After hearing both the sides by the impugned order the learned Additional Sessions Judge rejected the application. Hence this writ petition.

5. The learned advocate for the petitioner submits that though this Court had permitted and directed recalling of the witness, in the

reasoning part it was abundantly clear that it is only because the suicide note was produced subsequently that this Court had granted permission to recall the Prosecution Witness No. 2 for further cross-examination. It was therefore illegal on the part of the learned Additional Sessions Judge to allow the respondents/accused to cross-examine Prosecution Witness No. 2 generally without restricting it to the suicide note. Every attempt was being made by the respondents/accused to fill-up the lacuna which was not permissible and was not contemplated by the order passed by this Court. The order being manifestly erroneous, may be quashed and set aside.

6. Learned APP submits that though the prosecutor had filed the application (Exh. 84) the State has not sought any exception to the order.

7. Learned advocate for the respondents/accused submits that since after passing of the impugned order the trial has progressed. Cross-examination of not only Prosecution Witness No. 2 has been completed but even rest of the witnesses have been examined and cross-examined and the trial is now posted for final arguments. This being the fact situation, the Writ Petition has become infructuous and may be rejected on this sole ground.

8. The learned advocate for respondents/accused would further submit that even otherwise this Court had not restricted the cross-examination only to the aspect of suicide note while allowing the Writ Petition No. 1231/2018. No fault can be found with the impugned order refusing to restrict the cross-examination to that respect only. Therefore the Writ Petition even on merits is liable to be dismissed.

9. I have carefully gone through the papers. At the cost of repetition it is necessary to note that respondents/accused had filed application under section 311 of the Code of Criminal Procedure seeking to recall the Prosecution Witness No. 2 for further cross-examination though apparently, mistakenly he was referred as P.W. 1. As can be seen from the application (Exh. B) the witness was sought to be recalled for the purpose of cross-examination not only on the aspect of suicide note but also to fill up some lapses on the part of the defence lawyer in bringing on record certain omissions. It is this application which was initially rejected by the Trial Judge and was subsequently allowed by this Court directing further cross-examination of P.W. 2. It is also apparent that this Court had not restricted it to the suicide note only and a blanket direction was given to the Trial Judge to recall the petitioner who is Prosecution Witness No. 2 and to allow him to be cross-examined further. It is in the backdrop of such fact situation that

the petitioner was recalled and was subjected to cross-examination when the application (Exh. 84) was filed by the prosecutor. It is thus apparent that this Court while allowing the Writ Petition No. 1231/2018 had not allowed the cross-examination to be done only in respect of the suicide note, albeit in the reasoning part that was a ground on which the Writ Petition was being allowed. Therefore apparently there was no illegality committed by the learned Additional Sessions Judge in rejecting the application (Exh. 84) for this reason alone.

10. Apart from the above state of affairs, as is pointed out, the trial has already proceeded and has reached the stage of arguments. Any evidence which is inadmissible can be assailed even during the course of final arguments. Either side can certainly point out the Trial Judge as to which portion of the testimony is inadmissible and should not be read in evidence. In view of state of affairs and the position of law, the Writ Petition becomes infructuous by virtue of the supervening circumstance of the trial reaching a concluding stage.

11. There is one more aspect. When the prosecution is not impugning the order (Exh. 84), even there is a reasonable doubt as to the maintainability of the Writ Petition at the instance of the original informant. However, one need not go into this aspect at this juncture.

12. Learned advocate for the petitioner sought to place reliance on the decision of **A.G. Versus Shiv Kumar Yadav and another, 2015 DGLS (SC) 903** as well as the decision of the Single Judge of High Court of **Gauhati in Altaf Hussain Alias Alta Hussain Versus State of Assam, LEX (GAU) 2011 4 11.**

13. I have carefully gone through both these decisions. As far as principles laid down in these decisions are concerned there can be, with respect, no two opinions. Whenever there is a request to recall a witness by invoking the powers under section 311 of the Code of Criminal Procedure, the aspect whether the request was being made at the fag end of the trial is essentially to be considered. Besides, when this Court in the earlier Writ Petition has already allowed the witness to be recalled under section 311 of the Code of Criminal Procedure, these decisions are of no consequence when the trial has already proceeded and has reached the stage of hearing the arguments. Therefore the petitioner is not entitled to avail any benefit from the decisions.

14. For the reasons mentioned above, the Writ Petition is dismissed.

15. Rule is discharged.

16. At this juncture the learned advocate for the petitioner submits that by the order dated 28.11.2018 this Court had directed the Trial Court not to proceed further in the matter and since the petitioner intends to approach the Supreme Court the same arrangement may be continued for eight weeks.

17. Since the interim arrangement is already in place in operation till date same may continue for a further period of four weeks. Therefore ad-interim order dated 28.11.2018 shall remain in force for a further period of four weeks.

(MANGESH S. PATIL, J.)

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