

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.320 OF 2019

Subhash Pandurang Kad

... Applicant

Vs.

The State of Maharashtra

... Respondent

.....

Mr.Aniket Nikam i/b V.N. Arote for the Applicant

Mr.N.B. Patil, APP, for the Respondent – State

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**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED : MARCH 19, 2019**

P.C.:

1. This application is directed against the order dated 5.3.2019 passed by the learned Additional Sessions Judge, Pune below exhibits 90 and 93 in Sessions Case No.661 of 2012. The applicants are facing trial under sections 307, 323, 504, 506 r/w section 34 of the Indian Penal Code in C.R. No.104 of 2012 registered with Shikrapur police station, Pune. It is the case of the accused that there is a cross case filed by the accused against the complainant and his relatives. The complaint given by the accused is first in time and the copy of the said FIR given by one Subhash Pandurang Kad, who is one of the accused, gave FIR on

the same date i.e., 12.5.2012 which was registered at C.R. No.495 of 2012 for the offences punishable under sections 323, 504, 506 of the Indian Penal Code. The applicant/accused wants to bring on record the said FIR as a part of the evidence and therefore, the accused wanted to examine the SHO who recorded the said FIR in CR No.495 of 2012. The prosecution did not examine the said SHO, who recorded the FIR No.495 of 2012 wherein the complainant in the said Sessions Case is the accused and, therefore, the accused moved two applications that the said SHO, Shikrapur, who has recorded FIR in CR No.495 of 2012 of Subhash Pandurang Kad is to be examined and necessary directions are to be given to the prosecution to examine the SHO. Then, another application below exhibit 93 was moved under section 231 (2) of the Code of Criminal Procedure (for short, "the Cr.P.C.") that the cross examination of the Investigating Officer Mr.Tavaskar be deferred till recording of evidence of SHO who recorded the FIR. The learned Judge by a common order rejected the application below exhibits 90 and 93. Hence, this application.

2. Mr.Nikam, the learned Counsel for the applicant, has submitted that there is an overwriting in the margin in the timing of

the said FIR, which is a factor that goes in favour of the accused. He submits that in the medical Yadi given to the accused persons and the yadi given to the complainant, it does not disclose the outward number of the police station, Shikrapur. He submitted that if the SHO is not examined, then, it is difficult for the accused person to prove the overwriting in the time when the FIR given by the accused was recorded. He submitted that the best evidence rule is to be adhered to by all the Courts. He has submitted that if a particular witness is necessary, the Court cannot be a mute spectator and it can use of powers under section 311 of the Code of Criminal Procedure.

3. In support of his arguments, the learned Counsel relied on the judgment in the case of **Mohanlal Shamji Soni vs. Union of India & anr.**¹; **Rajesh Laxman Shirke & Ors. vs. State of Maharashtra**²; **Bablu Kumar & Ors. vs. State of Bihar & anr.**³; **Zahira Habibullah Sheikh & anr. vs. State of Gujarat & Ors.**⁴; **Prasad Ramakant Khade vs. State of Maharashtra**⁵.

1 1991 SCC (Cri.) 595

2 Cri. WP No.1665 of 2017 decided on 5.5.2017

3 (2015) 8 SCC 787

4 (2006) 2 SCC (cri.) 8

5 1999 SCC (cri.) 1487

4. Let me discuss the ratio laid down in various cases and applicability of the same to the present set of facts.

5. In the case of **Prasad Ramakant Khade** (*supra*), a confessional statement was made in the presence of two panch witnesses. The prosecution did not examine one of them. The confessional statement was recorded leading to discovery of arms. The Supreme Court has held that the examination of the second panch witness is not must and if the appellant wanted to cross-examine the second panch witness, nothing prevented him from making proper application to the trial Court during trial for producing the said panch witness for cross-examination. On the basis of this observation of the Supreme Court, according to the learned Counsel it enables the defence to move an application to call a witness of prosecution for cross-examination. It is difficult to accept this argument as a ratio because in that matter the evidence of one panch was sufficient to prove the confessional statement and was relied by the Supreme Court.

In my humble opinion, it is incorrect to hold that by this observation the Supreme Court has laid down a law regarding

procedure making available to the defence to ask prosecution to call a witness for cross-examination, when prosecution does not want to examine the said witness.

6. In the case of **Zahira Habibullah Sheikh & anr.** (*supra*), the Supreme Court while dealing with the case of forgery, has also considered section 311 of the Cr.P.C. which gives power to the Court to summon material witness. Further, the Supreme Court has held that section 311 of the Cr.P.C. is wholly discretionary and has said that if the evidence appears to it to be essential to the just decision of the case, then only the witness can be called. In the present case, filing of the cross complaints by the accused and the complainant is a proved fact. Overwriting on the FIR can be pointed out by the defence so the view taken by the learned Sessions Judge in the present case that it is not necessary to call SHO to record the cross complaint, is correct.

7. In the case of **Rajesh Laxman Shirke & Ors.**, the learned Single Judge of this Court has considered the provision of sub section 2 of section 291-A of the Cr.P.C. pertaining to proof of identification report of the Magistrate in test identification parade.

The learned Single Judge has considered the case law under section 291-A of the Cr.P.C and held that the learned Sessions Judge shall follow the mandate of section 291-A of the Cr.P.C.

A specific provision under section 291-A of the Cr.P.C. is amended with effect from 23rd June, 2006 and in sub-section (2) of section 291-A of the Cr.P.C., a special provision is made of calling the Magistrate to prove the report of identification if the application is made either by the prosecution or by the accused wherein the word “shall” is used. Thus the ratio laid down in the said case is not useful to the applicant/accused.

8. In the case of **Bablu Kumar & Ors.**(*supra*), the Supreme Court has discussed the concept of fair trial, the obligation of the prosecution and the duty of the Court and observed that the Court cannot be a silent spectator or mute observer when it presides over trial. The Supreme Court has further observed that if the Court is of the opinion that the material witnesses have not been examined, then it should not allow the prosecution to close the evidence. The Supreme Court has further observed that the

prosecution may not examine all the material witnesses, but the Court should independently consider whether any witness is material.

In the present case, after going through the order passed by the learned Sessions Judge, I am convinced that the learned Sessions Judge has applied his mind and held that the examination of SHO is not required in view of the nature of the offence.

9. In the case of **Mohanlal Shamji Soni** (*supra*), the Supreme Court has specified a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. The Supreme Court has also pointed out illustration (g) to section 114 of the Evidence Act can be relied while drawing presumption if the evidence is withheld by a party if it is found unfavorable. The ratio laid down in the said case is binding on the Court. However, this does not itself render the order passed by the Sessions Court illegal.

10. In view of the facts of the present case, the order dated 5.3.2019 passed by the learned Additional Sessions Judge, Pune

below exhibits 90 and 93 is found legal and correct. No interference is required in the said order. The trial Court to proceed with the matter immediately.

11. Criminal Application is dismissed.

(MRIDULA BHATKAR, J.)