

Vidya Amin.

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

CRIMINAL APPLICATION No. 493 OF 2019

Ajay Ashok Chavan	...	Applicant
VS.		
The State of Maharashtra	...	Respondents

Mr. Fakhruddin Khan, Advocate for the applicant.
Mr. Vinod Chate, APP for the respondent/State.

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: 25th April, 2019**

P.C. :

Upon mentioning, taken on production board.

2. This Application under section 482 of Cr. P.C. is filed for setting aside the order dated 14th March, 2019 passed by the learned Additional Sessions Judge below Exhibit 78 in Sessions Case No. 303 of 2016 pending in Court No. 10, City Civil & Sessions Court, Greater Bombay. The applicant is facing charges under sections 302, 504 r/w. 34 of Indian Penal Code and under section 37(a) r/w. section 135 of Maharashtra Police Act. He wants to recall PW-2, the eye witness. The examination-in-chief of PW-2 was conducted on 8th August, 2018. However, on the same day, the Advocate Mr. Kudrat Shaikh appearing for accused no. 2

withdrew his Vakalatnama, which was allowed. The accused was asked to cross-examine PW-2. The accused put one question. On the same day, the prosecution moved application Exhibit 51 declaring the witness hostile and seeking permission to cross-examine him. Thereafter the learned Sessions Judge allowed the said Application and the witness was recalled and cross-examined by the prosecution on 29th October, 2018. Opportunity to cross-examine the witness was given to co-accused no. 1 and co-accused no. 3. However, accused no. 2 was not represented by advocate at the relevant time. Thereafter he engaged advocate of his choice and moved Application Exhibit 78 under section 311 of Cr. P.C. on 4th March, 2019 that PW-2 Mehrajuddin Nashir Shaikh is to be recalled. The said application was opposed by the prosecution on the ground that the said witness in examination-in-chief gave admission destroying the case of the prosecution and therefore, the said witness was cross-examined by the prosecutor on the subsequent date. So, the cross-examination of PW-2 if recalled would damage the case of the prosecution. The learned Judge accepted the submissions of the learned Prosecutor and by its order dated 14th March, 2019 rejected the Application (Exhibit 78).

3. The learned counsel for the applicant/accused submitted that the applicant/accused was not represented when the witness was recalled. The applicant/accused is uneducated and poor. He could not avail of the bail of Rs.25,000/- which is granted by the Court. Therefore, he could not engage the advocate within time. As soon as he appointed the advocate, the said advocate moved Application under section 311 of recalling PW-2.

4. Per contra, the learned APP opposed the Application and relied on the reasoning given by the Sessions Court that recalling the witness would shake the foundation of the case of the prosecution, as this witness is very material.

5. Considered the submissions and the impugned order. The basic principle of criminal law cannot be forgotten that the accused is to be represented by the advocate. The accused is facing charge of murder where the capital punishment can be awarded. It is the duty of the Court to assure fair trial to the accused as well as to the victim. Especially when the accused is not represented by the advocate, it is more the duty of the Court to see that the accused is represented by the advocate and the learned Sessions

Judge ought to have appointed atleast an Advocate from the panel of Legal Aid to defend the accused. The order passed by the learned Sessions Judge does not disclose whether the learned Judge has taken efforts to appoint advocate from the Legal Aid Panel. If it is so, the Application for recalling is to be allowed irrespective of apprehension of the prosecution that it may lead some damage to the prosecution. Hence, I quash and set aside the order dated 14th March, 2019 passed by the learned Additional Sessions Judge, City Civil & Sessions Court, Greater Mumbai..

6. I am informed that the matter is fixed before the Sessions Court on 30th April, 2019 and now the applicant is represented by the advocate. On that day, the prosecution is directed to keep PW-2 present and the counsel representing accused no. 2 shall cross-examine PW-2 on that day and cross will be completed on the same day or next date. Parties to cooperate the Court. The Court to expedite the matter.

7. Criminal Application is disposed of.

(MRIDULA BHATKAR, J.)