

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1571/2019

NAZIM NAZIR SHAIKH).... **APPLICANT.**
Age about 26 years, Occ:Fabrication)
work, residing at 3rd floor near Hope)
Hospital,AD Camp chowk, Nana Peth,)
Pune.)

VERSUS

STATE OF MAHARASHTRA **RESPONDENT.**

.....

Mr.Debajyoti Talukdar, Advocate for the applicant.

Mr.A.R. Kapadnis, APP for the State.

CORAM : A. M. BADAR, J.

DATE : 18TH DECEMBER 2019.

ORAL JUDGMENT:

1. Heard. Rule. Rule is made returnable forthwith.
2. By this application, the applicant/accused No.1 in Sessions Case No.235/2018 for offences punishable u/s 397, 506 (2) r/w 34 of the Indian Penal Code, is challenging the

Order dated 14.2.2019 and Order dated 18.4.2019 passed by the learned trial Court below Exhibits 20 and 30 moved by the applicant.

3. Application at Exhibit 20 came to be preferred by the applicant/accused for adjourning trial for cross examination of PW 2 Santosh Khedkar. Reasons stated in the said application dated 14.2.2019 are to the effect that though learned Advocate for applicant/accused was before Court right from 11.00 a.m., the witness did not turn up till 3.15 p.m. However, thereafter the learned counsel for the applicant/accused being held up in a time bound matter, was not in a position to attend the Court. With these reasons, adjournment was sought for cross examination of PW 2 Santosh Khedkar. That application came to be rejected by impugned order dated 14.02.2019, with reasons that Mr.Talukdar, learned Advocate for the applicant/accused was present in the Court and the Court had given him an

opportunity to cross examine PW 2 Santosh Khedkar. The learned trial court further observed that on the last date, Mr.Talukdar conducted part of the cross examination and hence, he is expected to conduct further cross examination. It is observed that inspite of the fact that he is present in the Court, but did not cross examine PW 2 Santosh Khedkar, the application at Exhibit 20 needs to be rejected. Consequently, as seen from the deposition of PW 2 Santosh Khedkar, cross examination of this witness by the applicant/accused no.1 came to be closed with endorsement “no cross examination”.

4. It is seen that, ultimately on 12.4.2019 applicant/accused No.1 moved an application u/s 311 of the Cr.P.C. for recalling PW 1 Sambhaji Devikar and PW 2 Santosh Khedkar for cross examination by stating that these two witnesses were not cross examined on behalf of the applicant/accused No.1 and therefore, they be recalled.

Learned trial court rejected this application (Exhibit 30) on 18.04.2019, by observing that as both these prosecution witnesses have supported the prosecution case, applicant/accused on one or another pretext is trying to postpone their cross examination and he is trying to fulfil his intention by invoking Section 311 of the Cr.P.C. Learned trial court further recorded that applicant/accused intentionally did not avail opportunity to cross examine these two witnesses and intention of applicant/accused is malafide.

5. Incidentally it needs to be noted that, when PW 1 Sambhaji Devikar was being cross examined on behalf of applicant/accused no.1, his learned Advocate applied for deferring the cross examination by moving application Exhibit 16, till recording evidence of other witnesses by stating that, applicant/accused did not want to disclose his defence at the initial stage. That application was rejected and further cross examination of PW 1 Sambhaji Devikar was closed by the

learned trial court.

6. It is thus, evident that neither PW 1 Sambhaji Devikar nor PW 2 Santosh Khedkar were fully cross examined on behalf of applicant/accused No.1. In the opening para of this Judgment, it is already recorded that the trial is for the offence punishable under Section 397, 506 r/w 34 of the Indian Penal Code. PW 1 Sambhaji Devikar and PW 2 Santosh Khedkar are material witnesses who claimed to be victims of the crime in question. They have deposed that by assaulting PW 2 Santosh Khedkar with sharp edged weapon, valuables belonging to them came to be looted by the applicant/accused.

7. Article 21 of the Constitution confers valuable fundamental rights by stating that no person shall be deprived of his life and liberty except according to procedure established by law. Section 304 of the Cr.P.C. in clear terms

states that when accused is not represented by a pleader, the Court shall assign a pleader at the expenses of the State. Right to cross examine the prosecution witness is part of due procedure of law and when learned Advocate for the accused is either not in a position to cross examine prosecution witnesses or remains absent when the occasion arises for cross examining prosecution witnesses then, it becomes incumbent on the part of the trial court to provide advocate at the cost of the State to the accused for furtherance of his defence. In criminal trial, evidence of material prosecution witnesses can not be closed by making endorsement “no cross” or “further cross examination closed”. When the learned Advocate for applicant/accused was not available for cross examining PW 2 Santosh Khedkar, the learned trial Court ought to have provided legal aid to the applicant/accused by appointing an advocate to represent him. Similar course of action ought to have been taken when the learned Advocate for the applicant/accused showed his inability to cross

examine PW 1 Sambhaji Devikar. Valuable reference to this proposition can be made from following case laws.

i)Baliram Madhukar Dalvi Vs. State of Maharashtra¹

ii)Hussainara Khatoon and Others (IV) Vs. Home Secretary, State of Bihar, Patna²

iii)Suk Das and Another Vs. Union Territory of Arunachal Pradesh³

iv)Khatri and Others (II) Vs. State of Bihar and Others⁴

v)Madhav Hayawadanrao Hoskot Vs. State of Maharashtra⁵

vi)Sagri Vs. State of Madhya Pradesh⁶

8. In the light of the forgoing discussion, impugned orders can not be sustained. As such, following order.

ORDER

- i) Application is allowed.
- ii) Impugned order below Exhibit 20 closing the cross examination of PW 2 Santosh Khedkar and that below Exhibit 30 rejecting application for recalling prosecution

1 2008 ALLMR (Cri)2042

2 (1980)1 Supreme Court Cases 98

3 AIR 1986 Supreme Court 991

4 (1981)1 Supreme Court Cases 627

5 (1978)3 Supreme Court Cases 544

6 (1991) 1 Crimes (HC)580

witnesses viz. PW 1 Sambhaji Devikar and PW 2 Santosh Khedkar, is quashed and set aside.

- iii) Application at Exhibit 30 filed by applicant/accused for recalling PW 1 Sambhaji Devikar and PW 2 Santosh Khedkar is allowed. Those witnesses be recalled for the cross examination.
- iv) Applicant/accused is permitted to cross examine them without seeking any adjournment in the matter after appearance of those two witnesses.
- v) Application is accordingly disposed of.

(A. M. BADAR, J.)

