

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1757 OF 2019

Swapnil Santosh Maniyar,
Age 26 yrs., Occ. Student,
R/o Turkabad Kharadi,
Tq. Gangapur, Dist. Aurangabad.

... Petitioner.

... Versus ...

The State of Maharashtra

... Respondent.

...

Mr. N.S. Ghanekar, Advocate for petitioner

Mr. A.A. Jagatkar, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 29th JANUARY, 2020

PRONOUNCED ON : 12th FEBRUARY, 2020

JUDGMENT :

1 Present writ petition has been filed by the original accused challenging the order below Exh.213 passed by the learned Additional Sessions Judge, Aurangabad on 15.10.2019; rejecting his application to recall the prosecution witnesses for further cross-examination.

2 The present petitioner stands prosecuted for allegedly

committing offence punishable under Section 306, 354(D) of the Indian Penal Code in Sessions Case No.235/2015. The prosecution has examined in all 14 witnesses. Thereafter, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded. He has examined three witnesses in defence, and thereafter, the arguments of both the sides have also been advanced. The matter was for pronouncement of Judgment when the application Exh.213 was filed for recall of PW 7, 9, 10, 11 and 13 for further cross-examination. It has been contended in the petition, that after the evidence of the prosecution was closed, the defence had filed the application for sending mobile phone of the deceased to expert to retrieve data from that mobile, which according to the defence, was deleted by PW 7 prior to giving that mobile to police. It is stated that the mobile was handed over to police after about a month after alleged incident. The defence had also suggested PW 7 that she has deleted the data from the mobile before handing it over to the police. That application Exh.189 was rejected by the Court on 19.09.2019. The defence, that has been put forward by the accused, is about the false implication and destruction of evidence, which was in his favour. It is also stated that PW 7 has deleted the messages, call logs and data from the mobile. The defence was not provided with the Compact Disk (CD) of data retrieved from the mobile of the deceased. When the Investigating Officer, PW 13 was examined, he was asked about receiving

of any CD from expert, but then he says that he has no idea about the same, and also tried to conceal the fact that there is a CD in the muddemal property received along with the report filed by the prosecution and marked as Exh.176. It is stated that the copy of the report Exh.176 was not provided to the accused till date. At the time of final arguments the defence Advocate had gone through the entire record and then found, that there is mention of CD in report Exh.176, and therefore, an application was filed at Exh.212 for providing CD to the applicant-accused on 09.10.2019 and then he had continued the final arguments. The CD was provided by the Court after the Court hours, but then after going through the said CD, the accused was shocked and surprised to see that the deceased was having intimate relation with one person named Abhi and on the date of her unfortunate demise she had conversation with said Abhi, just prior to the commission of the suicide. The defence has even found that data from the mobile was deleted, but it has been retrieved. There were messages between deceased and one Sadanand. Therefore, there were many messages and many aspects on the basis of which PW 7 and 13 were required to be cross examined. The nodal officers, who were examined, had not provided the entire data and it is stated that they had edited the CDR and the same has been provided to the Trial Court as well as to the accused. Under such circumstance, recalling of certain witnesses is utmost necessity and therefore, application Exh.213 was filed,

which was rejected by the learned Trial Court.

3 It has been further contended in the petition that the application has been mainly rejected, on the ground that the trial has been expedited by this Court and the defence Advocate has not argued the matter and instead of that he has filed various applications. It is stated, that a fair opportunity needs to be given to the petitioner to prove his innocence, and therefore, the present petition has been filed for setting aside the said order below Exh.213, passed by the learned Additional Sessions Judge, Aurangabad and to recall the witnesses, as stated in the said application.

4 Heard learned Advocate Mr. N.S. Ghanekar for petitioner and learned APP Mr. A.A. Jagatkar for respondent.

5 At the outset, it is to be noted that when the arguments were advanced by the learned Advocate for the petitioner before this Court, it was found and it was pointed out to the learned Advocate for the petitioner that intentionally he has not given all the papers, which were before the learned Trial Court. Only those papers have been produced along with the writ petition, which were in favour of the petitioner. Under the said circumstance, after the arguments were concluded by both the parties before this Court, on the same day order was passed to call the record. Accordingly, the record has

been produced and it has been perused.

6 The learned Advocate for the petitioner vehemently submitted, that the prosecution has intentionally not provided all the documents to the accused. The CD, which was produced along with Exh.176 was before learned Judicial Magistrate First Class and copy of the same was not even given to the accused. The learned Advocate for the accused could realize this fact only after he had submitted the final arguments. The prosecution story was, that the deceased was pursuing MBA degree course. The accused was her classmate and he had sent obscene messages and used to talk on phone in filthy language, about 20-22 days prior to the incident and then she had lodged report against the accused, for which he was arrested. It was further the prosecution story that, the accused was then harassing her by sending messages and was asking her to marry him by making phone calls on her mobile. Deceased consumed sleeping pills due to the harassment of the accused and unfortunately succumbed to death. Under the said circumstance, as per the prosecution story, the contents of the mobile phone, the conversation, the data, was the important piece of evidence. The sister of the deceased had produced the mobile phone before police after about a month of the incident, and therefore, specific questions were asked in the cross, that she had deleted certain messages and conversation from the said

mobile, before handing it over to the police. The deletion of the data has been revealed after the copy of the CD was provided to him and data was retrieved. Necessary cross-examination, on the basis of the said retrieved data, is required and therefore, recall of the prosecution witnesses was necessary. But the application has been rejected, on the ground, that the matter is time bound and already cross-examination of the witnesses had taken place, and therefore, opportunity was made available to the accused. Learned Judge failed to consider that when the said CD itself is made available after the final arguments were advanced, then there could not have been questions to those witnesses, on the basis of the data in the said CD. A fair opportunity is definitely required to be given to the accused to put forth his defence and to prove his innocence.

7 Reliance has been placed by the learned Advocate for the petitioner in the decision of this Court at Principal Seat in **Criminal Appeal No.973 of 2012** with companion matters decided on 10.12.2012. In that case also the evidence in respect of electronic evidence was in question and it was held that the appellants should get a fair trial, which is their fundamental right enshrined under Article 14 and 21 of the Constitution of India.

8 Per contra, the learned APP has submitted that the order passed by the learned Additional Sessions Judge below Exh.213 is sufficient in itself

to show the conduct of the accused. Every opportunity was available to the accused to put forth his defence, when the witnesses were examined by the prosecution. He himself has examined the defence witnesses. At any earlier point of time, there was no attempt on the part of the learned Advocate for the accused to go through the entire record and then make a suitable application. When the matter was posted for Judgment, then only with a view to protract the trial the application Exh.213 has been filed. The case is pending since 2015. On the request of the accused himself it is made time bound, yet, now, he is inventing different reasons to protract the trial.

9 It is necessary to take the summary of the record before the Trial Court. The prosecution story has already been covered in the earlier paragraphs. As aforesaid, the prosecution has examined about 14 witnesses and the accused has examined three witnesses in defence. The prosecution has examined the nodal officers to prove the CDR and SDR. Those nodal officers have been cross examined in detail on behalf of the accused. The Investigating Officer, PW 12 has categorically stated that he had sent the mobile phone to the Forensic expert. Though he has stated that the report has been received after he had filed the charge sheet before Judicial Magistrate First Class, yet it appears that on the date of his evidence the report Exh.176 was on record. The cross-examination of the Investigating

Officer was conducted by the learned Advocate for the accused on 24.06.2019. Yet, it appears that there was no attempt on the part of the accused to get the copy of the said CD and reserved his cross-examination till it is perused. Now, the learned Advocate for the petitioner has come with a novel case that after the arguments were submitted, he found that the CD is received by the learned Judicial Magistrate First Class and then from that stage it appears that he has made efforts to get the copy of the CD and then he says that for the first time he had come to know about the said CD. The question, that crops up in the mind, that what was the occasion for the learned Advocate for the accused to go through the record after the arguments were submitted. In fact, he ought to have taken efforts to go through the record prior to submission of his final arguments. Taking into consideration the cross-examination of the Investigating Officer, who had received the report Exh.176, which was the report regarding the analysis of the CD, the learned Advocate for accused cannot now claim ignorance about the existence of CD from the date of, at the most from exhibiting that report in the depositing of PW 12, Investigating Officer. It will not be out of place to mention here that the record shows, that along with the charge sheet there is letter dated 09.10.2015 given to Director, Forensic Laboratory Kalina, Santacruz, Mumbai, requesting that the muddemal be analyzed and the report be given. The accused is not coming with a case that he has not

received copy of the said letter. That means, even before his charge was framed he had the idea that the muddemal was sent for analysis. At any point of time, earlier to Exh.213, he had never prayed for getting the copy of the said CD or the report. He cannot merely say, that since the copy has not been provided, he can keep mum. When the document was required for cross-examination of the witnesses, then definitely the Advocate, who was conducting the matter on behalf of the accused, would have definitely insisted upon supply of all those copies and even inspection of the muddemal.

10 It appears that the accused has changed Advocates 2-3 times and the entire record shows, that there were instances of protracting the matter by the accused, on one or the other pretext. This was with the knowledge of the accused that this Court, on his own request, had expedited the trial. It is to be noted that on 18.06.2019, application was given at Exh.188 by the accused to call for mobile Micromax, CDR and SDR from muddemal pending before Judicial Magistrate First Class, Aurangabad (Court No.10). That application was rejected on 19.09.2019 by the learned Additional Sessions Judge. On the same day i.e. on 18.06.2019 another application Exh.189 was given to call the photograph, messages and other material from mobile Micromax and request was made to send two mobile phones to Forensic

Laboratory Kalina with a direction to recover the deleted data, if any, and to provide a copy of data, which is available. That application was also rejected on 19.09.2019. Third application was filed on 18.06.2019 by the accused to supply CDR, SDR and tower location of one more mobile number. That application was rejected by the learned Additional Sessions Judge on 23.09.2019. Order on these applications were never challenged by the accused. But then with a novel idea, as stated above, another application was filed at Exh.212 for supply of CD mentioned in Exh.176. This application was given on 09.10.2019. The learned Additional Sessions Judge had allowed the said application, and it appears that in pursuant to the said order, the said CD was given. Thereafter on 10.10.2019 application Exh.213 was given, which was rejected by the learned Additional Sessions Judge on 15.10.2019 and the order of which, is under challenge in this writ petition. In the application Exh.213, there is absolutely no reason, as to why there is no earlier attempt by the accused to get that document/copy of the CD. In the application it is not made clear, on what basis the accused is saying that the details in CD would show, that the SMS messages, call logs and WhatsApp chats have been deleted. A person would say that a matter or thing has been deleted unless he has knowledge about the existence of this same. No annexure has been attached with the application Ex.213 to show the existence of such deleted SMS messages, call logs and WhatsApp chat.

But then he says that same have been retrieved. He has again not given the details, as to who and with which procedure the said data has been retrieved at his request. He has not produced any document in support of his contention that the data on the CD has been retrieved. Contents of the application Ex.213 do not show that the said CD itself contains retrieved data. Rather those contents say that even after going through the CD, he found that some data has been deleted and for that purpose itself he had earlier filed the application for sending the mobiles to forensic laboratory for retrieving the data. If he wants to confront the contents of the said CD, there has to be some record with him to show that how and by which procedure, the data has been retrieved. It will not be then out of place to mention, that if he has retrieved the data and want to put it to the witnesses, then it may amount to production of “electronic evidence” by him, for which the procedure has not been then adopted by him. When he is coming with a case, that the data is retrieved and in order to confront that retrieved data the witnesses are required to be recalled, then he ought to have produced that retrieved data on record, by appropriate method and mode. By the said simple application under Section 311 of Cr.PC., it cannot be said that request ought to have been allowed by the learned Additional Sessions Judge.

with exercise of powers on the submission of application by the party and the word “may” used in the first part gives discretion to the Court to summon any witness. The second part of the Section uses the word “shall” and therefore, it becomes mandatory for the Court to recall the witness for further evidence, when the Court considers that the evidence of such witness is essential for the just decision of the case. Reliance can be placed on the decision in **Jamatraj Kewalji Govani vs. State of Maharashtra, AIR 1968 S.C. 178** to support the above said legal position. Here, the application Exh.213 was under first part of Section 311 of Cr.PC., and taking into consideration the conduct of the accused, the learned Additional Sessions Judge has rightly rejected the said application. The decision in **Criminal Appeal No.973 of 2012** (supra) relied by the learned Advocate for the petitioner, will not be helpful to the petitioner, for the reason that on the basis of the necessity to have the recall of the witness that too on the basis of the electronic evidence, the directions were given in that matter. No doubt, the constitutional rights of accused for fair trial cannot be denied, but in this case the accused himself is not fair enough and has protracted the matter on one or the other pretext. In addition, in this case, as aforesaid, the basis on which the accused intends to recall the witnesses itself is not supported by him by any evidence. There was ample opportunity to the accused to have that document in custody, even when the cross-examination of the witnesses starting from PW 7 was

recorded. The accused has not availed that opportunity for the reasons best known to him and conducted the cross-examination, so also examined the defence witnesses also and addressed the Court for final arguments. He cannot now take shelter of the second part of Section 311 of Cr.PC..

12 For the above said reasons, no case is made out by the accused to exercise the powers of this Court under Article 227 of Constitution of India to interfere with the order of rejection of the application Exh.213, which was filed under Section 311 of Cr.PC.. The petition being devoid of merits, it deserves dismissal. Hence, Following order.

ORDER

1 The writ petition stands dismissed.

2 Learned Trial Court to pronounce the Judgment, within one month from today.

3 Registrar (Judicial) to make arrangement to send back the Record and Proceedings, immediately, with the copy of this order.

(Smt. Vibha Kankanwadi, J.)