

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

15 CRIMINAL WRIT PETITION NO.707 OF 2021

**OSMAN KHAN S/O. ISMAIL KHAN AND ANR
VERSUS
THE STATE OF MAHARASHTRA**

...
Advocate for Petitioners : Mr.Ladda Somnath G.
APP for Respondent-State : Mrs. G.L.Deshpande
...

CORAM : SURENDRA P.TAVADE , J.

DATE : 09th August, 2021.

P. C. :

1. The petitioners have filed this petition for quashing the order passed on Exhibit- 71 in Sessions Case No. 01 of 2020, pending before the Court of Additional Sessions Judge, Aurangabad.

2. The petitioners are facing charge under Sections 302 and 120B of the Indian Penal Code (for short 'IPC'). In order to prove the charge, the prosecution has examined Afsarkhan s/o Anees Khan Pathan (PW 1). His examination-in-chief was recorded prior to the Covid-19 pandemic. Thereafter, the Courts were not recording the evidence during Covid-19 pandemic. On 16.6.2021, the cross-examination of Afsarkhan s/o Anees Khan Pathan (PW-1) was started. In examination-in-chief, the witness deposed that the accused (petitioner) took the deceased from home. He further deposed that

“as the deceased did not return home, therefore, he went out to see him”. According to the petitioner the words “he went out to see him”, are omission. In order to bring the omission on record the witness was asked to explain, as to why the said fact was not mentioned in his previous statement. But the said question was objected by the learned APP, hence the trial Court did not record the answer of the witness to the question. Hence the petitioner has filed an application Exhibit-71, which was rejected by the trial Court.

3. Heard the learned counsel for the petitioners and learned APP for the respondent State.

4. It is contended that in cross-examination of PW 1 in Sessions Case No. 01 of 2020, the learned counsel for the petitioners asked questions regarding the alleged omission appeared in the examination-in-chief. The said question was not recorded by the Trial Court on the ground that there is no omission.

5. Learned counsel for the petitioners submits that the witness Afsarkhan s/o Anees Khan Pathan stated in his examination-in-chief that his brother Firozkhan, did not return forthwith, hence “he went to see him”. According to the learned counsel for the petitioners the said fact is omission, as it was not stated by the witness in his previous statement, recorded by the police. He invited

the attention of this Court to the statement of witnesses, wherein, the witness has stated that his brother was taken by accused persons from his house and his brother did not return home, hence “he came out of the house” and saw that accused persons were assaulting his brother.

6. On going through the FIR, as well as the evidence on record, it appears that the statement “he went to see him”, is the omission in his statement before the Court. Such omission was put to the witness, but the Trial Court has not recorded the answer of witness, on the ground that there is no omission. In fact, the Trial Court should have recorded the question, put to the witness and the answer given by the witness, instead of doing the said procedure, the Trial Court simply opined that there is no omission in the evidence of PW 1. On this point, learned counsel for the petitioners submitted that if the trial Court had followed the procedure of recording the question and answer, then it would have been easy for him to point out the omission, at the time of final stage. To substantiate this point he relied on the ratio in the case of **Bipin Shantilal Panchal vs. State of Gujarat and Another – AIR 2001 Supreme Court 1158**, wherein it was held that :

“13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility

of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

14. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses”

7. On going through the above ratio, it is crystal clear that the Trial Court should have noted down the objection of learned

defence Advocate in question and answers form. Instead of following such procedure, the trial Court has simply refused to record the answers of the witnesses, therefore, in my opinion, impugned order of the trial Court is required to be set aside, with direction to record it in the question and answer form.

8. With this, the trial Court is directed to record the answers of the witnesses, on questions put to by the defence counsel and the such answers can be considered at the time of final judgment.

9. Hence this writ petition is allowed and disposed of.

(SURENDRA P.TAVADE)
JUDGE