

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

CRIMINAL APPEAL NO.474 OF 2021

Arun Gulabrao Gawli

.. Appellant

Versus

State of Maharashtra

.. Respondent

.....

Ms.Akshata B. Desai i/b.Mr.Nitin Sejpal, Advocate for the Appellant.

Mr.S.V. Gavand, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATED : MARCH 10, 2022.

P.C. :

Heard. Admit. Appeal is taken up for hearing forthwith.

The question which arise for consideration in this Appeal preferred by the appellant under the provisions of MCOC Act is whether the appellant is entitled for copy of statement of approver recorded during the course of investigation while he was arraigned as an accused.

2 The applicant is aggrieved by the order dated 14th February, 2020, rejecting the application preferred by the applicant seeking copy of statement of approver Sudhir Ghorpade.

3 The submission of the appellant is that the approver was arrested as accused, and, during the course of investigation, his

statement was recorded by the investigating agency. He was thereafter made approver and examined as prosecution witness in the trial, wherein the appellant is tried as an accused. The approver has ceased to be an accused. His statement recorded while he was an accused will have to be treated as previous statement. The appellant is entitled for copy of such statement, to confront the approver by cross examination.

4 According to prosecution the statement sought by the appellant/accused is the statement of the accused and the appellant is not entitled for copy of the same. While the statement of approver was recorded, his status was that of accused.

5 The factual aspects necessary to decide this appeal are as follows:

- (i) The appellant and others were arraigned as accused in MCOC Special Case No. 5 of 2008 with MCOC Special Case No.13 of 2008 and charged for commission of offences under Sections 387, 506 part II read with Section 120-B of IP, sections 3 and 25 of Indian Arms Act. Sections 3(1)(2) and 3(5) of MCOC Act.
- (ii) Charge was framed against the accused. The trial has commenced. Witnesses were under examination.

- (iii) The co-accused Sudhir Ghorpade had preferred an application for granting pardon and making him approver in accordance of Section 306 of Cr.P.C. He was declared as approver by the prosecution. His evidence was recorded as approver. He was examined as P.W.4 during the trial.
- (iv) During the course of recording his evidence, P.W.4 had admitted that his statement was recorded during the course of investigation. It was recorded while he was in police custody. The said statement was not filed by the concerned investigating officer along with the charge – sheet.
- (v) Application was preferred vide Exhibit - 177 on behalf of the appellant for providing previous statement of approver. It was prayed that, directions be issued to the prosecution to produce statement of P.W.4 recorded by the police officer after his arrest.
- (vi) The learned Special Judge called upon the prosecution to file say. The prosecution opposed the application on the ground that statement made by any person accused of an offence is inadmissible and such statement cannot be produced or given to the accused.
- (vii) The learned Special Judge rejected the said application by order dated 14th February, 2020, on the ground that the appellant is

not entitled for copy of such statement. The statement of Sudhir Ghorpade is hit by provisions of Sections 25 and 26 of the Evidence Act.

- (viii) The appellant presented application vide Exhibit-180 for review of the order dated 14th February, 2020. The application was opposed by prosecution by relying on Section 362 of Cr.P.C. and submitted that Court cannot review its own order. The learned Special Judge rejected the application by order dated 8th February, 2021 on the ground of maintainability.

6 Learned advocate for the appellant urged as follows :-

- (a) The learned Special Judge has committed an error in rejecting the application below Exhibit-177.
- (b) Sudhir Ghorpade was arrested as an accused. His statement was recorded. Subsequently, he was examined as approver. In this circumstances, statement of Sudhir Ghorpade recorded during the course of investigation will have to be termed as previous statement and the appellant-accused is entitled for the copy of the same, for the purpose of cross-examination of approver and or to confront him with the version in statement.

- (c) Not allowing the appellant to have copy of the statement of Sudhir Ghorpade, who was examined as an approver affect the right of the accused. He is entitled for fair trial.
- (d) When an accused becomes approver and he was an accomplice evidence of such person has to be accepted by utmost care and caution and requires corroboration. In the present case approver is allegedly one of the member of organized crime syndicate allegedly headed by the appellant and the said accused has become approver. Hence, the statement made by him before the police immediately after arrest is crucial and vital for the just decision of the case.
- (e) If the prayer for production of statement of approver is not allowed before the trial Court, irreparable loss and damage would be caused to the right of defence of the appellant. No prejudice would be caused to the prosecution if such statement is handed over to the appellant/accused.
- (f) Learned advocate for the appellant relied upon the following decisions:
 - (i) ***Hazara Singh Vs. Emperor*¹**;
 - (ii) ***Maifzaddi Vs. King Emperror*²**;

1 AIR 1928 Lahor 257

2 AIR 1927 Calcutta 644

- (iii) *Punya Prasad Sankota and Anr. Vs. Balvadra Dahal and Anr.*³
- (iv) *Order dated 16th July, 2014, passed by this Court in Criminal Writ Petition No.3817 of 2013 alongwith Criminal Writ Petition No.527 of 2014.*

7 Learned APP submitted as under :-

- i) that the application for copy of the statement of approver was made belatedly. The trial has already proceeded.
- ii) There is no infirmity in the impugned order passed by the learned Special Judge under the MCOC Act.
- iii) The appellant is not entitled for the copy of the statement of approver Sudhir Ghorpade. The purported statement was recorded during the course of investigation while the approver was impleaded as an accused the statement of the accused is of no consequence. It is hit by the provision of the Evidence Act. It is not admissible in evidence. Hence, the appellant is not entitled for copy of such statement.
- (iv) Merely on the ground that the co-accused had turned approver, his statement recorded during the course of investigation does not losses its status that it was the statement of the accused. It was not part of charge-sheet. The appellant

(accused) is not entitled for copy of such statement.

(v) The Special Court has rightly rejected the application on the ground that such statement cannot be provided to the accused as it is hit by Sections 25 and 26 of the Evidence Act. There is no evidentiary value to such statement.

(vi) Learned APP relied upon the decisions in the case of State of *H.P. Vs. Surender Mohan and Ors.*⁴, delivered by Himachal Pradesh High Court

(vii) The decisions relied upon by the learned counsel for the appellant are not applicable in the present case.

8. It is not in dispute that Sudhir Ghorpade was arrested pursuant to the registration of FIR and he was remanded to custody. It is also not in dispute that his statement was recorded during the course of investigation. The accused sudhir Ghorpade filed application under Section 306 of Cr.P.C. on 21st June, 2008, notice was issued to Sr.P.I., DCB, CID, until to file say through SPP. Application was adjourned to 30th June, 2008. On 30th July, 2008 Special P. P. filed reply before trial Court. In the said reply it was stated that after the arrest of Sudhir Ghorpade on 25th March, 2008, during his

4 2003 Cri.L.J. 4223

interrogation gave lot of valuable information which helped investigating agency in investigating the said crime which was also useful in apprehending most of the accused concerned with the said crime. The said accused also gave his confession under Section 164 of Cr.P.C. before the learned Additional Chief Metropolitan Magistrate and confessed to the said crime without suppressing anything as he regretted having participated in said crime along with others. In view of above circumstances prosecution can no objection if accused is granted tender of pardon and making him an approver on condition of his making a full and true disclosure of the circumstances within his knowledge relating the offence and to every other person concerned.

9 Vide order dated 12th August, 2008 passed by Special Judge the application for pardon was allowed. The operative order reads as follows :-

“ORDER”

“Application is disposed off as allowed. Applicant/accused No.8 Sudhir Krushna Ghorpade in MCOC Spl. Case No.5/2008 is tendered pardon under Section 306 of Code of Criminal Procedure subject to the condition that he shall make full and true disclosure of whole of the circumstances with his knowledge relating to the offence and to every other person concerned, whether as principal abettor in the commission thereof. The applicant accused is already on bail granted to him by the Addl. C.M.M. in the order passed in bail application No.282 of 2008. The applicant is released on same bail. Contents of the final order are explained to the applicant/accused. Copies of this order be given to him and all other accused free of costs.”

10 Accused has been examined by the prosecution as PW-4. The evidence of approver was recorded from 8th November, 2019. The appellant had preferred application for seeking statement of Sudhir Ghorpade, recorded by police after his arrest. The application was filed on 11th February, 2020. The Court by order dated 12th February, 2020 directed say of other side. The prosecution filed say stating that statement made by any person accused of an offence is in admissible. Hence, such statement cannot be produced.

11 The learned Special Judge, MCOC, rejected the application of appellant on 14th February, 2020. It was observed that, prosecution has examined accused Sudhir as its witness and now the co-accused are conducting his cross examination. During cross examination of accused Sudhir conducted by applicant/co-accused he has admitted that Police officer recorded his statement during the Police Custody granted after his arrest. That statement is obviously not part of charge-sheet and prosecution on the other hand has also not admitted that such statement was recorded any time. However as the accused himself admitted its existence hence the prayer of applicant co-accused for his production can be considered on the legal basis. Admittedly, accused Sudhir was involved in the alleged incriminating activities or organised crime syndicate headed by

accused No.1 of which the co-accused/applicants are members. Thereafter, immediately after arrest of accused-Sudhir, if the police officer had recorded his statement during police custody then it is certainly hit by Section 25 & 26 of the Evidence Act. Those provisions specifically provide that such statement of accused recorded by Police Officer during police custody is inadmissible for any custody is inadmissible for any purpose during the criminal trial grant of pardon under Section 306 of Cr.P.C. will not change the nature of such statement by police officer when accused was facing the accusations of various crimes. It will be hit by Section 25 & 26 of the Evidence Act. The accused require the statement for confronting approver in the light of Section 145 of Evidence Act. The second part of said section provided that procedure of confronting should be followed in respect of earlier statement. The statement approver is hit by Sections 25 & 26 of Evidence Act. Same would be a case relevant to the matter in question. The accused are not entitled for bringing on record statements of accused Sudhir recorded by Police. The statement of Sudhir will not attract Section 161 or 162(1) of Cr.P.C. The documents listed under Section 207 of Cr.P.C. does not cover confession by accused before Police Officer. The accused are not entitled for production of statement of accused Sudhir made to the Police Officer.

12 Section 145 of the Evidence Act reads as follows:

***“145. Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”*

13 Section 145 of Evidence Act, permits cross-examination of witness in any trial with reference to his previous statement to establish a contradiction and also refers to manner in which such contradiction can be established. It provides that the previous statement of the witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. It is the right of the accused in the trial to use the previous statement of a witness, either for the purpose of establishing contradiction in his evidence or for the purpose of impeaching the credit of the witness.

14 Section 161 of the Code of Criminal Procedure provides that police officer investigating the case or any empowered Police Officer therein may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person

is bound to answer truly all question relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The Police Officer may reduce into writing any statement made to him in the course of an examination. A statement by a police officer under Section 161 even though is the previous statement for the purpose of Section 145 of the Evidence Act, it can be used for the purpose of establishing contradictions or impeaching the credit of the witness. The use of previous statement recorded under Section 161 of the Code is controlled by Section 162 of the Code. Section 162 of the Code provides that when any witness is called by the prosecution in such inquiry or trial, his statement has been reduced into writing, any part of his statement is duly proved, may be used by the accused and with the permission of the Court by prosecution to contradict the witness in the manner provided by Section 145 of the Evidence Act, and, when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but, for the purpose only of explaining any matter before his cross – examination. Thus, in a criminal trial the previous statement of the witness can be used by the accused for the purpose mentioned therein. The object of section 162 is noticed by the Apex Court in the case of *Tahasildar Vs. State of U.P.*⁵. Bearing in mind the object of said section and Section 145 of the

5 AIR 1959 SC 1012

Evidence Act, it is clear that the accused in a criminal trial has a right to make use of previous statement of a witness including statement recorded by the investigating agency during the course of investigation for the purpose of establishing contradiction in the evidence of a witness or to discredit the witness.

15 The facts of the present case would indicate that Sudhir Ghorpade was arrested in this case. He was produced before the Court and remanded to custody. At that point of time his statement was recorded. Subsequently, he has turned approver and his evidence has been recorded. In such eventuality, the defence cannot be deprived of the copy of his previous statement recorded during the course of investigation. It is pertinent to note that at this stage, Sudhir Ghorpade, is no more an accused and he has been examined by the prosecution as witness being approver and has deposed in favour of the prosecution.

16 In the case of Hazara Singh and Ors. Vs. Emperor (Supra), the factual matrix of the said decision would indicate that the prosecution relied on the statement of approver and led evidence to corroborate his statement. The accused were involved in dacoity. The approver was close friend of main accused. The

sessions Court refused to allow statement made by approver to the Police before he was tendered pardon. The sessions Judge held that, this statement was made by the approver as an accused person and not as a witness and Section 162 of Cr.P.C. did not apply to the case. The Court held that the case is covered by Section 162, and, even if the trial Court was correct in holding that the statement was not within Section 162 of Cr.P.C., it would be a previous statement of a witness and it could be used either to corroborate him or to contradict him under the ordinary provisions of the Evidence Act. The Court further observed that the prosecution cannot claim any privilege in accordance with Section 172 of Cr.P.C. The statement should not have been refused in evidence. The counsel should be furnished with a copy of the statement any contradictions between this statement and those made in Court by the approver should be taken as left explained by the approver.

17 In the case of Mafizaddi Vs. King Emperor (Supra) the witness was put into the box for recording examination in chief. The defence desired to cross examine this witness with object of breaking down her testimony by putting certain statement which it is alleged to be made to investigating officer. The Sessions Court held that, the statement was recorded by Investigating Officer under Section 172 of Cr.P.C. and therefore it is privileged. The Court was of the opinion that

Section 172 of Cr.P.C. does not deal with the recording of any statement by witness. No mention whatever made there of any statement by a witness. Section 161 and 162 of Cr.P.C. properly deal with the different portions of the investigation. The statement under Section 172 is not privileged. It is immaterial whether the statement recorded is actual record of the words used by the witness. Even, if the statement was recorded in the form of a memorandum of what the witness had said to the police officer, it is available for the purpose of contradicting the witness. The sessions Court was wrong in refusing the defence to have copy of statement of witness. The Orissa High Court in the case of *Punya Prasad Sankota and Another Vs. Balvadra Dahal and Anr.* (Supra) the trial Court refused to allow the accused to contradict the prosecution witnesses with reference to their previous statements recorded by the Police on the ground that such statements were not recorded by the Police in the course of any investigation under the provisions of Chapter XIV of Cr.P.C., 1898 and, therefore could not attract the provisions of Section 162(1) of the Code, under the proviso whereof the accused is entitled to contradict the prosecution witnesses with reference to their previous statements only when those are recorded by the Police in the course of any investigation under Chapter XIV of the Code. The Court observed that, provisions of Section 162 of the new Code of 1973, are almost

verbatim reproduction of the provisions of Section 162 of old Code, save for the new explanation added to the Section in the Code of 1973. the new Section has not introduced any new principle, but has endeavoured to set at rest the sharp cleavage of opinion among different High Courts, sought to be sealed by the Supreme Court in Tahsildar Singh V/s. State of Uttar Pradesh (Supra) as to when an omission to State of fact or circumstance in the statements recorded may also amount to contradiction. The learned magistrate having denied to the accused the right to contradict the prosecution witnesses with reference to their previous statements recorded by Police. The accused moved the Sessions Court in revision. The Sessions Court referred the case to the High Court for order of High Court as the Sessions Court was of the opinion that, if as held by Magistrate, the previous statements were not recorded in the course of any investigation within the meaning of Section 162, then the statements' would all the more be available to the accused under Section 145, Evidence Act to contradict the makers of those statements when deposing as witnesses. The High Court held that revision must be accepted and order of Magistrate must be set aside. The High Court observed that; if Section 162 did not apply to the Statements recorded by Police for their not having been recorded in the course of investigation under Chapter XIV, then the prohibition

against the use of any such statement as enacted in Section 162(1) also would not apply and therefore, such statement would be available for any purpose for which they are allowed to be used under the law. When the maker of previous statement is examined as a witness, such previous statement can be used under the provisions of the Evidence Act to contradict him under Section 145, to impeach his credit under Section 155(3), to corroborate his testimony under section 157 and to refresh his memory under Section 159 of that Act. Once the learned Magistrate found Section 162 to be out of way and did not find any other provisions of law to stand in the way, he ought to have realized that the previous statements of the witnesses were available for the purpose of cross examination, contradiction corroboration and refreshing memory of the witnesses under provisions of Law. It is not necessary that, a previous statement recorded by Police in order to be available to contradict the evidence of the maker, must be recorded in the course of an investigation under Chapter XIV and that only when so recorded, they can be used for the purpose of contradicting a witness under the proviso to Section 162(1). When such statement is not so recorded in the course of any investigation under Chapter XIV and therefore, such statement does not attract Section 162, the right to use such previous statement becomes much wider, because while a previous statement not covered by Section 162 can be used for cross

examination, contradiction, corroboration and also for refreshing the memory of the maker of the statements when deposing as witness.

18 In the case of Kerala V/s. Babu and Others 1999 SCC (Cri.) 611 it was observed that Section 145 of Evidence Act permits the cross examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the same manner in which such contradiction can be established. Section 145 of the Evidence Act provides that the previous statement of the witness can be made use of during the cross examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen that, it is the right of a party in a trial under Section 145 of the Evidence Act is some what controlled in criminal trials by the provisions made in the code. The accused in a criminal trial has the right to make use of previous statements of a witness including statements recorded by investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness.

19. Kerla High Court in the case of State of Kerala Vs. Thomas Cherian and Ors.⁶ has observed that if the witness was examined after grant of pardon, failure to supply copies of statement

6 1982 CRI. L.J. 2303

recorded by the investigating officer to accused for the purpose of cross examination would affect the right under Section 145 of the Evidence Act. The investigating officer in the said case has admitted that the approver was questioned by him and his statement was recorded under Section 161(3) of Cr.P.C. After the grant of pardon he was examined as a witness on behalf of prosecution. The statement recorded by the investigating officer is an important material that should be made available to the accused for the purpose of cross-examination. It was not made available to the accused in the said case. The confession of the said person was also recorded before he was granted pardon under Section 306 of Cr.P.C. It was produced in the case after examination of the approver and was sought to be proved by the evidence of the Magistrate. It was also not made available to the accused for the purpose of cross-examination. It was held that failure to supply copies of the statement of approver, the accused had been considerably prejudice for having deprived of valuable material for cross-examination of approver for the purpose of testing his reliability.

20 In the case of Sharaf Shah Khan and Ors. Vs. State of A.P.⁷, the Court had dealt with similar issue. The factual matrix of the said case would indicate that the copy of statement of approver

7 1963(2) CRI. L.J.121

recorded during investigation was not supplied to the accused. The Court noted that it is a fatal defect. It was further observed that whether the breach of provisions under Section 162 inasmuch as the copy of statement of approver which was recorded during investigation was never made available to the accused and the accused were denied the valuable right conferred thereunder for cross-examination of the approver, it is fatal to the prosecution case. The right given to an accused under Section 162 is valuable and often provides important material for cross-examination of the prosecution witnesses.

21 Learned APP relied on decision by Himachal Pradesh High Court in State of H.P. V/s. Surinder Mohan and others 2003 Cr.LJ 4223. The accused in that case were tried for the offences under Sections 302 & 380 read with Section 34 of IPC. They were acquitted. The state challenged the order of acquittal before High Court. The appeal was dismissed. The Supreme Court set aside judgment of High Court and remanded the appeal to High Court for fresh disposal. The Supreme Court held that by not examining the approver during the course of committal proceedings, the trial would not get vitiated. The evidence of the approver may have to be scrutinized with greater circumspection and if in such scrutiny, the

evidence is found reliable the Court cannot be inhibited from using the evidence. During the trial the approver was cross examined and sought to be contradicted by defence with his previous statement made by him as an accused during the course of investigation of the case and recorded by investigating officer. The objection by prosecution was overruled. The High Court held that, it is to be kept in mind that the alleged previous statements made by approver, as an accused, during the course of investigation, are not statements made by him under Section 161 of Cr.P.C. but are only the substance of interrogation recorded by investigating officer. The same cannot be used for the purpose of contradiction of the witness under Section 161 of Cr.P.C.

22 From the catena of decisions referred herein above, it is the consistent view that the accused is entitled for previous statement to enable him to establish contradictions or to test the reliability of the version of witness. The appellant in the present case has been facing the prosecution under the provisions of MCOC Act. The approver was arrested, as one of the co-accused in this case. Undisputedly, his statement was recorded during the course of investigation. Subsequently, he turned approver. He has been examined by the prosecution, as prosecution witness no.4, and it is apparent that he has deposing in favour of the prosecution. His

statement was recorded while he was an accused. The prayer for copy of the statement of the approver ought not have been rejected by the trial Court on the ground that it is hit by provisions of Evidence Act and inadmissible in evidence. The statement would be previous statement and the accused has right to confront the approver, who is not witness for the purpose specified in Section 145 of the Evidence Act. Not furnishing such statement would be prejudicial to the defence of accused.

23 In the light of the aforesaid observations, the prayers made in this Appeal are required to be granted.

:: ORDER ::

- (i) The order dated 14th February, 2020, passed by the Special Court in Special Case No.5 of 2008, along with Special Case No.13 of 2008, is set aside. The prosecution is directed to hand over copy of the statement of approver Sudhir Ghorpade, recorded during investigation after his arrest to the appellant-accused;
- (ii) On receipt of the statement of the approver recorded during the course of investigation while he was an accused, the appellant-accused will be at liberty to

prefer appropriate application before the trial Court for recalling P.W.4, for the purpose of cross examination.

If such application is preferred, the trial Court shall deal with it only to the extent of cross-examination *qua* such statement of approver;

- (iv) Criminal Appeal No.474 of 2021, is allowed, and stands disposed of accordingly.

(PRAKASH D. NAIK, J.)