

AGK

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

CRIMINAL REVISION APPLICATION NO.53 OF 2023

Alta Azam Khan Alias Shaikh

... Applicant

V/s.

The State of Maharashtra

... Respondent

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Mr. Gaurav Bhawnani i/by Khan Abdul Wahab for the
applicant

Mr. A.R. Patil, APP for the respondent/State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 15, 2023

P.C.:

1. The challenge in this application is to the rejection of application refusing to allow the accused to go through the contents of case diary for the purpose of cross-examination of the Investigating Officer.

2. On perusal of the examination-in-chief conducted on 16th November 2022 and in particular paragraphs 7 and 8 of it, it is clear that the Investigating Officer was unable to recall further proceedings and, therefore, to refresh his memory he sought permission of the Court. The Court granted him permission to peruse entire case diary. The evidence thereafter has been recorded based on contents of case diary.

3. The accused, therefore, filed an application seeking direction

against prosecution to produce case diary and to permit the accused to cross-examine the Investigating Officer based on case diary. The said application is rejected by the Sessions Court. While rejecting the contention, the Sessions Judge accepted the position of law that such right to get copy of case diary is available if the Investigating Officer wants to refresh his memory; however, rejected the application.

4. Learned advocate for the applicant invited my attention to the judgment of the Apex Court in **Balakram v. State of Uttarakhand & Ors.** reported in (2017) 7 SCC 668 wherein the Apex Court in paragraphs 10 and 11 observed thus:

“10. Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly laid down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

11. In other words, in case if the Court does not use such

entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of the accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.”

5. The conspectus of the judgment laid down by the Apex Court is that limited right of accused to get such case diary is restricted if the Police Officer uses such entries for contradiction or for refreshing his memory. As held earlier, paragraphs 7 and 8 of the examination-in-chief are clear that the Investigating Officer sought permission of the Sessions Judge for refreshing his memory and after perusing such case diary, he continued with the examination-in-chief.

6. In that view of the matter, the applicant/accused has made out a case for production of case diary and to conduct cross-examination based on such case diary.

7. For the aforesaid reasons, the revision application is allowed in terms of prayer clause (a).

8. No costs.

(AMIT BORKAR, J.)