

CRIMINAL APPLICATION NO. 61 OF 2024

...Respondent

API Abdagire, Hadapsar Police Station is present.

DATE : 19th JANUARY, 2024

2. The applicant is arraigned as accused No.2 in MCOCA Case No. 5 of 2015 pending before the Court of learned Additional Special Judge for

MCOC Act at Pune for offences punishable under Sections 143, 147, 148, 149, 302, 352, 201 of Indian Penal Code and Sections 3(1)(i)(ii), 3(2), 3(4) and 4 of the MCOC Act. The applicant was arrested on 29th October 2014.

3. The applicant challenges order dated 11th July, 2023 passed by Special Court rejecting application for recall of PW No.5 and PW No.6 for further cross-examination. In the application dated 15th June, 2023 preferred by applicant under Section 311 of Cr.PC. it was contended that PW-5 was summoned on 10th January, 2022. Application for adjournment was preferred by Accused Nos.1 and 2 (applicant). The application was allowed. Case was kept on 13th January, 2022. The Advocate for Accused Nos.1 and 2 filed pursis before Court stating that the Advocate for Accused has withdrawn his Vakalatnama and he is not representing Accused Nos.1 and 2. Accused Nos.1, 2, 3 and 4 filed an application for appointment of Advocate Ladda and transfer of matter. Case was kept in 3rd February, 2022 for cross-examination on 3rd February, 2022. Advocate Basit conducted cross-examination of PW-5. Question pertaining to crucial points were not put to the witness. The applicant remained non-represented during evidence of PW-5 and PW-6. Legal aid counsel was appointed. The legal aid Advocate did not cross-examine PW-6. There is note in deposition of PW-6 that Accused No.2 has adopted cross-examination of other Accused and he

will recall witness.

4. The application was opposed by prosecution by filing 'Say' dated 27th June, 2023.

5. The application was rejected by Special Court vide order dated 11th July, 2023.

6. The examination-in-chief of PW-5 was recorded on 10th January 2022. The Advocate for Applicant sought adjournment for cross-examination. Adjournment of two days was granted until 13th January, 2023. On the next date i.e. 13th January, 2023 Advocate Dushing submitted a Vakaltnama withdrawal pursis. Witness was present. Advocate Dushing was appearing for Accused Nos.1 and 2. Application was filed by Accused Nos.2, 3 and 5 for adjournment/change of Advocate and transfer of case. Application was rejected. Case was adjourned to 3rd February, 2022. On 3rd February, 2022 the case was adjourned to 5th March, 2022. Applicant was unrepresented by Advocate on 3rd March, 2022 and 5th March, 2022. Part cross-examination of PW-5 was conducted on 5th March, 2022 and 11th March, 2022. Cross-examination of PW-5 was conducted on 16th March, 2022. Deposition of PW-6 was recorded on 5th April, 2023. The applicant was not represented by Advocate. Case was adjourned. PW-6 was cross-examined on 13th April, 2022. The Applicant was not represented by

Advocate. Case was adjourned to 29th April, 2023. Cross-examination of PW-6 continued. Applicant was not represented by Advocate. On 2nd May, 2022 the Court appointed Advocate Deshmukh as legal aid Advocate. On the same day Advocate Deshmukh adopted cross conducted by other Accused. He did not cross-examine. He requested that in the event any cross-examination of witness is required to be conducted, he would prefer an application for recalling witness. On 16th June, 2022 Advocate Dushing was appointed to represent applicant. Application was preferred by applicant to recall PW-5 and PW-6. Application was opposed by prosecution by filing say. Application was rejected vide order dated 11th July, 2023.

7. Learned Advocate for applicant submitted that, the applicant was in custody for a period about nine years. While cross-examination of PW-5 was being conducted, the applicant was not represented by Advocate. Initially Advocate Mr.V. V. Dushing was representing Applicant, he had withdrawn his appearance qua applicant on 13th January 2022. Subsequently, same Advocate was again appointed by the applicant on 16th June 2022. Thus, while cross-examination of PW-5 and PW-6 was conducted, the applicant was not represented by any Advocate. The record indicate that, the legal aid Advocate was provided to represent the applicant. He had appeared in the proceeding on 2nd May 2022. He did not conduct cross-examination of PW-6 and adopted the cross-examination by other accused. However, it was

stated that, if any, further cross-examination is to be conducted, he would prefer appropriate application for recall of witnesses. It is submitted that, in the interest of justice, the applicant may be permitted to conduct cross-examination of PW-5 and PW-6 by recalling the said witness.

8. Learned APP submitted that, the trial Court has rightly rejected the application on the ground that the accused are delaying the trial. PW-5 and PW-6 were examined in 2022. The application for recall of witness was preferred belatedly in 2023 after the prosecution had examined about 20 witnesses. Sufficient opportunity was given to the applicant to proceed with cross-examination of the accused. Legal aid Advocate was also appointed to represent applicant. During the trial threats were issued to the complainant and witnesses. Complaints were registered for non-cognizable offences against the person threatening the complainant. The panch witness had also complained about threats at the hands of accused. Similar apprehension was expressed by PW-5.

9. Learned Advocate for intervenor/original complainant submitted that the application for recalling witness was filed belatedly. Sufficient opportunity was given to the Accused to cross-examine witnesses. PW-5 had remained present in Court on several occasions. Accused are repeatedly making applications to prolong the trial. Threats were issued to witnesses. N.C. complaints were filed. The applicant was represented by Advocate. The

trial Court had passed orders making observations about conduct of Accused.

10. Learned Advocate for applicant submitted that the applicant has not delayed the trial. He was not involved in threatening witnesses. N.C. was lodged on 9th July, 2023. The applicant was in custody. Examination in chief and cross examination of witness was already recorded.

11. It is pertinent to note that, the applicant is facing serious charges under the provisions of IPC as well as MCOC Act. It is true that the prosecution has proceeded to examine about 20 witnesses and the trial has proceeded further, after the evidence of PW-5 and PW-6 was recorded. The record indicate that, the applicant was initially represented by Advocate Dushing. However, on the date of cross-examination of PW-5 and PW-6, the said Advocate was not representing the applicant. The applicant was represented by legal aid counsel during the cross-examination of PW-6. However, the said Advocate did not conduct any cross-examination but reserved the right to recall the witnesses. The applicant was in jail for substantial period of time. After realizing that, the cross-examination of PW-5 and PW-6 was not conducted, who are crucial witnesses, the applicant preferred application for recall of witnesses. Although, there is delay in preferring such application, considering the fact that, the applicant is facing charges for serious offences and he was not represented by the Advocate at

the relevant point of time, in the interest of justice and fairness and to give an opportunity to the petitioner to defend himself effectively, witnesses are required to be recalled.

12. The order dated 10th January, 2022 passed by trial Court indicate that directions were issued to provide appropriate protection to witness (intervenor). The Police Inspector was directed to take necessary steps to avoid tampering. The Court had issued directions to take care of threats to witnesses. Vide order dated 13th January, 2022 the learned Judge has made observations about conduct of Accused. Similar observations are made in order dated 3rd February, 2022. The directions issued by learned Judge to protect witness is appreciated. It is expected that the Accused and their Advocates will cooperate with trial Court to conclude trial expeditiously. The applicant shall not delay cross-examination of PW-5 and PW-6. Trial Court is at liberty to take appropriate measures for protecting witnesses.

13. It is made clear that, the applicant shall not further delay the trial by deferring the cross-examination of the witnesses when they will remain present before the Court for the purpose of cross-examination.

ORDER

(i) Criminal Application No.61 of 2024 is allowed.

(ii) Impugned order dated 11th July 2023 passed by learned

Additional Special Judge under MCOC Act, Pune in MCOCA Case No. 5 of 2015 is set aside.

- (iii) The trial Court is requested to recall the witnesses PW-5 and PW-6 for the purpose of cross-examination at the instance of applicant/accused No.2.
- (iv) The applicant shall not tamper with the evidence.
- (v) On the date when witness is recalled, the Advocate representing applicant shall proceed with cross-examination and the same to be concluded on the same date or immediately thereafter, subject to convenience of trial Court.
- (vi) Intervenor be impleaded as Respondent in this application.
- (vii) Application stands disposed off.

(PRAKASH D. NAIK, J.)