



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

REVISION APPLICATION NO. 527 OF 2024

Jay Shankar Mishra
Adult :42 years,
Occ. Business
Residing at Crown Imperial Tower,
Flat No. A-901, Plot No. 7,
Sector-20, Roadpali, Kalamboli,
Navi Mumbai 410 2018

...Applicant

Vs.

The State of Maharashtra
(at the instance of Uran Police Station)

...Respondent

Adv. Ramesh Tripathi a/w Adv. Shreyas Vaghe a/w Ms. Shruti Tripathi, Adv. Hitesh Singh, Adv. Animesh Kashyap, Adv. Shobha C.	Advocate for the Applicant
Ms. Sangita E. Phad	APP for the Respondent No. 1
Mr. Sushant Tudde	PSI Uran Police Station

CORAM : S. M. MODAK, J.

DATE : 30th SEPTEMBER 2024

JUDGMENT :-

1. Heard learned Advocate for the Applicant-accused and learned APP.

2. This revision application is preferred against the Order dated 21.08.2024 passed by the Court of the Additional Sessions Judge, Panvel. By said application, he has rejected the application filed by the accused for recalling the investigating officer-PW No. 4-Sandeep N. Jadhav. His evidence was recorded on 01.08.2024. When the Applicant applied for certified copy and got it on 08.08.2024, he came to know that certain questions which were put during cross-examination, answers to those questions were not recorded by learned trial Judge. By impugned order, the request was rejected because filling up lacunae is not permissible under Section 311 of the Criminal Procedure Code.

3. Learned Advocate for the Applicant has taken me through various documents. They are as follows:-

- (i) Copy of the F.I.R. filed by Police Constable Shrikant Saindane dated 28.04.2017. His contention is when he has inquired with trailer drivers about their licenses, he was told that those licenses are with the owner. When the owner came there within an hour in his four wheeler, he has quarreled with the first informant and he caught

hold his shirt collar. The owner was none other than the present Applicant. He has tried to record the events in his mobile.

- (ii) F.I.R. is registered under Sections 341, 353 and 506 of the Indian Penal Code with Uran Police Station and the charge-sheet is filed.
- (iii) The spot panchnama and sketch attached to it.
- (iv) According to him, no parking board was displayed therein. At page no. 44.
- (v) Copy of the certain photographs taken at place of the incident on page no. 76 onwards.
- (vi) And google map filed by that Applicant on page no. 79.
- (vii) Copy of the application preferred under provision of the Section 348 of the BNSS Act for recalling the witness, on page no. 84.
- (viii) Copy of the evidence of PW No. 4, part of the evidence is recorded in questions answers form.
- (ix) Copy of the order passed by learned Principal District Judge, Alibag on 13.08.2024 thereby rejecting the

request for transfer of the cases.

4. Learned Advocate for the Applicant relied upon the following judgments:-

- (i) *State (NCT of Delhi) Vs. Shiv Kumar Yadav and Anr.*¹
- (ii) *Manju Devi Vs. State of Rajasthan*²
- (iii) *Varsha Garg Vs. State of Madhya Pradesh and Ors.*³
- (iv) *P. Sanjeeva Rao Vs. State of A.P.*⁴
- (v) *Rajendra Prasad Vs. Narcotic Cell Through Its Officer*⁵
- (vi) *Mohan Lal Shamji Soni Vs. Union of India*⁶
- (vii) *Zahira Habibullah Sheikh and Ors. Vs. State of Gujarat and Ors.*⁷

5. Learned APP submitted no interference is warranted and this revision application is filed for delaying hearing of the Sessions trial.

6. I have perused the application. There are five questions which are mentioned in the application. His grievance is that those questions were put to the witnesses, however, they were not recorded. These

1 2015 AIR (SC) 3501

2 2019 SCC Online SC 552

3 2022 SCC Online SC 986

4 AIR 2012 SC 2242

5 AIR 1999 SC 2292

6 AIR 1991 SC 1346

7 (2006) 3 SCC 374

questions pertain to lacunae in the investigation. Whether really these questions were put or not is disputable question. It is difficult to ascertain as to whether these questions were put or not.

7. It is true that in some of the judgments, the Hon'ble Supreme Court has permitted recalling of the witnesses. My attention is invited to one of such judgment i.e. in case of Rajendra Prasad (supra) and para no. 8. In that case after the prosecution has closed their evidence, two witnesses were re-summoned at the instance of the prosecution. For the purpose of proving certain documents, it was allowed. The Hon'ble Supreme Court has differentiated in between filling up lacunae on one hand and mistake remained due to oversight in the management of the prosecution. If it is second kind of the mistake, the Court should be magnanimous in allowing it.

8. Whereas in case of Varsha Garg (supra), witness was recalled for the purpose of proving the certificate issued under Section 65B of the Indian Evidence Act. It is in respect of digital evidence of the compact disk. Earlier compact disk was found corrupted. The Hon'ble Supreme Court has differentiated, when it is optional to exercise power under Section 311 and when the Court should exercise that power. It may be

either in favour of the prosecution or in favour of the accused.

9. If we apply these principles to the facts before me, I do not think that the revisional application needs to be allowed. I will clarify this aspect. If there is certain lacunae in investigation, the accused has got two remedies. One to point out to the concerned witnesses or to point out these lacunae at the time of the final arguments.

10. In this case, the first informant has alleged that the accused was doing recording with the help of mobile handset. By way of recalling, the Applicant wants to put a question to PW No. 4 about non-seizure of the mobile. If such mobile is seized, certainly prosecution ought to have given evidence. Such evidence is not given, so the accused can plead while arguing the matter that his mobile is not seized and this is weakness in the prosecution case.

11. Question No. 2 pertains to denying the allegation of the parking and denying allegation of the first informant that he came by the car but not on motor-cycle. When the cross-examination of Investigating officer is perused, I find recording of the question no. 4. It pertains to non-seizure of the car of the accused and about visiting the spot on the motor-cycle and not by car. It is denied. For this question, recalling is

not required.

12. Question No. 3 pertains to denying the allegation of the misbehaviour and catching hold the collar of the first informant by the Applicant. Admittedly, PW No. 4 is not the witness to the incident. He came on scene later on. During his cross-examination, the accused has given a suggestion about carrying of false investigation and false charge-sheet. In nutshell, allegations are denied generally though not specifically. The trial Court need not insist upon the specific denial during cross-examination of PW No. 4.

13. Similarly, question no. 4 pertains to denying allegations of the obstruction of the traffic police. The trial Court can have same approach while appreciating the evidence. The trial Court need not insist upon specific denial.

14. When I have read the evidence of PW No. 4, what I gather is many of the questions are recorded in question and answer form. Mostly, it does not happen. It happens when the trial Court realized that the questions put has to be recorded then only it is done. Thought it is not mentioned anywhere from the nature of the cross-examination, it appears that some confrontation must have taken place in between

learned Advocate for the Applicant and learned trial Judge. Ultimately, which questions should be asked and what is manner depends upon the perception of the learned Advocate who is conducting cross-examination. Whereas duty of the judge is to give an opportunity to the accused to conduct cross-examination. However, cross-examination has to be conducted within the parameters. In criminal trial, there is no burden on the accused, but it is on prosecution.

15. As said above, lacunae in investigation can be pointed out by way of arguments also. I do not think that by disallowing the application, there is any prejudice caused to the Applicant-accused. Learned Principle District Judge has also rejected the transfer application. He has granted liberty to the Applicant to take appropriate steps. He had come to this Court by way of the revision.

16. Considering the facts and circumstances, this Court has clarified as to how learned trial Judge should conduct remaining trial of the case. It is expected that learned trial Judge will decide the case on the basis of the settled principles and learned trial Judge should not be affected by some transfer application or the events that have taken place during cross-examination of the PW No. 4.

17. These observations are sufficient. With these observations, revision application is rejected.

[S. M. MODAK, J.]