Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.192 OF 2024

Hifzur Rehman Ansari] Applicant
Vs.
The State of Maharashtra] Respondent

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Mr. Ganesh Gupta a/w Mr. Jamal Khan, Mr. Sahil Ghorpade, Mr. Madan Khansole and Ms. Jagruti Patil i/b G.G. Legal Associates, for Applicant.

Dr. D.S. Krishnaiyer, A.P.P, for Respondent-State.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

DATE : 25th June, 2024.

ORDER:

1. Heard Mr. Gupta, learned Counsel for the applicant and Dr. Krishnaiyer, learned A.P.P, for the respondent – State.

2. A short question which needs to be determined is as to whether the learned Metropolitan Magistrate was right in disallowing following question;

> "**Question**: You have deposed in examination in chief on 04/03/2023 that "he orally permitted him to occupy a small portion of the shop for a brief period and had also given him the duplicate key of the shop" have you mentioned it before police while recording FIR?

This question has been asked by applicant-original - accused No.2 to the prosecution witness/first informant during cross-examination in a trial for the offences punishable under Sections 170, 177, 379, 392, 447, 471 r/w 34 of the Indian Penal Code.

3. Learned Magistrate disallowed the said question, which, according to him, does not amount to omission as according to the Magistrate, omission is the thing "which was recorded in prior statement but not in the later statement".

4. Incidentally, the order challenged by the applicant before the Revisional Court has also been confirmed on 29th January, 2024.

5. It reveals from the record that the first informant is under cross-examination on behalf of the applicant-original accused No.2. At the very outset, the aforesaid question was asked to the first

informant on behalf of the applicant on the basis of deposition of the said witness in his examination-in-chief on 4th March, 2023. It appears that this aspect has not been stated by the first informant in his First Information Report and, therefore, it would indeed be an omission. The question whether it is a material omission which amounts to contradiction or otherwise shall be looked into by the Trial Court in view of the attending circumstances before him. As per Section 145 of the Indian Evidence Act and in view of the well-known judgment of the Supreme Court in case of **Tahsildar Singh Vs. State of Uttar Pradesh**[1], the witness can be cross-examined with regard to his previous statement recorded by the Police in order to bring contradiction on record.

6. The learned Additional Sessions Judge ought not to have entertained a revision since the order impugned before him was an interlocutory order and, therefore, there was no question of exercising the power under Section 397 of the Cr. P.C. Be that as it may.

1 AIR 1959 Supreme Court 1012

7. An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention in the statement as well as in the First Information Report. The learned Magistrate in the impugned order had incorrectly observed that omission is the thing which is recorded in prior statement but not in the later statement. It is not clear which two statements the Magistrate referred to. Be that as it may.

8. Now, to the order.

: **ORDER** :

(a) The application is allowed.

(b) The impugned order dated 18th September, 2023 passed by the Metropolitan Magistrate below Exhibit 187 in C.C. No.951/PW/2012 and order dated 29th January, 2024 passed by the Additional Sessions Judge in Criminal Revision Application No.1020 of 2023 is quashed and set aside.

> (c) The learned Magistrate is directed to proceed further in accordance with the observations made hereinabove.

9. Needless to say that this Court has not expressed any opinion on the merits of the matter as well as discretion of the trial Court to consider whether the omission sought to be brought on record would amount to contradiction or otherwise.

10. The Application stands disposed of in the aforesaid terms with no order as to costs.

[PRITHVIRAJ K. CHAVAN, J.]