

(1998) 11 BOM CK 0074

In the Bombay High Court

Case No : Criminal Application No. 2721 of 1996

Ahmed Khan Alikhan Deshmukh

APPELLANT

Vs

The State of Maharashtra and another

RESPONDENT

Date of Decision : 11-11-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 161, 164, 165, 3, 9

Citation : (1999) 5 BomCR 158 : (1999) BomCR(Cri) 158 : (1999) 1 MhLj 401

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : S.V. Marvadi, for the Appellant; M.P. Galeria, Assistant Public Prosecutor, M.K. Patwardhan, H.V. Mehta and N.M. Patwardhan, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Advocate for the petitioner/applicant and Mr. Patwardhan for respondent No. 2/C.B.I. The petitioner is accused No. 2 in a trial which he is facing vide Special Case No. 47 of 1997 and which was at the relevant time pending on the file of Smt. R.S. Dalvi, the Special Judge. The petition is for transfer of the case from the file of Smt. R.S. Dalvi, the Special Judge to any other Special Judge of Greater Bombay.

2. The Counsel for the petitioner contended that however, by now the assignment of the Judges have changed and Smt. R.S. Dalvi is no longer dealing with the present case, and therefore, he did not press for his prayer for transfer of the case.

3. He, however, contended that while witness of the prosecution was being examined, Smt. R.S. Dalvi, the Special Judge repeatedly intervened in the matter and adopted a role of prosecutor and in support of his contention he drew my attention to the questions put to the witness P.W. No. 1 by the Court (Record page 18 of the present petition). On the other hand Mr. Patwardhan Counsel for the C.B.I. also contended that the evidence of the prosecution, particularly in

respect of tape recorder conversation has not been properly taken on record in the sequence, that, when the tape played in the Court, conversation that was recorded should have been taken out verbatim as is coming from the tape and since this has not been done, the prosecution also suffered in its case. He, therefore, prayed that while considering the prayer of the Counsel of the accused for deleting the portion of the evidence of P.W. No. 1, which came on record pursuant to the course of questions put to the witness by the Court, a de-novo trial should be ordered so that the prosecution can lead its evidence fully, completely and without prejudice to the prosecution.

4. Both the Counsel relied upon a judgment of the Supreme Court reported in Ram Chander Vs. State of Haryana, , wherein the Supreme Court has held that guidelines to be followed by the trial courts while conducting the trial. My attention was drawn to paragraph Nos. 2 and 3 of the said judgment and also to paragraph No. 8 alongwith other facts of the case.

5. I have carefully gone through the evidence of P.W. No. 1 recorded in this case by the Special Judge. It appears that through this witness the tape recorder conversation was tried to be proved by the prosecution as per the statement of this witness this conversation was recorded on three cassettes and this recording was done on 9th March 1987, 12th March 1987 and 18th March 1987 respectively. Further it appears from the evidence that three cassettes kept in three separate packets. They were produced in the Court and removed from the packets and they were played in the Court one after the other. However, it appears that every sentence in the conversation in all the three cassettes is not recorded in the sequence in which it has come on the tape. In fact, the Court should have played the cassettes fully in the Court, deployed a couple of stenographers to take verbatim reproduction of the conversation on record, cassette wise and sidewise, and thereafter the prosecution should have been allowed to put the question to the witness regarding identification of voice and other relevant questions. However it appears that after every question the witness was asked to identify the voice and again question was put to the witness as to whether there is any specific portion in the cassette in which specific demand has been made by the accused latter. Since the witness replied in negative the Court observed that there was no necessity to hear the cassettes further.

6. Certainly this is not a correct approach adopted by the Additional Sessions Judge. Whether the tape recorder conversation contains anything of importance or not (either to the prosecution or to the defence) should not have been decided by the Court on the basis of opinion given by witness. All the three cassettes should have been fully played in the Court and everything that has to be taped should have been taken on record in the form in which it was. It appears that the cassettes was again played, fast forwarded many times meaning thereby that certain portion of the same was not heard by Court or by witness or by defence.

7. Further it appears from the record that after the witness was cross examined

for some time, the Special Judge Smt. R.S. Dalvi started putting questions to the witness and those answers were recorded under the caption of "To Court" meaning there by that these were the Court's Questions." The Court's Questions are running into one and half pages and it appears that as many as 30-40 questions were put by the Court.

8. In the Supreme Court's case relied upon by both the Advocates it has been held as under :--

"The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to all the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence Counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses."

"We may go further than Lord Denning and say that it is the duty of a Judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant" (section 165, Evidence Act). But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence Counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the Judge. The Judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony: subdue the raucous, encourage the timid, conspire with the young, flatter the old."

"The questions put by the learned Sessions Judge, particularly the threats held out to the witnesses that if they changed their statements they would involve themselves in prosecutions for perjury were certainly intimidating, coming as they did from the presiding Judge. The learned Sessions Judge appeared to have become irate that the witnesses were not sticking to the statements made by them under sections 161 and 164 and were probably giving false evidence before him. In an effort to compel them to speak what he thought must be the truth, the learned Sessions Judge, very wrongly, in our opinion firmly rebuked them and virtually threatened them with prosecutions for perjury. He left his seat and entered the ring, we may say. The principle of fair trial was abandoned. We find it impossible to justify the attitude adopted by the Sessions Judge and we also find it impossible to accept any portion of the evidence of P.Ws. 8 and 9, the two

alleged eye witnesses."

It is clear that even though the Court is not supposed to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence, and even though the Court is not supposed to be silent spectator to the examination-in-chief or cross examination, the Court should not assume the role of prosecution or defence lawyer and put the questions to the witnesses to jeopardise the prosecution case or the defence of the accused.

9. It is true that u/s 165 of the Evidence Act ample powers have been given to the Court to have effective and proper control over the trial and Court can ask any question, in any form, at any time. This is an absolute power given to the Court. However, the power has to be used sparingly and only when the circumstances justify its use. From the manner in which the witness is examined by the Court it does not appear that it was necessary for the Court to put so many questions to the witnesses particularly when cross examination was in progress.

10. Since strong grievance is made out by both prosecution as well as accused, prayer for deleting of those questions which have been recorded as questions to Court and prayer of the prosecution for ordering de novo trial are required to be considered in order to give fair chance and better opportunity to the prosecution and defence, and hence, prayer (b-1) of the petition which was allowed to be included at the time of this arguments has to be allowed.

ORDER

Petition is partly allowed.

There shall be de novo trial in this matter.

Copy of this judgment to be sent to the concerned Additional Sessions Judge (Smt. R.S. Dalvi) for taking note of the Supreme Court's judgment referred to above and this judgment for future.

Certified copy expedited.

11. Petition partly allowed.