

(2013) 09 BOM CK 0224

In the Bombay High Court

Case No : Criminal Appeal No. 451 of 2013 in MCOC Special Case No. 21 of 2006

Kamal Ansari and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-09-2013

Acts Referred:

Citation : (2013) ALLMR(Cri) 3917

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : Yug Mohit Chowdhary assisted with Mr. Khan Abdul Wahab, for the Appellant; Raja Thakare, Spl. P.P. a/w Ms. Purnima Kantharia and Ms. P.P. Shinde, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

Sadhana S. Jadhav, J.—The present appellants are facing trial in Case No. 21 of 2006 pending before the MCOCA Special Judge, Mumbai. The appellants herein are challenging the order passed by the Special Judge below Exhibit 3647 dated 1.3.2013 thereby rejecting the application filed by the present appellants to examine six persons as defence witnesses.

2. In the course of hearing the present Appeal, the learned Counsel for the appellants candidly submits that he would withdraw his prayer of examining (1) Santosh Prakash Khanvilkar, (2) Ramanand Marutirao Machewad, (3) Amit Rangnath Punja, (4) Vijaykumar Babanna Rayappa, (5) Suresh Shekhar Suvarna, and the then Collector of Mumbai Suburban District, Mumbai. However, the appeal is restricted to the prayer for examining ACP Kishan Shengal of Anti Terrorism Squad.

3. The Counsel for the appellants submits that the Investigating Agency has filed the charge sheet on 29.11.2006. In the list of witnesses annexed along with the charge-sheet, the name of ACP Kishan Shengal is at Sr. No. 330. It is submitted that the prosecution, for the reasons best known to it, has not examined ACP

Shengal as a prosecution witness and hence the same has caused prejudice to the accused. The Counsel for the appellants submits that ACP Shengal was supervising the investigation of this case for a substantial period. He was supervising the investigation when the recovery of traces of RDX were found in the house of accused Nos. 6, 13 and 3. His name is reflected in the Station Diary as well as the panchnama. According to the Counsel for the appellants, he would be the best person to throw light upon the recovery of traces of RDX. It is the contention of the Counsel for the appellants that the remainder of the RDX used in Malegaon Bomb Blast case of 2006 was used in this case. It is alleged by the Counsel that the investigation under the supervision of ACP Shengal has not been a fair investigation and it is necessary to examine him as a defence witness since the prosecution has not examined him.

4. It is pertinent to note that in fact the present appellants had filed an application below Exhibit 2848 seeking to examine 35 witnesses as Court witnesses. The name of ACP Shengal was at Sr. No. 23 in the list of witnesses. The said application was filed on 27.6.2012. The prosecution filed a say on 30.6.2012, contending therein that the said witnesses cannot be examined as Court witnesses as the prosecution did not find it necessary to examine them as prosecution witnesses. It was specifically contended that "on the contrary, if any evidence of any witness is furthering the defence can certainly examine such witness as defence witness." In view of the said contention, the application was rejected.

5. The Counsel for the appellants specifically contends that when the prosecution did not examine ACP Shengal as prosecution witness, the appellants have requested the Court to examine him as Court witness. The said prayer was turned down. At that stage, the prosecution was of the opinion that the said witness could be examined as defence witness. The Counsel further submits that in view of the said contention of the prosecution, the appellant has sought to examine ACP Shengal as defence witness and, therefore, now the prosecution cannot oppose the grant of the said relief and cannot go back on their own words. The contention of the Counsel for the appellants needs to be upheld.

6. The Counsel for the appellants has further drawn the attention of this Court to the fact that on 4.4.2012, the prosecution had filed the Pursis stating therein that it does not desire to examine any further witness. It is contended that while dropping other witnesses, the prosecution has not assigned any specific reason for not examining ACP Shengal. The Counsel for the appellants has drawn the attention of this Court to the substantive evidence of PW-186 wherein it is stated by the witness that the team consisting of ACP Shengal, PI Tajne and the staff have taken house search of accused No. 6 Mohamed Ali. According to the Counsel, it is, therefore, necessary to examine ACP Shengal.

7. Upon perusal of the substantive evidence of PW-186 and upon hearing respective Counsel, this Court is of the opinion that the accused ought to be given a fair trial and the permission to examine ACP Shengal needs to be

accorded. Initially, the accused were given liberty by the prosecution to examine him as defence witness and the prosecution cannot be allowed to withdraw itself from granting the said permission to the accused. Examining ACP Shengal as defence witness would not cause any prejudice to the prosecution as ACP Shengal is part and parcel of Investigating Agency. He was cited as a prosecution witness and has been dropped by the prosecution without assigning any special reason for the same. He would be a witness on facts. Learned APP has also conceded to permit the accused to examine ACP Shengal as defence witness.

In view of this, the Appeal is partly allowed. The prayer to examine other witnesses is dismissed as not pressed. The learned Special Judge shall permit the appellants to examine ACP Shengal as a defence witness. The Special Judge shall summon ACP Shengal as a defence witness. The prosecution shall make an endeavour to secure the presence of ACP Shengal on scheduled date.

The Appeal stands disposed off.