

(2003) 06 BOM CK 0024

In the Bombay High Court

Case No : Criminal Revision Application No. 41 of 1999

Milind Atmaram Pawar and Another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-06-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 306(1), 397

Citation : (2003) 06 BOM CK 0024

Hon'ble Judges : P.S. Brahme, J

Bench : Single Bench

Advocate : Gandhi, for the Appellant; Mirza, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Brahme, J.—Heard Mr. Gandhi, the learned Counsel appearing for the applicants and Mr. Mirza, the learned A.P.P. for the non-applicant-State.

2. The present application is preferred by the applicants original accused in the Sessions Trial No. 200 of 1994 challenging the order passed by the Sessions Judge, Akola on 2-2-1999 whereunder the Sessions Court has quashed and set aside the order of committal passed by the Judicial Magistrate, First Class, Murtizapur, dt. 5-12-1994 and remanded back the entire proceedings to the Judicial Magistrate for holding the committal proceedings as per law.

3. Applicants were, in fact, tried before the learned Sessions Judge for the charge of committing murder of one Ramesh Ahire. One Lalita Ashok Tayade and her husband Ashok Tayade were also charge-sheeted along with the present applicants in Crime No. 202 of 1994 for murder of victim Ramesh. In that, Ashok Tayade was already discharged u/s 169 of the Code of Criminal Procedure by the Court in pursuance of the report made by the Investigating Officer. As per the prosecution case, victim Ramesh was done to death by the applicants and accused Lalita. Accused Lalita was granted bail on 31st August, 1994 by the

Judicial Magistrate, First Class, Murtizapur. After that, on 16-9-1994, she appeared before the Chief Judicial Magistrate, Akola with a prayer in the application that she wanted to be an approver and prosecution witness and as such, she sought pardon. The Investigating Officer gave his no objection and on 16-9-1994 itself, her statement was recorded by the incharge, Chief Judicial Magistrate, Akola wherein she made all the disclosures about the same. After completing investigation on 16-11-1994, the Investigating Officer filed charge-sheet against three persons including accused Lalita and the present applicants. It was specifically mentioned in the charge-sheet that accused Lalita was tendered pardon and that she was examined as an approver and prosecution witness. On 5-12-1994 the learned Magistrate, Murtizapur committed the case to the Court of Sessions against both the accused.

4. Before the learned Sessions Judge, after the charge was framed, both the accused were tried and in that, prosecution examined in all 12 witnesses including accused Lalita to whom pardon was granted. Statements of accused u/s 313 of the Code of Criminal Procedure were recorded. Counsel for the accused were heard who pointed out that committal Magistrate has not recorded statement of Lalita, approver as required u/s 306(4)(a) of Cri.P.C. It was pointed out that it is mandate of law that the approver, when pardon has been tendered has been u/s 306(1) Cri.P.C. must be examined as a witness before the Magistrate who takes cognizance of the case and who commits the case to the Court of Sessions. It was also submitted that when such an approver was examined as a witness before the committal Court, the accused also gets an opportunity and right to cross-examine the witness and to point out, if possible, that there is no material against the accused and the case is not fit for committal to the Court of Sessions. The learned Sessions Judge, after considering the submissions of the Counsel for both sides, came to the conclusion that due to non-examination of Lalita as a witness before the Magistrate taking cognizance of the offence, committal proceedings itself is vitiated and therefore, the learned Sessions Judge passed the impugned order remitting the matter back to the Judicial Magistrate for holding committal proceedings.

5. Mr. Gandhi, the learned Counsel appearing for the applicants, vehemently submitted that the course adopted by the learned Sessions Judge in remitting the matter to the initial stage of taking cognizance by the Magistrate and then in committing the case to the Court of Sessions itself is not permissible in law as the irregularity and defect in the prosecution case was apparently sufficient to vitiate the trial and as such, the irregularity is incurable. He submitted that the applicants would be unnecessarily put to face re-trial without there being any fault on their part and serious prejudice would be caused to them. The learned Counsel pointed out that the applicants have challenged the order of the learned Chief Judicial Magistrate, Akola granting pardon to accused Lalita by preferring Criminal Revision No. 6 of 1995 before the Sessions Judge and the learned Sessions Judge rejected the revision application by his order dated 22nd July, 1996. It is submitted that, the learned Sessions Judge while passing the

impugned order, has not taken into consideration rejection of the revision application by the Additional Sessions Judge.

6. Mr. Mirza, the learned A.P.P. submitted that no prejudice is going to be caused to the applicants.

7. After taking into consideration the submissions of the learned Counsel for the applicants and the learned A.P.P., I am of the opinion that no interference is called for by this Court in the order passed by the Sessions Judge remitting the matter to the Judicial Magistrate for holding committal proceedings for the observations which the learned Sessions Judge has made in the order. There is no doubt that the mandate of section 306(4)(a) of Cri.P.C. requires that an accomplice to whom pardon has been tendered should be examined as a witness before the Magistrate. Examination of witness necessarily requires examination-in-chief, cross-examination and if necessary, re-examination. Therefore, as observed in *State of Kerala v. Monu Surendran* 1990(2) Cri.L.J. 177, when the approver is examined as a witness before committing Court, the accused has a right to cross-examine him. The applicants have also agitated the same thing before the Additional Sessions Judge in the revision application which they had preferred after the matter was committed to the Court of Sessions, though statement of the approver was not recorded by the committing Magistrate and thereby the accused, who was left to face the session trial, were denied the opportunity to cross-examine the approver. It is true that as a consequence of the Additional Sessions Judge's having not interfered with the order passed by the Additional Sessions Judge in the revision application and not ascending to the prayer of the applicants for giving an opportunity to them to cross-examine the approver, after the approver being examined again, once pardon has been granted to her. Trial against the applicant proceeded before the Sessions Judge and it came to be concluded after examining the witnesses including the approver Lalita. But then, the learned Sessions Judge did take into consideration the effect of non-examination of the approver and he has come to the conclusion that basically cognizance taken by the Magistrate and subsequent committal of the case by the Magistrate is vitiated for the reason that statement of the approver was not recorded after pardon was granted to accused Lalita as envisaged under the provisions of section 306(4)(a) of the Code of Criminal Procedure. That is why, the learned Sessions Judge remitted the matter to the committing Magistrate with a direction to take cognizance and at the same time, to hold committal proceedings afresh.

8. The learned Counsel for the applicant has vehemently submitted that the defect in taking cognizance and also in committing the case to the Sessions Court is incurable and it was agitated before the Sessions Judge by the applicant that the proceedings should be quashed. But then, the learned Additional Sessions Judge did not take into consideration the submissions of the accused. The order passed by the Sessions Judge subsequently in remitting the matter, virtually would amount to reviewing the order passed by the Additional Sessions

Judge and therefore, the learned Counsel submitted that as a consequence of de novo trial, much prejudice would be caused to the applicants, apart from protraction of Sessions trial looming large upon the head of the applicants.

9. It is true that the applicants are unnecessarily put to face re-trial without there being any fault on their part and inspite of the fact that they have already tried to bring all these aspects, particularly intrinsic defect in committal of the case against the applicant, to the Court of Sessions in absence of recording statement of the approver. But, I do not agree that the course adopted by the learned Sessions Judge in remitting the matter to the committing Court in holding committal proceedings, would cause any prejudice to the applicants. It is true that after the committal proceedings, there would be de novo trial before the Sessions Judge. It is also true that as a result of earlier trial before the Sessions Court, the defence of applicant has been disclosed and the witnesses have been cross-examined bringing on record necessary particulars and details relating to the facts and circumstances which might support the defence. I do not think that, by taking recourse to de novo trial, any prejudice would be caused to the applicants vis a vis the evidence already recorded by the Session Court at the trial. However, there is justification for the order passed by the learned Sessions Judge for remitting the matter for taking cognizance and committing the case to the Court of Sessions when, undisputedly the cognizance taken by the committing Magistrate, as also, committal of the case to the Court of Sessions by the said Magistrate is vitiated for the defence in not recording the statement of approver once the pardon was granted. It is also pertinent to note that even the statement of the approver as a witness was recorded at the trial before the Sessions Court. She has been also cross-examined by the defence. Therefore, after remittal of the matter taking cognizance and re-remittal of the proceedings to the Sessions Court was a technicality. In that view of the matter, no prejudice would be caused to the applicants in the background of the fact that the evidence of the approver is already recorded wherein the applicants had an opportunity to cross-examine her. In addition to this, the applicants would get an opportunity to cross-examine the approver when her statement would be recorded by the committing Magistrate. Even when there would be de novo trial, there would be again an opportunity to the applicants to cross-examine the approver. I do not think that in the process of re-trial, de novo as it could be, prosecution would get an opportunity to fill up the lacuna so as to improve its case. If that happens, the applicants would also get an opportunity to accost the witnesses with reference to their statements already recorded before the Court.

10. In the result, no error or illegality is found in the order passed by the Sessions Court. There is no reason to interfere with the order. The revision application is dismissed.