
(1994) 07 BOM CK 0017

In the Bombay High Court

Case No : Criminal Application No. 680 of 1994

Ramesh Wamanrao Babhulkar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-07-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 161(3), 162, 162(1)
Evidence Act, 1872 — Section 27, 32
Penal Code, 1860 (IPC) — Section 306, 498

Citation : (1995) MhLj 724

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : A.B. Choudhary, for the Appellant; Kishor Pande, Assistant Public Prosecutor, for the Respondent

Judgement

V.S. Sirpurkar, J.—By this application u/s 482 of the Code of Criminal Procedure, the applicant-accused challenges the order passed by the Additional Sessions Judge, Wardha, rejecting his application for directing the prosecution to produce the dying declarations of deceased and also for supply of the statements of witnesses recorded by the police prior to 17-2-1990.

2. Shortly stated the facts are that the applicant-accused is facing a trial before the learned Additional Sessions Judge, Wardha, for the offences under sections 498 and 306 of the Indian Penal Code, on the allegation that on 27-1-1990, Chanda, his wife, set herself on fire, after sprinkling kerosene on her person with an intention to commit suicide and, ultimately, she succumbed to her burn-injuries on 30-1-1990. It is the case of the prosecution that Chanda was driven to commit suicide because of the extreme cruel treatment given by the applicant-accused and also because of his unreasoned demand of money from her parents. Thus, the prosecution alleged abetment of suicide against the applicant-accused.

3. The investigation of the said crime was completed and there is an allegation that during the said investigation Chanda gave three dying declarations. It is also

suggested by the applicant-accused that the statements of as many as eight witnesses were taken, but those statements were not supplied to him. On these allegations, the applicant-accused filed an application before the learned Additional Sessions Judge, being Application Exhibit-11. In this, there is a clear cut assertion made by the Counsel for the applicant-accused that the dying declaration of deceased Chanda was recorded thrice and the statements of as many as eight witnesses, whose names were given, were also recorded, and yet all these documents were never supplied with the charge-sheet. The defence urged in this application that these documents were necessary for the purpose of cross-examining the witnesses and, therefore, in the interest of justice and fair trial, the same should be supplied to the defence.

4. The learned Public Prosecutor opposed this application. He made on the application the following endorsement:

"The prosecution does not rely on the documents mentioned in this application. As such the accused cannot insist on production of the same."

On this, the learned Additional Sessions Judge rightly directed to hand over the copies of the statements of witnesses who were going to be examined by the prosecution. However, as far as the dying declarations were concerned, the trial Court held that there was no record at that stage before the Court and the APP also was not in a position to state anything about the same and, therefore, there was no question of production of dying declarations at that stage, if the prosecution was not relying on the same. The trial Court ordered the case to proceed. It is this order, which is in challenge before this Court in the present criminal application.

5. Shri Choudhary, learned counsel appearing on behalf of the applicant-accused, submitted that it was the right of the accused to get the copies of the statements of witnesses recorded by the prosecution during the investigation, who were proposed to be examined by the prosecution. He pointed out the positive language of section 207 and also section 173 of the Code of Criminal Procedure and contended that if during investigation, some statements were recorded of the proposed witnesses, the accused was entitled as of right to have the copies thereof, particularly to use the same in the cross-examination. We need not go into this as the trial Court has directed the said statements to be supplied. If the named witnesses in the application figured in the charge-sheet as the prosecution witnesses, their statements are bound to be supplied. Even in addition to them, if the prosecution wanted to examine some other witnesses who do not figure in the list, the statements of such persons would also be supplied, if so demanded. After all the Additional Public Prosecutor is the best person to know as to the witnesses to be examined, besides the ones who are named as the witnesses for prosecution. The learned Additional Sessions Judge had rightly directed the supply of such statements. However, that is not the only contention of Shri Choudhary. In addition, he submits that if any dying declarations are recorded, the copy of such dying declaration has also to be

given to the accused in the interest of a fair trial, even if the prosecution was not relying upon the same.

6. Shri Pande, learned Additional Public Prosecutor opposed the application on the ground that it was not known as to whether the said dying declarations were in reality recorded. He fairly stated before the Court that if they were so recorded, then the copies of the same were bound to be supplied to the applicant-accused.

7. The Question would, therefore, be whether the dying declarations were liable to be supplied to the applicant-accused, if the prosecution was not going to rely upon the same.

8. The learned Additional Sessions Judge has directed the supply of the statements of those witnesses whom the prosecution wanted to examine. However, insofar as the dying declarations were concerned, the learned Additional Sessions Judge was not certain whether the said dying declarations were the part of the record or not. This Court fails to understand the rationale behind this order. In the first place, there is no denial by the APP that the dying declarations were not recorded. A simple assertion on the part of the Additional Public Prosecutor was that the prosecution did not rely upon the "documents" mentioned. He has even not asserted that the named witnesses were not shown as such in the list of witnesses in charge-sheet, or that the dying declarations were not recorded.

9. One fails to understand the approach of the learned Additional Sessions Judge regarding the dying declarations. The learned Additional Sessions Judge should have looked into the Police Diary to examine whether any such dying declarations were recorded or not. This was all the more important when the Additional Public Prosecutor had not denied this fact in his reply. It is not known as to why the learned Sessions Judge did not go into the Police Diary to examine whether any such dying declarations were recorded or not. It is also not known as to why the APP was not in a position to state anything about the dying declarations. Who else could state about the papers of investigation? Certainly, the Additional Public Prosecutor and the Court had the case diary, or at least, were expected to have the same. One look in the case diary would have confirmed the whole thing. From the very fact that it was not denied by the State that the dying declarations were not recorded, it is certain that those dying declarations must have been recorded and if they were so recorded, the Court as well as the Additional Public Prosecutor could not feign ignorance about the same.

10. Further question would be: if those dying declarations were so recorded and are in existence, could the prosecution be asked to supply the copies thereof to the accused, even if the prosecution did not rely upon the same. The answer to this question has to be in the affirmative.

11. Section 161(3) of the Code of Criminal Procedure specifically provides that the police officer may reduce into writing any statement made to him during the

course of investigation by any witness and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. u/s 161, therefore, the police officer, who is making an investigation, is expected to keep a separate and true record of statements of the witnesses recorded by him during the investigation.

Under section 162 of the Code of Criminal Procedure, which deals with the use of such statements in evidence, it is provided that no such statement shall be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as provided in that section. u/s 162, therefore, the police officer has to make a record of such statement in the case diary. Thus, the statements of the witnesses during investigation can be recorded by a police officer not only on the ordinary sheet of paper but also in the Police Case Diary.

12. Police Diary, u/s 172 of the Code of Criminal Procedure, is normally meant for a police officer investigating a crime for recording his day-to-day progress. Such notings may be used by the police officer, but u/s 172, such notings in the Police Diary do not become available to the defence. Section 172(2) specifically says that the Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

13. It will be seen that u/s 207, Criminal Procedure Code, where the proceedings are instituted on a police report, the Magistrate is bound to supply free of cost of copy of - (1) the police report; (2) the first information report, recorded u/s 154; (3) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173. In the reported case of the Delhi High Court - S.J. Chowdhary Vs. State, , a view is taken that if the statements of the witnesses are recorded more than once, then all such statements will have to be supplied to the accused, as the accused may be able to use those statements, if they are contradictory. It has been held that the prosecution cannot choose a particular statement to be supplied and leaving out the other statements. The Delhi High Court has further taken a view that the prosecution would be bound to supply all the statements, even if recorded more than once of such witnesses as contemplated u/s 161(3), whether recorded in a police diary or otherwise, and thereby the valuable right, which has been conferred upon the accused person, would be preserved and the same cannot be denied to him. Reliance also can be placed on another reported decision of the Kerala High Court reported in State of Kerala Vs. Raghavan etc., , wherein the Kerala High Court has held that the prosecution cannot pick and choose and refuse to supply to the accused the copies of the statements which are contradictory to the prosecution case on the ground that the prosecution is not

going to rely on the statements of those witnesses. Otherwise, it would be in deviation from the mandatory provisions of Criminal Law and to deny the accused the just and fair trial. Similar view is also expressed in another reported decision in *State of Punjab vs. Mohinder Singh*, (1974) 76 Punjab L.R. 364. The Court there expressed :

"If the police officer does not record the statements of all or some of the witnesses u/s 161(3) of the Criminal Procedure Code, but cleverly incorporates the same in the case diary maintained u/s 172, Criminal Procedure Code in the belief that by doing so those statements can be kept back from the knowledge of the accused, then the accused cannot be deprived of the copies of those statements. The provisions of sections 162, 173(4) and 207-A(3), Criminal Procedure Code, impose an obligation upon the prosecution agency to supply copies of statements of witnesses, who are intended to be examined at the trial to enable the accused to obtain a clear picture of the case against him, to utilise them in the course of cross-examination to establish his defence and also to shake the testimony of the prosecution witnesses. The words such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record" in sub-section (1) of section 162, Criminal Procedure Code, make it abundantly clear that statements of witnesses during investigation u/s 172, Criminal Procedure Code, can be used by the accused for the purposes specified in proviso to section 162(1), Criminal Procedure Code. A very valuable right is given to the accused under the proviso to section 162(1), and he can exercise this right only if the copies of all the statements made by the witnesses during the investigation, whether recorded u/s 161(3) or in the police-diary maintained u/s 172, Criminal Procedure Code, are supplied to him. It follows, therefore, that the accused is entitled to the copies of statement of persons whom the prosecution proposes to examine as witnesses even though those statements are recorded in the police diary maintained u/s 172, Criminal Procedure Code."

(Emphasis supplied).

It thus appears to be an established position that the accused is entitled to have the copies of all the statements of witnesses for prosecution recorded u/s 161, Criminal Procedure Code, even if that particular statement is not being relied upon by the prosecution, it being unfavourable to the prosecution.

14. Insofar as the dying declarations are concerned, the same principle will apply, because it is also a statement of a witness recorded during the course of the investigation. It is quite irrelevant that the witness should have died after making a dying declaration. A dying declaration has been specifically excepted from the operation of bar u/s 162, Criminal Procedure Code. Sub-section (2) of section 162, Criminal Procedure Code, reads as under:

"Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, or to

affect the provisions of section 27 of that Act."

Therefore, a dying declaration can be used against the accused, without a bar u/s 162 being affected. Where a statement of a witness against the use of which there is a specific bar has to be supplied to the accused on his demand, it is unthinkable that a dying declaration which is without any such bar can be kept from the accused.

15. If such a dying declaration is recorded during investigation and is kept back from the accused, merely because it helps the accused, to deny the copy thereof to him for the purposes of defence would be highly prejudicial to him. The said dying declaration, if existing on record, would undoubtedly provide a material to the defence to effectively cross-examine regarding the nature of investigation. Even the investigating officer could be subjected to a cross-examination on the basis of such dying declaration. Apart from that, such dying declaration could be used for unearthing the truth of the prosecution story, because it might affect the evidentiary value of the other dying declarations on account of the contradictions. Under such circumstances, it will not be fair to deny the copy of the dying declaration to the accused on the spacious ground that it forms a part of the case diary. If such dying declaration is proved to be in existence, it will be the right of the accused to have the copy thereof. The trial Court was, therefore, in error in not establishing as to whether such dying declaration exists or not. It has already been pointed out that there is no denial that there are no such dying declarations. The impugned order is, therefore, clearly incorrect and will have to be set aside.

16. In the result, the learned Additional Sessions Judge is directed to get it established as to whether such dying declarations are in existence or not. If they are in existence, copies thereof shall be supplied to the applicant-accused. With these observations, the instant Criminal Application stands disposed of.