

(2015) 11 BOM CK 0050

In the Bombay High Court

Case No : Criminal Application No. 1407 of 2015 in Criminal Appeal No. 572 of 2015

Salman Salim Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 311, 391
Evidence Act, 1872 — Section 33
Motor Vehicles Act, 1988 — Section 181, 185, 187, 3
Penal Code, 1860 (IPC) — Section 134, 304, 304-A, 337, 338

Citation : (2015) 11 BOM CK 0050

Hon'ble Judges : A.R. Joshi, J.

Bench : Single Bench

Advocate : Amit Desai, Senior Counsel, Anand Desai, Nirav Shah, Munaf Virjee, Gopal Shenoy, Manasi Vyas, Rishabh Jogani and Nausher Kohli, i/b. DSK Legal, for the Appellant; S.K. Shinde, Public Prosecutor and Poornima Kantharia, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Heard rival arguments on this application preferred by the appellant/original convicted accused during pendency of his appeal. Present application is preferred for directions to be given by this Court under section 391 of Cr.P.C. for recording of the evidence of one witness by name Kamal Khan.

2. In order to have proper perspective of the circumstances under which this application was made by the appellant/accused, certain factual position regarding the case against the appellant and his conviction for the particular offences and the nature of evidence brought against the applicant-appellant before the Sessions Court, can be summarized as under:

3. Without going into much details, suffice it to say that the present applicant-appellant was tried for various offences including the main offence punishable

under section 304 Part II of IPC. Other offences are punishable under sections 338 , 337 of IPC and under section 134 read with section 187 , U/s 185 , U/s 3 read with section 181 of Motor Vehicles Act. The said trial in Sessions Case No. 240 of 2013 ended in his conviction and the appellant-accused was sentenced to suffer RI for five years for the major offence punishable under section 304 Part II of IPC. It is pertinent to mention that factually the earlier charge was mainly for the offence under section 304-A of IPC when initially the matter was taken before the concerned Metropolitan Magistrate's Court, Bandra and this has arisen out of the incident which happened at early hours of 28.9.2002 wherein allegedly the present appellant-accused drove the motor vehicle Toyota Land Cruiser in rash and negligent manner and under influence of alcohol and rammed the said motor vehicle on the shutter of American Express Laundry situate at the junction of St. Andrews Road and Hill Road, Bandra (West). One person died and four were injured in the said incident.

4. As mentioned earlier though initially charge was for the offence under section 304-A of IPC, later on it was altered and in between the matter was taken before this court which then reached the Hon"ble Apex Court. Without going into much details suffice it to say that the matter reached the M.M. Court on the orders of the Hon"ble Apex Court when it was made clear by the Apex Court that the trial Court i.e. the M.M. Court if feels necessary as per the material available on record during the trial for the main offence U/s 304-A of IPC may alter the charge. Under this premise, the M.M. Court on the application of the prosecution came to the conclusion that the evidence then recorded before it of 17 prosecution witnesses discloses the commission of offence of 304 Part II of IPC. Under those circumstances, the matter was committed to the Court of Sessions. During recording of evidence Sessions Court recorded the evidence of 27 prosecution witnesses and one defence witness. The sessions case ended in conviction as mentioned earlier.

5. Again certain factual position so far as filing of the appeal before this Court and grant of bail to the appellant and taking the appeal for expeditious hearing, are required to be mentioned.

6. The appeal was filed in this Court and on admission of the appeal, the bail application of the appellant was granted and by consent of parties, as specifically mentioned by another single bench of this Court an order was passed directing that the appeal shall be heard, finally as far as possibly, in the month of July 2015. As such, during pendency of this appeal the effective hearing of the arguments started initially on 30.7.2015 for four days till 7.8.2015 and then after some events concerning preparation of paper book etc., further hearing started on 21.9.2015 and till date it is continuing, almost on all dates except few occasions.

7. The present stage of the appeal is that the arguments on behalf of the appellant are over and the present application for directions under section 391 of Cr.P.C. was preferred on 16.11.2015, though earlier at the starting of the

arguments it was merely indicated on behalf of the applicant/appellant by the learned Senior Counsel that one witness by name Kamal Khan is required to have been examined. However, the fact remains that an application before this Court is filed only on 16.11.2015 when the arguments on behalf of the appellant were closed but those on behalf of the State were yet to start. The arguments by the learned Chief Prosecutor for the State started on 17.11.2015. An affidavit-in-reply by Assistant Commissioner of Police, Bandra Division Mumbai was filed on 23.11.2015. Prior to that in the meantime, the arguments on behalf of the State continued with the understanding as expressed on behalf of the State that the State may file written reply or may orally argue on the application of the Appellant under sec. 391 of the Code. After filing of the affidavit-in-reply, affidavit-in-Rejoinder was filed on behalf of the appellant, on 24.11.2015 i.e. on the next day of reply-affidavit filed by the State.

8. Usually, the application under section 391 of Cr.P.C., considering the merits of the same and the discretion vested with the Appellate Court, should not take much time for adjudication. However in the present matter it has been argued with great zeal taking almost two days. Apparently, this might be because of the allegations against the applicant-appellant and the main charge earlier under section 304-A of IPC which was then altered to section 304 Part II of IPC. This is also for the reason that the Sessions Court had convicted the applicant-appellant for the said main offence of 304 Part II of IPC and sentenced him to suffer RI for five years. All the same the said application under section 391 of Cr.P.C. is argued on behalf of the applicant at length and replied by the prosecution today.

9. Now the factual circumstances apparently necessitated the applicant-appellant to prefer this application are summarized rather in detail, as under.

10. According to the case of the prosecution, during the incident of driving of the car there were only three persons in the car including the present applicant-appellant and who was allegedly driving the vehicle. One Ravindra Patil, body guard of the appellant and one Mr. Kamal Khan, friend of the applicant were present in the car throughout from about 9:30 p.m. on 27.9.2002 till the time of the incident which occurred at about 2:45 a.m. on 28.9.2002. Though it is the prosecution story that there were three persons in the car, defence has put forth its case by submitting that instead of three persons in the car there were four persons and at the time of the incident one Ashok Singh, the driver of the applicant was driving the vehicle. However admittedly factual position remains that the friend of the present applicant-appellant, one Kamal Khan was definitely present in the car throughout and was also interrogated by the police and his statement under section 161 of Cr.P.C. was also recorded. It formed part of the charge-sheet. Even the name of this Kamal Khan is also appearing in the list of the witnesses filed before the M.M. Court at early stage of the proceedings and subsequently before the Sessions Court at the later stage when the matter was committed to it. In fact, it is a factual position that before the M.M. Court the said witness was bound over for attending the M.M. Court and to give his

evidence but his evidence was not recorded though 17 prosecution witnesses were examined prior to committal. It is also an admitted position that before the Session Court process was issued against said Kamal Khan for bringing him as a prosecution witness but he could not be brought before the Court as allegedly according to the State, his whereabouts were not found and he could not be traced at the address recorded in his statement under section 161 of Cr.P.C. which was recorded in the year 2002.

11. As such, the factual position remains that though Kamal Khan was present before the M.M. Court on three occasions in the year 2008 his evidence was not recorded. Moreover there were no summonses issued against him requiring his presence before the M.M. Court when the matter was tried for the main offence under section 304-A of IPC.

12. According to the case of the prosecution, one Mr. Ravindra Patil, a police guard, who was on duty was also present in the car during the entire incident. In fact, he was all along in the car since 9:30 p.m. of 27.9.2002 till the happening of the incident at 2:45 a.m. of 28.9.2002. Before the M.M. Court, the substantive evidence of Ravindra Patil was recorded and he was also cross-examined when the main charge against the applicant-appellant was under section 304-A of IPC. The apparent effect of the substantive evidence of said Ravindra Patil was that when the applicant was allegedly driving the vehicle at the time of the incident, he was under the influence of alcohol. As mentioned earlier, on the application preferred by the prosecution, the M.M. Court thought it fit to commit the matter to the Court of Session by observing that offence under section 304 Part II is attracted. However, in the meantime said Ravindra Patil, Police guard, and apparently the star witness before the M.M. Court expired in the year 2007. Consequently his substantive evidence could not be recorded by bringing him before the sessions court when the Sessions Case No. 240 of 2013 started. Again, without going into much detail as to how the substantive evidence of said Ravindra Patil before the M.M. Court was taken shelter of by the prosecution and also by the trial Court at the time of hearing of the sessions case, suffice it to say that the recourse to section 33 of the Indian Evidence Act was taken by the trial Court i.e. the Sessions Court and it was so done on the application preferred by the prosecution when by that time the stage before the Sessions Court was that 24 prosecution witnesses were examined and apparently only two Investigating Officers i.e. PW 26 and PW 27 remained to be examined. As such the fact remains that the evidence of said Ravindra Patil before the M.M. Court was taken help of by the Sessions Court though there was no opportunity for the applicant-appellant to cross-examine him in the Sessions Court trial when the main charge was under section 304 Part II of IPC.

13. Again, another circumstance is required to be mentioned that after the committal of the case to the Court of Sessions said Ravindra Patil was named as witness No. 1 in the list of witnesses. Despite this, he was not examined and in fact, almost 24 prosecution witnesses were examined and under the

circumstances mentioned in the earlier paragraph, the evidence of Ravindra Patil was accepted as relevant under section 33 of the Evidence Act and the admissibility of the same was finally determined by the Sessions Court at the time of final judgment. In fact, this was also the main point canvassed on behalf of the applicant in support of the present application under section 391 of Cr.P.C., to further the argument that initially under section 311 of Cr.P.C. there was no scope or opportunity for the appellant, then accused, to ask for taking the evidence of Kamal Khan. By pointing this out, it is argued by learned Senior Counsel for the applicant that had the admissibility of the evidence of Ravindra Patil been decided at early stage and necessarily at the starting of a trial, then the proper steps could have been taken by the applicant asking for recording of the evidence of Kamal Khan before the Sessions Court, during the trial.

14. It is also a factual position that one Ashok Singh was examined as a defence witness during the trial before the Sessions Court and according to the defence he was the fourth person present in the car at the time of the actual incident which occurred on 28.9.2002 at 2:45 a.m. According to defence he was driving the car from J.W. Marriott Hotel till the spot of the incident. The trial Court had come to the conclusion that the substantive evidence of said defence witness Ashok Singh is not trustworthy and discarded the same. As such by pointing out this factual position, it is submitted on behalf of the appellant accused that the only person admittedly present throughout in the car and not examined by the prosecution is Kamal Khan. It is further pointed out on behalf of the applicant-appellant that Kamal Khan was earlier listed in the list of witnesses and in fact, he was to be examined before the M.M. Court and later on also before the Sessions Court. By pointing this out, it is submitted on behalf of the appellant that if it was the earlier desire of the prosecution to examine Kamal Khan, then under such circumstances there should not have been any strong objection, much less even any objection on behalf of the State for allowing recording of the evidence of Kamal Khan. At this juncture, it is required to be borne in mind that the application preferred by the applicant is under section 391 of Cr.P.C. asking the Court to summon Kamal Khan and record his evidence so that there would be opportunity to the appellant-accused to cross-examine him. It is further argued on behalf of the applicant-appellant that the Sessions Court ought to have summoned Kamal Khan by exercising the powers under section 311 of Cr.P.C. and this was more so when the Sessions Court disbelieved the evidence of Ashok Singh i.e., the defence witness, even on preponderance of probabilities.

15. The learned Senior Counsel on behalf of the applicant further submitted that non-examination of Kamal Khan being the material witness has caused enormous prejudice to the applicant-appellant and by non-examination of this material witness an adverse inference is necessary to be drawn. He further submitted that in fact such adverse inference ought to have been drawn by the Sessions Court while analyzing the evidence and while discarding the testimony of defence witness Ashok Singh. It is strongly submitted that it was the duty of the prosecution to produce the evidence of the material witness and specifically in

the special circumstances of the case at hand when the main witness of the prosecution, Ravindra Patil was not available before the Sessions Court and definitely not available for cross examination when the charge under section 304 Part II of IPC was levelled against the applicant. It is further submitted that it is for the prosecution to be fair and honest and to keep all the available material before the trial Court, particularly, when it is the evidence of an eye-witness and more so in the light of the fact situation of the case when another eyewitness Ravindra Patil was not available before the Sessions Court.

16. Various authorities are cited on behalf of the applicant to canvass the proposition that under what circumstances the Appellate Court may exercise its discretion calling for any witness and directing his evidence to be recorded.

Said authorities are as under:-

17. (i) Narain and Others Vs. The State of Punjab,
- (ii) Darya Singh and Others Vs. State of Punjab,
- (iii) Ashok Tshering Bhutia Vs. State of Sikkim,
- (iv) Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others,
- (v) Rambhau and Another Vs. State of Maharashtra,
- (vi) (2014) 13 Supreme Court Cases 59 (Mannan Shaikh and others Vs. State of West Bengal and Anr)
- (vii) Mohanlal Shamji Soni Vs. Union of India and another,

18. It is also submitted on behalf of the applicant that once the Sessions Court had failed to exercise the powers under section 311 of the Cr.P.C. there is no alternative for the appellant but to ask this Appellate Court to take recourse to section 391 of Cr.P.C., directing recording of the evidence of one Kamal Khan and then decide the appeal.

19. Learned Chief Public Prosecutor countered the defence arguments and further stated that the scope of Section 391 of Cr.P.C. is required to be construed and it is further submitted that non-examination of a witness by the prosecution will not always prompt the Court to draw an adverse inference. Moreover, even at this stage of deciding the application under section 391 of Cr.P.C. such adverse inference cannot be drawn. Only when the entire evidence is to be discussed after the entire arguments on behalf of the State are heard, the Court may draw any inference concerning any circumstance including non-examination of a material witness, further argued. Secondly, it is submitted on behalf of the State that the evidence of the prosecution as led before the Sessions Court is sufficient to hold the applicant-appellant guilty for the main offence of 304 Part II of IPC and other allied offences and as such there is no legal necessity for this Court to take recourse to section 391 of Cr.P.C. and give directions for examination of Kamal Khan.

20. Though during the arguments, it is submitted and mainly it is mentioned in the affidavit-in-reply that the present application is mala fide and belated, thus need not be acted upon and though much is counter argued on behalf of the appellant as to whether it was the mala fide act on the part of the applicant or it was the entire mala fide investigation, in the opinion of this Court, this aspect need not be dealt in detail much less for decision of the application under section 391 of Cr.P.C. For this purpose, the provisions of section 391 of Cr.P.C. are required to be looked into. Section 391 of Cr.P.C. reads thus:

Sec.391 . Appellate Court may take further evidence or direct it to be taken.

"(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

21. After considering this legal position as to the circumstances under which recourse to section 391 can be taken by the Appellate Court and which is definitely a discretionary power, it must be mentioned that the ratios propounded by the authorities cited on behalf of the applicant do endorse the view that recourse to section 391 of the Cr.P.C. need not be taken so casually and only in cases where the circumstances specially do indicate that a just decision is not possible on the material available, then recourse to section 391 of the Code is to be taken. Undoubtedly, the primary object of section 391 of Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. This has been held in the authority cited above in the case of Zahira Habibulla H. Sheikh (supra).

22. In the present case, it is apparent from the record that Mr. Kamal Khan was present in the vehicle throughout that night and even at the time of the incident in question. Admittedly, the prosecution has not examined him despite naming him in the witness list. Moreover, the admissibility of the evidence of Ravindra Patil, recorded before the M.M. Court was decided by the Sessions Court at the time of final judgment thereby depriving the applicant-appellant of his opportunity for applying under section 311 of Cr.P.C. before the Sessions Court to examine Mr. Kamal Khan. It has therefore to be seen whether the circumstances do indicate that without the substantive evidence of Kamal Khan a just decision

is impossible. Moreover, non-examination of a prosecution witness and more so when the witness is a material witness, is an aspect to be considered and necessary inference can very well be drawn at the appropriate stage.

23. Apart from the above, if there is no dire need of examining Kamal Khan and in his absence the evidence adduced by the trial Court and brought before this Court in appeal if can be analyzed and equally the evidence of the defence witness can be considered though totally rejected by the trial Court, in the considered view of this Court, the recourse to section 391 is not the ultimate requirement.

24. Furthermore it must be mentioned that the applicant is asking the Court to examine Kamal Khan as a Court witness and in that eventuality said witness will be subjected to the cross-examination at the hands of the accused. It is also a factual position that though he was a prosecution witness cited by the prosecution and attempted to be brought before the Court by the prosecution but failed in doing so, the applicant-appellant also did not choose to call the said Kamal Khan as a defence witness. Of course, a criminal trial does not necessitate the accused to establish his case and it is for the prosecution to stand on its own legs. With this basic principle of criminal jurisprudence in mind if the appellant had chosen not to examine Kamal Khan as a defence witness but apparently chosen to examine Ashok Singh as a defence witness still it is for this Court to decide whether recourse to section 391 is necessary to be taken and whether the situation is such that without his evidence at this stage of appeal there would not be a just decision in the appeal.

25. Considering the scope of section 391 of Cr.P.C. and the mandate of the decisions of the Apex Court and cautioned by the Apex Court that only sparingly and for special reasons, recourse to section 391 of Cr.P.C. can be taken, in the considered view of this Court, there is nothing to entertain the present application by giving directions for summoning Kamal Khan to record his evidence. It is by now well settled, that the powers of the Appellate Court under Section 391 of the Code are discretionary and are to be exercised only if it thinks that additional evidence is necessary. As the provisions under Section 391 of the Code are by way of an exception, the Court has to carefully consider the need for and desirability to accept additional evidence. Of course, while disposing of this application with above observations, it must be mentioned that the aspect of non-examination of a material witness when the opportunity for cross-examination of Ravindra Patil was not available before the Sessions Court, when the charge was under section 304 Part II of IPC, shall be appropriately dealt with at the conclusion of the argument while deciding the present appeal. In any event, in the considered view of this Court, this is not a case in which for want of the substantive evidence of Kamal Khan the matter cannot be disposed of or there cannot be a just decision in the appeal. In the result, the present application is dismissed and accordingly disposed of.

Criminal Appeal No. 572 of 2015 to stand over on 1st December, 2015 for further

arguments of Prosecution.