

(2017) 09 BOM CK 0074

In the Bombay High Court

Case No : 1144 of 2016 and Criminal Application No 1239 of 2017 In Criminal Appeal No 53 of 2014

Sandeep Irla @ Sandya Chimnya Irla

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-09-2017

Acts Referred:

Constitution of India, Article 21 - Amendment of the Schedule

Code of Criminal Procedure, 1973, Section 304, Section 303 - Legal aid to accused at S

Citation : (2017) 09 BOM CK 0074

Hon'ble Judges : A.M. Badar

Bench : SINGLE BENCH

Advocate : Nandkumar V. Sawant, Farhana Shah, S.V. Gavand

Judgement

1. Criminal Application No.1144 of 2016 is filed by applicant / original accused no.4 Sandeep Irla @ Sandya whereas Criminal Application No.1239 of 2017 is filed by the applicant / accused no.3 Kumar @ Kalya Chinnu Devendra seeking their release on bail. Appellant / accused no.1 Om @ Vinayak Gaikwad, it seems, has not preferred any bail application.

2. Today all these appeals along with bail applications are listed for hearing before this court.

3. Mr.Nandkumar Sawant, the learned advocate appearing for the applicant / accused Sandeep @ Sandya and Mrs.Farhana Shah, the learned advocate appearing for the applicant / accused Kumar @ Kalya Chinnu Devendra argued that the learned Sessions Judge, Mumbai, has breached principles of natural justice while deciding the Sessions Case No.679 of 2012 and convicted appellants / accused Nos.1, 3 and 4 of serious offences punishable under Section 376(2)(g) as well as Section 324 read with Section 34 of the IPC. They are sentenced to suffer heavy punishment i.e. rigorous imprisonment for 10 years

and 1 year respectively on these two counts apart from imposition of fine, without following the due process of law and therefore they are entitled for bail.

4. The learned advocate appearing for appellant / accused no.4 Sandeep Irla @ Sandya and appellant / accused no.3 Kumar @ Kalya submitted that no opportunity of cross-examination of PW1 - victim of the crime in question was granted to accused no.2 Yogesh Kanojia and appellant / accused no.3 Kumar @ Kalya. The learned Sessions Judge, Mumbai, has observed that learned advocate for accused no.2 is absent and accused no.2 is unable to conduct cross-examination in person. With this observation, order of no cross-examination by accused no.2 Yogesh is passed. So far as applicant / accused no.3 Kumar @ Kalya is concerned, it is recorded by the learned Sessions Judge that his advocate is absent and he (accused no.3) refused to cross-examine PW1 - victim personally. With this, no cross order came to be passed. Both the learned advocates further submitted that similar is the case in respect of evidence of PW2 Dr.Baban Shinde. By marking absence of the learned advocate for accused no.2, it was observed that accused no.2 declined to ask any questions to PW2 Dr.Baban Shinde. With this observation, no cross order came to be passed. Both learned advocates for applicants / accused submitted that this procedure is unheard in criminal jurisprudence and the criminal trial cannot proceed exparte against accused persons.

5. The learned advocates appearing for applicants / accused further submitted that similar mode of proceeding against the accused was adopted by the learned Sessions Judge, Mumbai, in respect of PW5 Prajakta Kothekar. By marking absence of learned advocate for applicant /accused no.4 Sandeep and observing that the applicant / accused no.4 Sandeep has declined to cross-examine PW5 Prajakta Kothekar through video conferencing, the learned Sessions Judge, Mumbai, had closed evidence of PW5 Prajakta Kothekar.

6. It is further argued by learned advocates appearing for applicants / accused that after chief examination of PW6 Tukaram Jadhav, it is observed by the learned Sessions Judge, Mumbai, that advocate for applicant / accused no.4 Sandeep is absent, with further observation that he (accused no.4 Sandeep) refused to cross-examine PW6 Tukaram Jadhav through video conferencing, the learned Sessions Judge, Mumbai, discharged PW6 Tukaram Jadhav.

7. In submission of learned advocates appearing for applicant / accused, criminal trial cannot proceed exparte against accused persons and evidence of prosecution witnesses cannot be closed merely because rustic and illiterate accused is not in a position to cross-examine prosecution witnesses in person. Both learned advocates submitted that in the eventuality of absence of accused persons for cross-examination while trying serious offences, the Sessions Judge is duty bound to grant short adjournment in order to enable the concerned accused to make alternate arrangement for engaging another advocate to cross-examine prosecution witnesses. The learned advocates appearing for applicants / accused further argued that in the eventuality of absence of defence advocate

during the course of cross-examination of prosecution witnesses, the learned Sessions Judge, Mumbai, ought to have kept in mind provisions of Section 303 as well as Section 304 of the Code of Criminal Procedure, apart from provisions of Article 21 of the Constitution of India and ought to have granted legal aid to accused persons, particularly when record shows that they are slum dwellers and illiterate persons. Such procedure was not adopted by the learned Sessions Judge, Mumbai, which prima facie indicates that the learned Sessions Judge, Mumbai, was prejudiced against accused persons.

8. The learned advocate appearing for applicants / appellants have placed reliance on following judgments : (a) Baliram Madhukar Dalvi v. State of Maharashtra, 2008 ALL MR (Cri) 2042

(b) Hussainara Khatoon and Others (IV) v. Home Secretary, State of Bihar, Patna, (1980) 1 Supreme Court Cases 98 (c) Suk Das and another v. Union Territory of Arunachal Pradesh, 1986(2) R.C.R.(Criminal) 132 : AIR 1986 Supreme Court 991

(d) Khatri and Others (II) v. State of Bihar and Others, (1981) 1 Supreme Court Cases 627 (e) Madhav Hayawadanrao Hoskot v. State of Maharashtra, (1978) 3 Supreme Court Cases 544

(f) Sagri v. State of Madhya Pradesh, (1991) 1 Crimes (HC) 580 With the aid of all these judgments, learned advocates appearing for applicants / appellant / accused submitted that course adopted by the Division Bench of this court in the matter of Baliram Madhukar Dalvi (supra) needs to be adopted and at this stage itself, all applicants / appellants / accused need to be acquitted by quashing the impugned judgment and order of conviction, as the learned Sessions Judge, Greater Bombay, Mumbai, had convicted them without giving proper opportunity of cross-examining prosecution witnesses, including the alleged victim of the crime in question. It is further argued that way back in the year 1981, in the matter of Hussainara Khatoon and Others (supra) and Khatri and Others (supra), the Hon''ble Apex Court had clarified that right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and need of justice so requires. Learned advocates further submitted that this right to free legal service, as held in the matter of Khatri and Others (supra), would be illusory for an indigent accused unless the Sessions Judge before whom he is tried informs him of such right. In the case in hand, though the advocate of accused remained absent, the learned Sessions Judge for Greater Bombay, Mumbai, did not care to inform this constitutional right as well as procedural law to accused persons and straightaway denied them right to cross-examine important prosecution witnesses by closing evidence of such witnesses. This, according to learned advocates appearing for applicants / accused has made constitutional guarantee and provisions of Section 304 of the Code of Criminal Procedure merely a paper

promise. For this purpose, they relied on judgment in the matter of Suk Das and another (supra). It is argued that fair trial and fair procedure is denied to applicants / accused ignoring the observations of the Hon"ble Apex Court in the matter of Madhav Hoskot (supra).

9. The learned APP is seeking time to examine the issues involved in the matter and to answer points raised by learned advocates appearing for applicants / appellants.

10. Stand over to 27th September 2017.