

(2014) 12 BOM CK 0111

In the Bombay High Court

Case No : Criminal Revision Application No. 55 of 2014

State

APPELLANT

Vs

Mahanand Naik

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Penal Code, 1860 (IPC) — Section 302 392

Citation : (2015) ALLMR(Cri) 13

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : S.R. Rivankar, Public Prosecutor, Advocate for the Appellant; Sergio Pinto de Santana, Advocate for the Respondent

Judgement

R.M. Borde, J.—Heard. Rule with the consent of the parties. Learned Counsel waives service for the respondent. Petition is taken up for final disposal at admission stage.

2. This is a revision application tendered by the State seeking quashment of the order passed by the Additional Sessions Judge, South Goa, Margao on Exhibit 66 in Sessions Case No. 33/2009 recorded on 23/09/2014.

3. The respondent/accused is being tried for commission of offence punishable under Section 302 of the Indian Penal Code read with Section 392 of the Indian Penal Code. It is the case of the prosecution that between 19/02/2008 and 24/02/2008, the accused committed murder of Miss Nirmal Amolkar, resident of Chivan Waddo, Rivona, Quepem, Goa and robbed her gold ornaments such as gold chain, pair of gold earrings, etc. The crime came to be registered bearing No. 57/2009 at Verna Police Station. After investigation of the crime, charge sheet came to be presented against the accused alleging commission of offence punishable under Section 302 and 392 of the Indian Penal Code before the Judicial Magistrate First Class, Margao on 24/09/2009. The offence being triable by the Court of Sessions, the matter was remitted to the Sessions Court, Margao.

After examination of witnesses by the prosecution in the trial and on consideration of the defence put forth by the accused, the learned Sessions Judge at Margao by judgment and order dated 30/03/2010 was pleased to acquit the accused for offence charged against him. This Court took the suo motu cognizance of the acquittal of the respondent/accused and thereupon the State Government preferred an appeal to the High Court challenging the order of acquittal recorded by the trial Court. This Court by an order dated 29/10/2013 allowed the appeal presented by the State and remitted back matter to the trial Court with a direction to record further evidence of the witnesses, except such or those witnesses whose evidence has already been recorded. During the course of trial on remand the prosecution led evidence of 5 witnesses and since additional witnesses were examined the prosecution tendered application seeking leave of the Court to reexamine the Investigating Officer. The trial Court by order dated 23/09/2014 was pleased to reject the application tendered by the prosecution holding that the application does not deserve to be considered in view of the specific directions issued by the Division Bench of the High Court while remitting the matter back to the trial Court, thereby refusing permission to examine Investigating Officer, is subjected to challenge in this criminal revision application.

4. The learned Counsel appearing for the respondent has supported the order passed by the trial Court and objected for consideration of the application by this Court contending that any favourable order by this Court would run contrary to the order passed by the Division Bench while disposing of the appeal. It is contended that there is a prohibition imposed in the order while remitting the matter for examination of the witnesses whose evidence has already been recorded. It is thus contended that the Single Judge dealing with the revision application as a matter of judicial discipline shall not consider the application. Reliance is placed on the judgment in the matter of Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, . It is contended that though the Court does not agree with the view taken by the Division Bench has to take steps for placing the matter before the Hon"ble Chief Justice for making reference of the matter to the larger bench. It is thus contended that it would be impermissible for this Court to pass any order which would run counter to the order passed by the Division Bench while disposing of the criminal appeal.

5. Though the argument advanced by the respondent appears to be attractive, in the facts and circumstances of the case, since this Court is not taking any view contrary to the view expressed by the Division Bench, in the peculiar facts and circumstances of the case, the direction needs to be issued to the Magistrate to observe mandate of law. The operative order passed by the Division Bench while disposing of the criminal appeal shall have to be read in the context of the observations made in the judgment. It was argued before the Division Bench while raising objections to the order of acquittal recorded by the trial Court during earlier round of litigation by the prosecution that it is a fit case where the trial Court should have exercised powers under Section 311 of the Criminal

Procedure Code. It was pointed out that the instant case is one of the sensational cases in the State of Goa where the young girls/women were found killed, robbed, molested and sexually exploited in near about similar fashion. It was submitted, for a considerable long period the respondent/accused committed such crimes and was not traceable by police. There was social unrest and public outcry raised as the investigating agency was unable to book the culprit. It was further submitted that the judicial confession of the respondent/accused was not only recorded in respect of the incident in question, but in respect of other incidents too. It was submitted that in two other cases the confession recorded by the Special Judicial Magistrate was believed by this Court and the respondent/accused was convicted and sentenced to suffer imprisonment for life. It was contended that the prosecution ought to have led evidence in respect of the judicial confession recorded by the Special Judicial Magistrate before the trial Court and failure in recording evidence of the vital witness would lead to failure of justice. The arguments advanced by the prosecution were accepted by the Division Bench and it is observed in para 14 of the judgment as under:

"14. It is a settled legal position that the trial Court is not supposed to act like a referee in a match and raise hand of a winning person. During conduction of trial, the trial Court has to be attentive and should participate in the trial in the sense that no party is prejudiced, nor any party is prevented from leading any evidence, nor any material evidence is withheld from consideration of the Court. Statutory provision of Section 311 is of vital significance in serious cases. At the same time, the trial Court needs to observe caution during the course of trial, so that no prejudice is caused to either of the contesting parties."

6. After recording the findings as observed above, the Division Bench proceeded to allow the appeal and directed remand of the matter to the trial Court. In paragraph no. (d) in the operative part of the order, the Division Bench has observed that the evidence which has already been recorded in Sessions Case No. 33/2009 shall be read in evidence and all such witnesses whose evidence was already recorded shall not be recalled/reexamined/cross examined. The Division Bench in paragraph no. (e) has further observed that the trial Court shall issue summons to the witnesses, namely Neel Amolkar, Pradeep Patil, the concerned Special Judicial Magistrate, who recorded the alleged judicial confession of the respondent/accused and the concerned jeweller. The trial Court and the prosecution are at liberty to examine any other witness/ess, except the witnesses whose evidence was already recorded.

7. The directions are given by the Court in the context of the facts placed before the Court. The Division Bench has not in any manner restricted the powers of the trial Court under Section 311 of the Code of Criminal Procedure. On the contrary, the Division Bench has observed in the judgment that it was incumbent upon the trial Court to exercise powers under Section 311 which are of vital significance in serious cases. In the instant matter, the prosecution has examined as many as 6 witnesses including PW6 Neela Amolkar, who is stated to have identified the body

of the deceased, PW7 Pandurang Patil is the employer of the deceased, who had allegedly seen the deceased with the accused sometime prior to the incident, PW8 Ulhas Rivonkar is the jeweller, who has been examined to prove the contention that the accused after the commission of the alleged crime came to him and sold jewellery allegedly belonging to the deceased. The said witness is stated to have identified the accused. PW9 Shaikh Abu Backar is the Panch witness in respect of the recovery of gold ornaments allegedly belonging to the deceased and PW10 is the Special Judicial Magistrate Maria Mascarenhas, who has been examined to prove the confessional statement of the accused. In the light of the examination of these witnesses, the prosecution tendered an application requesting permission to examine the Investigating Officer. The additional witnesses have been examined by the prosecution, whose statements were previously recorded by the prosecution. The procedural law requires that the inconsistencies and the omissions and contradictions in the statements of the witnesses shall be put to the Investigating Officer. The examination of the Investigating Officer is not only necessary and essential for the prosecution, but in order to prove the contradictions and omissions occurring in the evidence of the witnesses, the defence also needs to get those contradictions proved from the Investigating Officer. Refusing to permit examination of the Investigating Officer after examination of additional 5 witnesses by the prosecution is likely to result in failure of justice.

8. It is contended that since Division Bench has issued certain directions consideration of the instant application would be contrary with the specific directions issued by the Division Bench. As has been expressed above, the tenure of the judgment of the Division Bench and on reading harmoniously the conclusions and the directions given by the Division Bench, in the light of the observations made in the judgment, the exercise of powers by the Magistrate under Section 311 of the Criminal Procedure Code is not prohibited under the orders passed by the Division Bench. The exercise of statutory powers conferred on the Court need not and have not been excluded or prohibited by the Division Bench. The examination of the Investigating Officer by the prosecution would be consistent with the observations made by the Division Bench in paragraph 14 of the judgment. Thus, in allowing the instant revision application, this Court is neither taking any view contrary to the view expressed by the Division Bench nor issuing any directions which would be in contravention with the directions issued by the Division Bench. Examination of the Investigating Officer after leading evidence of 5 more witnesses would be in conformity with the orders passed by the Division Bench. The view taken by the trial Court is very hyper-technical one. There is no prohibition on the Court and could not be so in a serious trial, in respect of exercise of powers under Section 311 of Criminal Procedure Code. In order to avoid failure of justice the prosecution needs to be permitted to examine Investigating Officer.

9. The revision application stands allowed. The order passed by the trial Court on application Exhibit 66 is quashed and set aside and the application at Exhibit 66

tendered by the prosecution shall be deemed to have been allowed. Rule is accordingly made absolute.