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IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 146 OF 2024-FILING.

MEENA TUYEKAR
Wife of Late Ramesh Tuyekar,
aged 63 years, Indian National,
r/o H. No. 113, Punola, Ucassaim,
Bardez – Goa.

.... Petitioners.

Versus

1. STATE OF GOA
Through the Public
Prosecutor, High Court of
Bombay at Goa
2. THE POLICE INSPECTOR
ACB/ Vigilance, Altinho
Panaji - Goa

.... Respondents.

Mr Vibhav Amonkar, Advocate for the petitioners.

Mr Nikhil Vaze, Addl. Public Prosecutor for the respondent nos.1
and 2.

CORAM:**BHARAT P. DESHPANDE, J****Date :****28th August, 2024****JUDGMENT.:**

1. Rule.
2. Rule is made returnable forthwith.
3. Matter is taken up for final disposal at the admission stage with consent of the parties.
4. The present petition is filed challenging the impugned order dated 18.1.2024 passed by the trial Court and in the deposition of the witness/PW1 thereby allowing the Public Prosecutor to refresh the

memory of the witness by showing him statement recorded by the Investigating Agency under Section 161 of Cr.P.C.

5. Mr Amonkar appearing for the petitioner/accused would submit that PW1 was in the witness box who gave a statement under Section 161 of Cr.P.C. to the Investigating Officer during the investigation. When the examination in chief began, initially the witness disclosed that he was present on the date of the incident in the office and an official of the Anti Corruption Bureau visited his office along with staff. They were doing some formalities. However, he disclosed that due to passage of time he cannot recollect the details of the raid. At this stage learned Public Prosecutor sought permission of the Court to refresh the memory of the witness by showing his statement recorded under Section 161 of Cr.P.C. Though objections were raised by the learned counsel for the accused, the impugned order was passed thereby allowing the witness to refresh the memory from the witness box and that too while recording examination in chief, which is challenged in the present proceedings.

6. Mr Amonkar would submit that statement under Section 161 of Cr.P.C. cannot be used for any other purpose except as provided under Section 162 and that too with the permission of the Court. He submit that request was made by the learned Public Prosecutor and that too during the chief examination is not in compliance with the provisions of Section 145 of the Evidence Act read with 162 of the

Cr.P.C. He would submit that refreshing memory of the witness is permissible only to contradict the witness, which is permissible during the cross examination and not while conducting examination in chief.

7. Mr Amonkar would submit that even Section 159 of the Evidence Act will not be helpful to the respondents in any manner as the scope of such Section is totally on different context. He also further submits that the provisions of Section 172(3) of the Cr.P.C. only permit the Investigating Officer to refresh his memory from the case diary but not otherwise.

8. Mr Amonkar placed reliance on the decisions of ***Simon Vs State of Kerala***,¹ and ***Arun Gulabrao Gawli Vs State of Maharashtra***². He also placed reliance on the decision of ***Superintendent and Remembrance of Legal Affairs, Bengal Vs Zahiruddin***³, to support his contention.

9. Per contra Mr Vaze, learned Addl. Public Prosecutor for the State would suggest that there is no bar to refresh the memory of the witness as Section 159 of the Evidence Act permits so. He would further submit that the provision of Section 172(2) of the Cr.P.C. permit refreshing the memory with respect to the Investigating

1 1996 CRI.L. J. 3368

2 2022 SCC Online Bom 9501

3 AIR 1946 Cal. 1483

Officer from the case diary. Accordingly, a request was made to the concerned Court which was rightly allowed.

10. Mr Vaze, would submit that the Investigating Agency and the prosecution did not attempt to refresh the memory stiltedly i.e. prior to stepping into witness box which has been deprecated by the Court. He would submit that such aspect could be considered at the time of appreciating evidence of the said witness since the accused will get an opportunity to cross examine the witness on all these aspects.

11. Mr Vaze, learned Addl. Public Prosecutor relied upon decisions of ***Suresh s/o Purshotam Ashtankar Vs State of Maharashtra and ors***,⁴, ***Sharad Namdeorao Shikbhate Vs State of Maharashtra***,⁵ and ***Mohan Ambadas Meshram vs State of Maharashtra through Police Station, Chandrapur***.⁶

12. Rival contentions fall for determination as under:

13. The fact is admitted that PW1 is the officer of a Transport Department of the Government of Goa and in whose presence officers of the Anti Corruption Bureau visited his officer in order to conduct raid wherein the applicant/accused was allegedly found demanding and accepting bribe.

4 2014 Law Suit(Bom) 1978

5 2006 Law Suit(BOM) 1509

6 2018 SCC Online Bom 1436

14. Paragraph Nos.1, 2 and 3 of the deposition of this witness only disclosed preliminary aspects but when he was asked about the actual raid, he discussed that due to passage of time he cannot recollect the details of the raid.

15. What the learned Public Prosecutor did is that instead of seeking cross examination of the witness, requested permission from the Court to refresh the memory of the said witness from the statement recorded under Section 161 of Cr.P.C. though learned counsel for the accused/applicant objected to it, learned Trial Court passed an order as under:-

“I find that since the witness has admitted giving statement to the ACB shortly after the raid was conducted, due to passage of time, the possibility of not remembering the details thereof is relevant and permission can be granted to refresh the witness's memory from the statement in writing given by him shortly after the transaction concerning which he is questioned or soon afterwards, such that it is likely that the transaction was fresh in his memory when his statement was recorded. Hence, permission granted to refresh his memory.”

16. First of all no provision is quoted either in the order or referred by the learned Public Prosecutor allowing to refresh the memory of the witness from the witness box and that too while recording examination in chief. It is a well settled proposition of law that while conducting examination in chief, direct questions cannot be put to the witness. He has to depose on the basis of his memory with regard to an incident which he witnessed on the day of the concerned offence.

17. Recording of the statement under Section 161 of Cr.P.C. is only for the purpose of the Investigating Agency to prepare material for the purpose of filing chargesheet. Such a statement under Section 161 of Cr.P.C. is not required to be signed by the witness. Even there is restriction for use of such statements which are found in section 162 of Cr.P.C.

18. It is no doubt true that a witness could be shown a statement or a portion in the statement only to contradict him with regard to his previous statement but not otherwise.

19. Provisions of Section 159 of Evidence Act contains two contingencies where memory of the witness could be refreshed. It says that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of transactions concerning which he is questioned or so since afterward with the Court consideration it is likely that the transaction was at the time

fresh in his memory. Secondly witness may also refers to any such writing made by any other person which was read by the witness within time aforesaid if when he read, it knew it to be correct.

20. Mr Amonkar is justified in disclosing that the statement under Section 161 of Cr.P.C. will not come within the categories of the documents referred in Section 159 of the Evidence Act.

21. First of all such a statement recorded under Section 161 of Cr.P.C. is not in the handwriting of the witness himself nor it is such writing made by any other person and read by witness within time mentioned therein.

22. Section 162 of Cr.P.C. clearly prohibits use of statement under Section 161 of Cr.P.C. except as disclosed in the proviso i.e. to contradict such witness in the manner provided under Section 145 of the Evidence Act. Thus, the provision of contradiction is as discussed in Section 145 of the Indian Evidence Act which basically deals with cross examination as to the previous statement in writing. Accordingly, purpose of restraining the use of statement under Section 161 of Cr.P.C. has to be kept in mind. The only purpose for which such statement could be used is to contradict the witness and that too during the cross examination as it amounts to previous statement of the witness.

23. In the case of **Simon** (supra), the Division Bench of Kerala High Court was called upon to decide upon the same circumstances

which are found in the present matter. Observation in para 11 are relevant to decide the present revision which reads thus:-

“11. It seems that the learned Sessions Judge is of the view that the witness could be allowed to refresh his memory by reading the statement recorded by the police under Section 161 Cr. P.C. A witness could be permitted to refresh his memory only under Sec. 159 of the Indian Evidence Act. That also could be allowed only under restricted circumstances. S. 159 of the Evidence Act says that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned. The witness may also refer to any such writing made by any other person, and read by the witness within the time of the transaction or soon afterwards concerning the matter he is questioned. It is also necessary that the court must consider that it is likely that the transaction was at that time fresh in the memory of the witness. So, the memory could be refreshed with reference to some contemporaneous document prepared by the witness by himself or made by any other person which the witness had occasion to read. Generally, this right is being exercised by expert witnesses such as a doctor who give evidence touching the postmortem certificate or wound certificate prepared by him. A Commissioner deputed by the court can also refresh his memory

at the time of giving evidence by referring to the report contemporaneously prepared by him. But this special privilege given to the witnesses under S. 159 of the Evidence Act cannot be made use of by a witness in a criminal case to refresh his memory by referring to his earlier statement given to the police under S. 161 Cr. P.C. This is because Sec. 162 of the Code of Criminal Procedure specifically states that the statement recorded by the police officer under S. 161 could only be used for certain specific purposes. Proviso to Sec. 162 Cr. P.C. reads as follows:

“Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Sec. 145 of the Indian Evidence Act; and when any party of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination”.

There are series of decisions to the effect that a statement recorded under Sec. 161 Cr. P.C. is not admissible in evidence. Such statement could only be used to contradict the maker of the statement as envisaged under Sec. 145 of the Evidence Act. If such a statement is put to any other use it should be deemed to have been

prohibited under Sec. 162 Cr. P.C. So, the learned Sessions Judge was not justified in stating that a witness is competent to refresh his memory with the prior statement recorded under Section 161 Cr. P.C. As the statement made under S. 161 Cr. P.C. is expressly made inadmissible, a witness cannot be allowed to refresh his memory by reading 161 statement and give evidence accordingly. That would amount to admitting by the back door an evidence which cannot be welcomed at the front and it would definitely fly in the face of the legislative mandate given under S. 162 of the Cr. P.C.”

24. Perusal of the observation of the Kerala High Court would clearly reveal that attempts by learned Sessions Court by allowing to refresh the memory of the witness by reading statements recorded under Section 161 of Cr.P.C. by taking recourse to Section 159 of the Evidence Act has been rejected by observing that Section 159 of the Evidence Act could be used only with regard to Contemporaneous documents and that too for the expert such as doctor who conduct the post mortem certificate or expert who give opinion based on the documents placed before him. It is also found that such procedure could be adopted only in exceptional circumstances but it cannot be used by a witness to refresh his memory by referring to earlier statements recorded by the police under section 161 of Cr.P.C.

25. Mr Vaze heavily relied on the decision in the case of **Suresh Purushottam Ashtankar**, (supra) delivered by the Division Bench of this Court. However, said matter is admittedly in case of any appeal challenging judgment of conviction in Magistrate trial. While arguing the matter, it was pointed out to the Court that one of the witnesses admitted during cross examination that he was allowed to refresh his memory which is before stepping into the witness box. In that context and while referring to the decision of the Single Judge in the case of **Sharad Namdeorao Shikbhate** (supra) it was observed in paragraph 32 that such witness cannot be relied upon; however, refreshing memory with regard to Contemporaneous record is permissible.

26. In the case of **Sharad Namdeorao Shikbhate** (supra), learned Single Judge while dealing with Criminal Appeal In connection with conviction under section 5 of the Prevention of Corruption Act observed in paragraph 10 that PW1 admitted during cross examination that he was allowed to refresh his memory before stepping into witness box. In this context it is observed by a learned Single Judge that such a witness cannot be believed. Further it is observed that nothing wrong in the witness refreshing his memory but ought to have been done before the Court and not outside the Court.

27. With great respect, with this Single statement, it cannot be construed that it is a ratio laid down by the Court with regard to refreshing the memory of all the witness in the presence of the Court and specifically when the witness is in the witness box for recording his examination in chief.

28. Refreshing memory of a witness and that too with permission of the Court is allowed only as per the provision of Section 159 of the Evidence Act and secondly under Section 145 of the Evidence Act for the purpose of contradiction. If the interpretation of the above decision is considered that each and every witness is entitled to refresh his memory, that too for recording examination in chief, would be clearly against the provision of section 162 of Cr.P.C. as well as section 145 of the Evidence Act.

29. There is no doubt that the Court is having power to grant permission to refresh the memory of the witness but it should be in accordance with law and provisions mentioned in the evidence Act and not otherwise. Witness is certainly required to be deposed on the facts which he knew only on the basis of his memory though his statement is recorded by the police under Section 161 of Cr.P.C. or even under Section 164 of Cr.P.C. Such refreshing of memory could be permissible during the cross examination and that too for the purpose of contradiction but not otherwise.

30. For all the above reasons, the impugned order passed casually without considering the relevant provisions needs interference.
31. The impugned order is hereby quashed and set.
32. Rule is made absolute in the above terms.
33. Criminal Writ Petition stands disposed of.

BHARAT P. DESHPANDE, J