

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3998 OF 2015

Shri Chandrakant Kashinath Belwate	...	Petitioner
vs.		
State of Maharashtra	...	Respondent

Mr. Ganesh Bhujbal, Advocate, for the petitioner.
Ms.A.A.Mane, APP, for the State.

CORAM : SMT. SADHANA S. JADHAV, J.
DATED : 7th October, 2015.

PC :

Heard. Rule. Rule is made returnable forthwith with consent of the parties.

2. The petitioner herein questions the correctness and validity fo the order dated 21.9.2015 passed by Addl. Chief Judicial Magistrate, Pune, thereby issuing non-bailable warrant against the accused and also an order passed under Section 309 proviso (c) of Cr.P.C. thereby denying the applicant-accused to cross-examine the witness.

3. The applicant is an accused in RCC No.2734 of 2008, wherein the applicant is being tried for the offences punishable under Sections 467, 468, 471. 406, 420 read with Section 34 of IPC. The investigation was completed and charge sheet was filed on 8.7.2008. The prosecution had not placed on record the report of the handwriting expert and, therefore, the trial had not commenced. On 12.7.2013, the report of the handwriting expert was placed on record and thereafter the learned Magistrate had directed the prosecution to proceed with the trial.

4. The petitioner was on bail in Crime No.65 of 2008 on the basis of which he was being tried in RCC No.2734 of 2008. On 10.6.2015, the petitioner herein was arrested by Chaturshringi Police Station in C.R. No.207 of 2015 for the offence punishable under Section 395 of IPC. It is submitted across the bar that the investigating agency has not filed charge-sheet in Crime No.207 of 2015.

4. It appears that the trial had commenced in RCC No.2734 of 2008 and PW-1 was examined on 21.9.2015. Since the accused is in custody in Crime No.207 of 2015, he could not remain present at the time of adducing of substantive evidence of the prosecution witnesses. The petitioner had also not engaged an advocate in RCC No.2734 of 2008. Since the petitioner was in custody, he was not aware of the stages of the trial and had not made sufficient arrangement to be represented in the trial. On 21.9.2015, the learned A.C.J.M, Pune had observed that the accused and advocate are absent. Hence, the evidence is recorded in the absence of the accused. "No cross" order was passed. Non-bailable warrant was issued and an order was passed under Section 309 proviso (c) of Cr.P.C. It reads as under :-

"309. Power to postpone or adjourn proceedings (1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded :

....

[Provided also that -

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be].”

In the present case, it cannot be said that the petitioner had deliberately remained absent or that he was not represented by a lawyer for the reason that he was in custody and therefore, it cannot be said that he was not ready to cross-examine the witnesses. Every accused has a right to cross-examine the witnesses and defend himself . In view of this, the order passed by the learned A.C.J.M, Pune deserves to be quashed and set aside. However, the petitioner would be at liberty to file an application through his lawyer seeking production warrant from Crime No.207 of 2015. It is for the prosecution to secure the presence of the accused at the time of trial to ensure that no prejudice is caused to the accused in defending

himself. That no opportunity was given to secure the presence of the accused. In all probabilities, it was not brought to the notice of the Court that the accused is in custody in another case and therefore could not remain present. It is incumbent upon the State to secure presence of the accused and see to it that the evidence is recorded in the presence of the accused and no prejudice is caused to him. In view of this, the order dated 21.9.2015 deserves to be quashed and set aside. As far as non-bailable warrant is concerned, since the petitioner is in custody, his Advocate may file an application seeking production warrant.

5. Writ Petition is allowed in the above terms. Rule is made absolute and the petition stands disposed of.

(SMT. SADHANA S. JADHAV, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed order.