

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPLICATION (APL) NO. 464 /2014

- 1) Tushar Najukrao Pundkar
Aged 26 years, occu: Agril.
R/o Ujwal Nagar, Daryapur Road,
Akot.
- 2) Shashank Dilip Gite
Aged 28 years, occu: Education
R/o Akot Dist.Akot
(applicants nos 1 and 2 in jail)
- 3) Yogesh Suresh Sawarkar
aged about 29 years, occu: Education
R/o Shaniwara Akot,
Dist. Akola.

...APPLICANTS

v e r s u s

State of Maharashtra
Through PSO Police Station,Akot.
Dist Akot.

..

...RESPONDENT

Suresh Purushottram Sedani
Aged about 54 years, occu: Business
R/o Saraswarinagar, Akot
Dist. Nagpur.

..

...INTERVENOR

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Mr.S.V. Sirpuarkar, Advocate for the applicants
Mr. H.R. Dhumale, Addl. Public Prosecutor for respondent-State
(Shri A.B .Moon, Adv. for intervenor/complainant/informer)

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CORAM: A.B.CHAUDHARI, J.
DATED : 17th December, 2015.

ORAL JUDGMENT:

Criminal Application No.72/2015 seeking permission to assist the prosecution, is allowed.

2. **Rule.** Rule heard forthwith, with the consent of the learned counsel for the rival parties.

3. During the course of session Trial No. 8/2014 in respect of Crime No 170/2013 registered at Police Station, Akot for the offence punishable under Sections 147, 148, 149, 307, 302, 120B of the Indian Penal Code, an Application (Exh. 51) seeking permission to carry out further investigation and another Application (Exh. 52) for conducting test identification parade of the accused in the crime was filed. The learned Additional Sessions

Judge, Akot, vide order dated 17.07.2014, allowed both these Exhs. 51 and 52 with the following operative order:

- “(1) The applications Ex.51 and 52 are allowed.
- (2) The investigating officer is at liberty to get conduct the identification parade through the Executive magistrate, in the Jail premises, by the witnesses mentioned in the applications.
- (3) The Jail Authority is directed to produce the accused before the Executive Magistrate and assist him for conducting the test identification parade as and when required.
- (4) The I.O. is directed to get conduct the test identification parade within 15 days from today and submit its report to the court.
- (5) Inform the jail Authority accordingly.
- (6) Applications are disposed of accordingly.”

4. Assailing the above order, Mr. S.V. Sirpurkar, learned counsel for the applicants submitted that this amounts to further investigation for which the power lay only with the Magistrate, with reference to Section 173(8) of the Cr.P.C. and, therefore, at the most, the Sessions Court ought to have referred the matter

back to the trial judge for taking a decision on the applications, in accordance with Section 173(8) of Cr.P.C. According to him, the Sessions Judge lacked the jurisdiction, during the course of trial the Magistrate having committed the case to the Sessions Court and, therefore, the impugned order is illegal. In support of his submissions, learned counsel relied on the following decision:-

- (1) (2009) 7 SCC 685 : Kishan Lal vs.Dharmendra Bafna & anr.
- (2) 1984 Cri.L.J. 324: Kesavan Natesan vs.Madhavan
- (3) 1977 Cri.L.J. NOC 238 :Shakoor vs.State of Rajasthan

5. *Per contra*, Mr.H.R. Dhumale, learned APP opposed the Application and submitted that as a higher Court, the Sessions Court, during the trial, has a power to make the impugned order. He relied on the judgment in the case of Sivanmoorthy and others vs. State : (2010) 12 SCC 29.

6. The learned Addl. Sessions Judge has passed the above-referred order, by giving detailed and sound reasons for

allowing Exhs.51 and 52. The only question that is raised before me by the learned counsel for the applicants is that under section 173(8) of the Cr.P.C. it was only the Magistrate who could make such order of further investigation and the Sessions Court lacked that power after the case was committed to it by the Magistrate.

7. It is not possible to agree with the submission made by the learned counsel for the applicants because multifariousness of the litigation is always to be avoided. Once the committal order was made by the trial Court under section 173(8) before the Sessions Court acting as a higher court to the court of Magistrate, it could exercise the same power if otherwise found just and proper. The submission that the Sessions Court, at the most, could have sent the matter to the learned trial Judge for exercising the power under section 173(8), is not sound since the Sessions Court is a higher court and while trying the Sessions case it exercises all plenary powers. Being a higher court, I do not think that such legal subterfuge should be inserted for procrastinating the trial on the ground that the power rests only with the

Magistrate. In my opinion, being the higher court, the Sessions court during trial having found necessity of exercising the power to order further investigation, no fault can be found out. In this context, instead of referring the plethora of judgments cited by both the counsel, I quote paragraph 16 from the judgment in the case of *Kishan Lal vs.Dharmendra Bafna and another : (2009).*

7 SCC 685 :-

“16. The Investigating officer may exercise his statutory power of further investigation in several situations as, for example, when new facts come to his notice. ; when certain aspects of the matter had not been considered by him and he found that further investigation is necessary to be carried out from a different angle(s) keeping in view the fact that new or further material came to his notice. Apart from the aforementioned grounds, the learned magistrate **or the superior courts can direct further investigation,** if the investigation is found to be tainted and/ or otherwise unfair or **is otherwise necessary in the ends of justice.** The question, however is as to whether in a case of this nature a direction for further investigation would be necessary.”

8. In the result, I find no merit in the submissions made by the learned counsel for the applicants. Hence this order :-

ORDER

- 1) Criminal Application No.464 /2014 stands rejected.
- 2) The trial Judge as well as the Investigating Officer are directed to expedite the trial and implement the order of the trial Judge, at the earliest.

JUDGE

sahare