

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.2589 OF 2017

Suryaprakash Jagdevappa Karande .. Petitioner

Vs.

The State of Maharashtra & Anr. .. Respondents.

WITH

CRIMINAL WRIT PETITION NO.2590 OF 2017

Vivek Vishwanath Kirkar .. Petitioner

Vs.

The State of Maharashtra & Anr. .. Respondents.

Mr.Sujay Kantawala with Mr.Amit Karkhanis i/b Kay Legal and Associates for the Petitioner in Writ Petition No.2589/2017.

Mr. Ashish Chavan for the petitioner in Writ Petition No.2590/2017.

Mr.Vinod Chate APP for the Respondent-State.

CORAM : A. K. MENON, J.

DATED : 2ND AUGUST, 2017

P.C. :

1. These two writ petitions challenge the common order dated 27th June, 2017 passed by the Additional Sessions Judge, Solapur. The Criminal Revision Application No.50 of 2016 which is filed against the order dated 18th April, 2001 below Exhibit-1 of R.C.C. No.277 of 2012 whereby the learned Magistrate framed charges under Sections 4(3), 5(1)(b), 5(1)(c), 29(1) of the Pre Conception and Pre Natal Diagnostic Techniques (Prohibition of Sex

Selection) Act, 1994 ('PCPNDT Act').

2. Respondent No.2 is the appropriate authority which has filed a complaint bearing STC No.2856/2007 before the learned Magistrate against Dr. Shashikant Gaikwad under Sections 9(1), 10(1), 10(1-A), 17(2), 25 and 29 of PCPNDT Act alleging that when respondent no.2 visited Kala Clinic owned by Dr.Gaikwad, Dr.Gaikwad was running ultra sonography center and some deficiencies were found in the record. He interalia revealed that Dr.Gaikwad had not maintained the record of the clinic properly. The complaint came to be converted into warrant case and renumbered as R.C.C. No.277/2012. The trial proceeded against Dr.Gaikwad as warrant case instituted otherwise than on police report. In the course of recording evidence of the prosecution witnesses, it was revealed that present applicants were working as sonologists at Kala Clinic and they allegedly did not fill up the complete information in Form-F. It is alleged that the applicants were not obtaining written consent of pregnant women while conducting sonography as a result respondent no.2 moved an application before the learned Magistrate to add present applicant as accused. The application was lodged on 27th July, 2016. Process came to be issued against the applicants. After service of summons, the applicants appeared and sought bail. The learned Magistrate framed charges against the applicants.

3. Being aggrieved they filed a revision application in the Sessions Court. The revision application was allowed and the impugned order was set

aside. The trial Court was directed to follow mandatory provision of Section 319(4) of the Code of Criminal Procedure. The Magistrate directed the prosecution to adduce fresh evidence. The prosecution, however, adopted the previous evidence. Thereafter the applicants' cross examined the complainant and on 18th April, 2017 the Magistrate proceeded to frame charges under Sections 4(3), 5(1)(b), 5(1)(c), 29(1) of PCPNDT Act and Rule 4, 9(1)(4), 13 and 14 of PCPNDT Rules read with Section 23 of PCPNDT Act. The framing of charges was challenged in the revision. The revision came to be dismissed. It is this order of dismissal that is called in question in this application.

4. Mr.Kantawala, learned counsel appearing for the petitioner in Writ Petition No.2589 of 2017 submitted that entire process was wrong. The applicants were visiting sonologists and they were summoned in the midst of trial under Section 319 and since they had no opportunity and had been denied an opportunity to defend themselves properly, they demanded denovo trial as contemplated in the decision of the Supreme Court in *Shashikant Singh vs. Tarkeshwar Singh and Anr. (2002) 5 SCC 738* wherein the Sessions Court on application being made to it, directed the prosecution to adduce fresh or adopt previous evidence as per Section 319(4) of the Code of Criminal Procedure. The prosecution had filed a purshis seeking to rely upon examination in chief of P.W.2 as evidence against the petitioner. This was once again challenged in the revision before the Sessions Court. The revision came to be dismissed on the ground that there was no need for examination in

chief to be recorded afresh. Reliance was placed on Shashikant Singh (supra) in which the Supreme Court held that the words “could be tried together with the accused” in Section 319(1) appeared to be only directory and “could be” cannot be held to be “must be”. According to the applicants some of the relevant documents produced by the prosecution have not been properly proved by them and objections to proof of the documents has to be taken into consideration and cannot be postponed to future date unless the witnesses are examined separately. The objection to sufficiency of evidence on record to admit a document in evidence and consequently maintaining challenge would become difficult. In view of this development a writ petition No.4070 of 2016 came to be filed in this Court which came to be disposed of by the Single Judge.

5. The order of the Single Judge clearly records that on 27th July, 2015 the trial Court had issued process against the petitioner and they were served with summons. The petitioner challenged the order of issuance of summons by filing a revision application which came to be rejected. The trial Court thereafter framed charges and called upon the petitioner to cross examine the witnesses. The petitioner once again approached the Sessions Court alleging non compliance under Section 319(4) of the Code of Criminal Procedure. Their chief contention was that denovo trial was warranted in view of the decision of the Supreme Court in Shashikant Singh (supra) and denovo trial would entail that proceedings against the petitioner should

commence afresh and the witness should be heard. This Court took a view that it is not possible that entire evidence is recorded denovo. The petitioner contended that if the witnesses were not examined afresh it would not be possible to take objections to the documents which have been taken on record and marked during the course of examination in chief and this was valuable right which cannot be denied to a party, even assuming that it was correct to implead the petitioner at that stage. The Court passed the following order :

“Before the petitioner proceeds with cross examination of the witnesses examined, the trial Court shall permit the petitioner to raise objection of sufficiency of proof or of incorrect mode of proof of the documents already taken on record and marked as exhibits. On the objection being raised, it shall decide the same after hearing the parties.”

Thus petitioners have not been prejudiced in any manner. It was open for the petitioner to deal with these objections to documents.

6. The impugned order dated 18th April, 2017 framed charges on the basis the petitioners are guilty of commission of offence under Sections 4(3), 5(1)(b), 5(1)(c), 29(1) of PCPNDT Act and Rule 4, 9(1)(4), 13 and 18 of the PCNPDT, Rules 1996. The petitioners' right to a fair trial has already been protected by the order dated 24th January, 2017 and this Court ensured that

they had adequate opportunity to defend themselves and that they were not put to a disadvantage. I find no reason to interfere with the impugned order. Hence I pass the following order :

(a) Writ Petition Nos.2589 of 2017 and 2590 of 2017 are dismissed.

(b) The trial Court shall proceed to hear the matters uninfluenced by the observations made in this order and in accordance with the law.

(A.K. MENON, J.)