

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

WRIT PETITION NO. 3839 OF 2016

Vishal Laxman Thite & anr.

... Petitioners

vs.

State of Maharashtra & ors.

... Respondents

Ms. Anita A. Agarwal, Advocate for the petitioners.

Mr. Anamika Malhotra, A.P.P. for State/respondents no.1.

Coram : Smt. R. P. SondurBaldota, J.

Date : 8th February, 2017

P.C. :

1. The petitioners along with others are the accused in Sessions Case No. 44 of 2014 pending in the Sessions Court, Khed, Rajgurunagar, Pune. They are facing charges for the offences punishable under Sections 302, 376 and 201 of Indian Penal Code. They had filed the application at Exh.117 on 5th July, 2016 praying that the evidence of Sameer Karanjkhede be not recorded in the Sessions Case as it would cause serious prejudice to their defence. The Sessions Court by the order passed on the same date rejected the application. Being aggrieved by the order they have filed the present petition.

2. The brief statement of the prosecution case is that on 23rd July, 2009 witness Sameer, then 19 years old and the deceased, who were in love with each other, had gone to Siddheshwar Temple behind the college at Khed. From the temple they moved towards the river in order to have privacy and later to the pump room. While they were sitting inside the

pump room accused Santosh Kurhade, neighbour of the deceased came there. He shouted at the deceased for being there with Sameer. He then slapped both, pushed Sameer and asked him to go away stating that he would take the deceased to her home. When Sameer moved from the place and climbed to the road he found three more persons including the petitioners waiting. They also assaulted and threatened him. Out of fear of further assault he went away but while leaving he had seen that all the four persons were with the deceased. Three days thereafter the body of the deceased was found in a well. The witness was arrested on 27th July, 2009 on suspicion. His first statement was recorded on 28th July, 2009 while he was in police custody and the second statement recorded on 4th August, 2009 while he was in judicial custody. Later on 24th October, 2009 the police filed application under Section 169 of Criminal Procedure Code for release of Sameer for want of evidence against him. Thereafter it filed charge-sheet showing Sameer as one of the witnesses. On 30th July, 2010 statement of Sameer was recorded under Section 164 of Criminal Procedure Code.

3. When the prosecution proposed to examine Sameer as a witness, the petitioners filed the application at Ex.117 contending that Sameer being one of the accused in the crime cannot be examined as a witness in the trial. They contended in the application that his statement recorded by police during investigation cannot be used for any purpose other than that permitted under Section 27 or 32 (1) of Indian Evidence Act and that in addition to Section 25 of Indian Evidence Act it is hit by Section 162 of Criminal Procedure Code. The petitioners claim that evidence of Sameer would cause serious prejudice to their defence. The Sessions Court rejected the application with observations that though Sameer had been arrested in the crime

registered, it cannot be ignored that the Investigating Officer had submitted report under Section 169 Criminal Procedure Code for his release and the charge-sheet that had been filed after his release showed him as one of the witnesses. Consequently at the time of filing of the charge-sheet Sameer was not an accused in the matter. It further observed that the evidence available on record would show that on the date of the incident Sameer and the deceased were last seen together and the involvement of the petitioners and the other accused came to light on the information given by Sameer. Since Sameer is a witness in the matter, the Sessions Court found no impediment in recording his evidence.

4. Ms. Agarwal, the learned advocate for the petitioners submits that the Sessions Court has committed a manifest error in exercise of its jurisdiction in passing the impugned order, resulting into prejudice to the petitioners. She submits that Sameer, in fact, should be the main accused in the matter as he had brought the deceased to the place of the incident and was last seen with her. It is also her argument that if Sameer were not to bring her to the place of the incident probably the incident of rape and murder would not have occurred.

5. There can be no substance in the argument advanced and in the challenge to the impugned order. On revelation of the crime the first needle of suspicion was obviously pointed towards Sameer as he along with deceased had gone to the place behind the temple. However that by itself cannot make him to be an accused in the matter. After arresting him on suspicion, the police during the course of investigation traced the petitioners and the other accused as the perpetrators of crime and arrested them. Thereafter they filed application under Section 169 of Criminal Procedure Code because they

found that Sameer was not involved in the crime committed and included him as a witness in the charge-sheet. In the circumstances, as held by the Sessions Court there can be no impediment in Sameer being examined as one of the witness. It is clear from the facts of the prosecution case that Sameer would be one of the key witnesses in the trial and obviously the accused desire to keep him away from the trial. Hence, the petition is dismissed.

[Smt. R. P. SondurBaldota, J.]