

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Writ Petition No. 0889 of 2017

District : Nanded

Narayan Dattatraya Polawar,
Age : 43 years,
Occupation : Agriculture,
R/o. Amdura,
Taluka Mudkhed,
District Nanded.

.. Petitioner
(Original complainant)

versus

1. The State of Maharashtra,
Through Police Inspector,
Bhagyanagar Police Station,
Nanded.

2. Shivanand Ganeshrao Nilawar,
Age : 45 years,
Occupation : Business,
R/o. Dhanegaon,
Taluka & Dist. Nanded.

3. Narayan Sadashiv Joshi,
Age : 51 years,
Occupation : Business,
R/o. Savangi (Bk.),
Taluka & Dist. Nanded.

4. Sunil Vishwanath Pashtekar,
Age : 42 years,
Occupation : Lawyer,
R/o. CIDCO, Aurangabad.

.. Respondents.

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*Mr. S.K. Kadam, Advocate, holding for
Mr. V.S. Kadam, Advocate, for the petitioner.*

*Mrs. P.V. Diggikar, Addl. Public Prosecutor,
for respondent no.01.*

*Mr. Vijay Sharma, Advocate, for respondent
nos.02 to 04.*

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CORAM : PRASANNA B. VARALE, J.

DATE : 12TH FEBRUARY 2018

ORAL JUDGMENT :

Heard Adv. Mr. S.K. Kadam h/f. Adv. Mr. V.S. Kadam for the petitioner, learned APP Mrs. P.V. Diggikar for respondent no.01 and Adv. Mr. Vijay Sharma for respondent nos.02 to 04.

02. With the consent of parties, the petition is taken up for hearing and disposal finally.

03. The petitioner challenges the order passed by the learned Addl. Sessions Judge-4, Nanded, dated 18.04.2017, thereby dismissing the revision preferred by the petitioner, being Criminal Revision No. 042 of 2016. The revision was preferred against the order dated 05.04.2016, passed by the Judicial Magistrate (F.C.), Nanded, below Exhibit 01 in R.C.C. No. 325 of 2005, copy of which is annexed along with the petition at pages 26-A and 26-B.

04. The facts giving rise to the petition can be summarized as follows :-

(a) The petitioner is the original complainant. It was alleged by the petitioner, that the accused persons i.e. respondent nos.02, 03 and 04, in connivance to each other, committed forery and

fabrication of the document. It was alleged that the accused persons initiated civil proceedings in the Civil Court at Nanded and in the said proceedings, a fabricated will was presented before the court. It was further alleged that when the complainant made an enquiry for the mischief played by the accused persons, the accused persons gave threats of life and abused the complainant. The complaint resulted in lodgment of report being FIR no. 26/2004 for commission of offences under Section 420, 468, 294, 504, 506, read with Section 34 of the Indian Penal Code. The investigating agency on conclusion of the investigation, submitted charge-sheet before the learned Magistrate on 27.03.2005 bearing charge-sheet no. 78 of 2005. Learned Magistrate registered the criminal complaint as R.C.C. No. 325 of 2005. Process was against respondent nos.02 to 04. In the meantime, Regular Civil Suit No. 211 of 2010 was dismissed on 01.04.2013. An appeal was preferred before the learned District Judge at the instance of respondent no.02. The appeal was also dismissed by the learned Principal District Judge, Nanded, on 10.02.2014.

(b) Perusal of the record show that as many as 09 witnesses were cited in the charge-sheet. Witness no.07 one Mr. N.R. Parikh and witness no.10 one Mr. U.M. Ghule were amongst other witnesses and for securing their presence, summons was issued. Finding that the witnesses are absent before the court and there is a failure to move an application on behalf

of the prosecution and the reports were submitted expressing inability to serve the summons witnesses and inspite of opportunities granted to the police machinery, no effective steps were taken. As such, the learned Magistrate passed the order on 05.04.2016. Learned Magistrate by observing that no purpose will be served keeping the case pending at the cost of right of accused, passed the order of closure of evidence of accused and posting the case for statement of the accused under Section 313 of the Code of Criminal Procedure, on the next date. Being aggrieved by the order, revision was preferred. Learned revision court finding no fault with the order of the learned Magistrate, dismissed the revision.

05. Mr. S.K. Kadam, learned Counsel appearing for the petitioner, vehemently submitted that out of these two witnesses, one witness namely, Mr. N.R. Parikh is a handwriting expert. Mr. Kadam then submitted that the learned Magistrate by orders dated 20.10.2015, 04.11.2015 and 27.12.2015 granted opportunities to the prosecution and police machinery to secure presence of the important witnesses. He then submitted that on 07.03.2016, it was submitted on behalf of the prosecution, for issuing the summons to secure presence of the witnesses namely, Mr. N.R. Parikh and Mr. U.M. Ghule. Mr. Kadam then submitted that on 05.04.2016, two reports are submitted to the court. These reports run contrary to each other. Mr. Kadam submitted that though the learned

Magistrate in clear and unambiguous terms observed that the reasons given by the police machinery are self-contradictory, only on the ground that the speedy trial is right of the accused and no purpose would be served by keeping the case pending at the cost of right of accused, closed the evidence. Mr. Kadam submitted that Mr. N.R. Parikh being handwriting expert, his evidence would be very much important and same would lead the court to assess the case of the prosecution and then to arrive at a proper conclusion. Submission is, the judicial scrutiny of the version of an important witness is one of the basic factor for a criminal trial. Mr. Kadam submitted that for the failure of the prosecution agency or for the lethargy of the policy machinery, the complainant cannot be put to a serious prejudice namely, escaping one of the witness from the test of judicial scrutiny. Mr. Kadam in support of his submissions, also invited our attention to these reports of same date i.e. 05.04.2016, placed on record at page 28 and page 29, respectively.

06. Mr. Kadam then submitted that this Court may remit the matter back to the learned Magistrate with directions to the State to take necessary steps to secure presence of aforesaid witnesses. Mr. Kadam then fairly submitted that if the prosecution agency or police machinery fail to secure presence of the witnesses within the stipulated period, the learned Magistrate may pass appropriate orders.

07. Per contra, Mr. Sharma, learned Counsel appearing for respondent nos.02 to 04, while supporting the orders passed by the learned Magistrate, as well as learned revisional court, vehemently submitted that the complainant is expanding his scope and is trying to assume the charge of Public Prosecutor. It is the submission of Mr. Sharma, that such an exercise is clearly impermissible. It is the submission of Mr. Sharma, that what the petitioner wants is stepping in shoes of the Public Prosecutor and to achieve something more than that of a complainant. This course is turned down in view of the judgment of this Court in the matter of *Kishore Wadhwani & another Vs. State of Maharashtra & another* [2012(5) Mh.L.J. 252], is the next submission of Mr. Sharma.

08. On the rival submissions of the learned Counsel for the parties, I have gone through the material placed on record. It is not in dispute, that the case of the complainant while approaching the Magistrate, is of an allegation against the accused persons, that they played a mischief and by fabrication of the document, a forged will deed is prepared so as to suit the purposes. The witness i.e. Mr. N.R. Parikh is an important witness being handwriting expert. He is witness no.07 and one Mr. U.M. Ghule, A.P.I., is witness no.10. True it is, that the learned Magistrate granted at least three opportunities to the prosecution to secure presence of witness nos.02 to 10 and on 07.03.2016, Asst.

Public Prosecutor submitted application for issuing summons to Mr. N.R. Parikh and Mr. U.M. Ghule. Reports submitted to the court on 05.04.2016 show that on the very day, these two reports refers to different and contradictory reasons for not securing presence of the witnesses. The first report states that as police machinery was busy in *bandobast* duty and the second report states that the police machinery was unable to trace out the address of the witnesses. Interestingly enough, witness no.10 Mr. U.M. Ghule is a police personnel and was attached to Bhagyanagar Police Station as Asst. Police Inspector. Inspite of this, report was submitted that the police machinery was unable to trace out the address of witness nos.01 and 02. Learned Magistrate though referred to these contradictory reasons, proceeded further observing that speedy trial is the right of the accused and no purpose would be served keeping the case pending at the cost of right of the accused. Mr. Kadam was justified in submitting that though the right of speedy trial is recognized by law, but the same cannot be exercised at the cost of a serious prejudice being caused to the complainant. Learned revisional court also toe the same line as of the learned Magistrate while dismissing the revision.

09. Mr. Sharma, learned Counsel appearing for respondent nos.02 to 04, placed heavy reliance on the judgment of this Court in the matter of *Kishore Wadhwani & another (supra)*. There cannot be any dispute on the proposition of law, that the complainant - informant

may seek an audience and the right of participation of the informant - complainant is a limited right. There cannot be any dispute on the proposition, that the informant - complainant cannot assume the charge of the prosecution which is to be discharged by the Law Officer, namely, the Advocate General or Public Prosecutor or Additional Public Prosecutor, as the case may be, and cannot travel beyond the limited scope. On the factual aspects referred above, in my opinion, the complainant is not travelling beyond the role or scope but his only attempt is to see that the prosecution agency makes a serious attempt to secure presence of the important witness like handwriting expert. Mr. Kadam, learned Counsel for the petitioner, was also justified in submitting before this Court, that if such an exercise is undertaken by the prosecution agency with the sincere efforts, no prejudice would cause to the respondents - accused persons. On the contrary, it may only help the court to reach to the just and proper conclusion. At the cost of repetition, it may be stated that the reports submitted to the court on the very date i.e. on 05.04.2016 show that the police machinery was not making serious attempt to secure presence of the witnesses and more particularly, witness no.07 Mr. N.R. Parikh, handwriting expert.

10. Considering all these facts, I am of the opinion that Mr. Kadam, learned Counsel for the petitioner, has made out a case for allowing the petition.

11. In the result, the criminal writ petition is allowed.

(a) The order passed by the learned Addl. Sessions Judge-4, Nanded, in Criminal Revision No. 042 of 2016, dated 18.04.2017, as well the order passed by the Judicial Magistrate (F.C.), Nanded, below Exhibit 01 in R.C.C. No. 325 of 2005, dated 05.04.2016, are quashed and set aside.

(b) Learned Magistrate is directed to re-issue witness summons to secure presence of witness no.07 Mr. N.R. Parikh and Mr. U.M. Ghule, A.P.I., Bhagyanagar Police Station, Nanded, in R.C.C. No. 325 of 2005. Respondent no.01 shall take all steps and make sincere efforts to secure presence of these two witnesses within three weeks from the date of receipt of judgment of this Court and submit a report before the learned Magistrate. If respondent no.01 fails to secure presence of these witnesses within stipulated period of three weeks and if such report is submitted to the Magistrate, the Magistrate may pass appropriate orders on receiving the report, as expeditiously as possible.

(**Prasanna B. Varale**)
JUDGE

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