

nsc.

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

CRIMINAL APPLICATION NO.472 OF 2017

Vijay Sopanrao Shivtare ... Applicant

Versus

The State of Maharashtra ...Respondent

Mr.R.S.Kadam, for the Applicant.

Mr.H.J.Dedhia, A.P.P for the Respondent-State.

CORAM : REVATI MOHITE DERE, J.

DATE : 17th JANUARY, 2018

P.C. :

1. Heard learned Counsel for the parties.
2. Rule. Rule is made returnable forthwith with the consent of the parties and is taken up for final disposal. Learned APP waives service on behalf of Respondent – State.

3. By this application, the applicant has impugned the order dated 24th August, 2016, passed by the learned Judicial Magistrate First Class, Saswad, by which the learned Magistrate was pleased to issue process as against the applicant as well as the order dated 27th September, 2016, issuing summons to the applicant.

4. Learned Counsel for the applicant submits that the learned Magistrate has clearly erred in law, inasmuch as, the learned Magistrate could not have issued process under Section 190 of Code of Criminal Procedure, as against the applicant, after charge was framed against the other accused (not the applicant). Learned Counsel relied on the Judgments of the Apex Court in the case of ***Kishun Singh and Others v/s State of Bihar***¹; ***SWIL Limited v/s State of Delhi and Another***²; ***Adalat Prasad v/s Rooplal Jindal and Others***³; ***Hardeep Singh v/s State of Punjab and Others***⁴; ***Balveer Singh and Another v/s State of Rajasthan and Another***⁵; and Judgments in the case of ***R.C.Kumar and Others v/s State of Andhra***

1 (1993) 2 SCC 16

2 (2001) 6 SCC 670

3 (2004) 7 SCC 338

4 (2014) 3 SCC 92

5 (2016) 6 SCC 680

Pradesh and Another⁶ ; State of UP. v/s Ram Kishan and Another⁷ ; Rohin Kumar Sachdeva v/s State of Punjab⁸ ; Trilok Singh v/s State of Himachal Pradesh⁹ and Anirudh Sen v/s State (N.C.T. Of Delhi) decided on 8th November, 2006, in support of his submissions. He submitted that at the highest, during trial, the Court has the power to invoke Section 319 of Code of Criminal Procedure, if any material is disclosed, qua the applicant.

5. Learned APP fairly states that the learned Magistrate had erred in law in issuing process as against the applicant, and states that the procedure adopted by the learned Magistrate was contrary to law. The learned APP has also filed an affidavit of the Additional Superintendent of Police, Shri Milind Mohite. According to the affidavit, there was no material to show the applicant's complicity in the commission of the offence.

6. Perused the papers. Admittedly, the applicant was not charge-sheeted in connection with the case i.e. C.R.No.126 of 2012, which was registered with the Jejuri Police Station. After investigation, charge-sheet

6 1991 CRI. L.J.887

7 1991 CRI. L.J.895

8 2004 CRI. L.J.3127

9 2004 CRI. L.J.3134

was filed against the accused (not the applicant) for the alleged offences punishable under Sections 143, 149, 294, 297, 186, 504 of the Indian Penal Code r/w Section 37(1)(3) of the Bombay Police Act, on 11th December, 2013. On the very same day i.e. 11th December, 2013, the learned Magistrate took cognizance and issued summons against the accused persons (not the applicant). Thereafter, on 30th December, 2013, the learned Judge was pleased to frame charge (Exhibit – 101), as against the said accused (not the applicant). After charge was framed, the matter was posted on several dates for recording the evidence of the prosecution witnesses i.e from 2014 to 2016. It appears that on 3rd August, 2016, witness summons were issued. On 24th August, 2016, the learned APP had also filed an application with respect to the muddemal in the case. It is at this stage, that the learned Magistrate after going through the charge-sheet in particular the statements of the witnesses felt, that there was material as against the applicant and hence proceeded to issue process as against him vide order dated 24th August, 2016. The procedure adopted by the learned Magistrate was completely contrary to the provisions of law and as such the learned Magistrate could not have passed the impugned order dated 24th August, 2016, issuing process and summons dated 27th September, 2016.

The stage of issuing process under Section 190 Cr.PC was over in 2013 itself, after which charge was framed against the accused (not the applicant) and the matter was kept for recording of witnesses. Thus, the learned Magistrate could not have restored to Section 190 Cr.PC, as the stage of Section 190 was over. Hence, the impugned order dated 24th August, 2016 issuing process as well as the order dated 27th September, 2016, issuing summons passed by the learned Judicial Magistrate First Class, Saswad, Pune, cannot be sustained in law. Needless to state, that a person not an accused can always be summoned as an accused in a case, under Section 319 Cr.PC, only if any material is disclosed as against the said person, during the recording of the evidence.

7. Accordingly, the impugned orders dated 24th August, 2016 and 27th September, 2016, passed by the learned Judicial Magistrate First Class, Saswad, Pune, are quashed and set aside.

8. Rule is made absolute in above terms.

9. In view of the aforesaid, the NBW issued as against the applicant will not survive.

10. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.