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

CRIMINAL WRIT PETITION NO.406 OF 2019

Kusum Narayan Konkar

...Petitioner

Versus

Namdev Parshuram Himgire and Anr.

...Respondents

Mr. Mohammed Umar Kazi i/b Mr. Zubair Kazi, for the Petitioner.

None for the Respondent No.1.

Ms. S. V. Sonawane, A.P.P for the Respondent No.2 – State.

CORAM : REVATI MOHITE DERE, J.

DATE : 19th OCTOBER, 2020

(THROUGH VIDEO CONFERENCING)

P.C. :

1. Heard learned counsel for the petitioner and learned APP for the Respondent No.2 – State. Despite Mr. Sachin B. Chandan having filed his vakalatnama, none appears on behalf of the respondent No.1.

2. By this petition filed under Article 226 and 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, the petitioner seeks quashing and setting aside of the impugned

order dated 16th September, 2012, passed by the learned Judicial Magistrate First Class, Kalyan, in S.C.C. No.1473 of 2010, stopping the proceeding against the respondent No.1 under Section 258 of the Code of Criminal Procedure.

3. Learned Counsel for the petitioner submits that there was no justification for the learned Magistrate to prepone the date of hearing of the petitioner's case being S.C.C. No.1473 of 2010, without informing the petitioner, who is the original complainant. He submits that the learned Magistrate preponed the case which was due on 8th January, 2013 to 16th September, 2012, without informing the petitioner and passed the impugned order dated 16th September, 2012. He submits that the matter was adjourned from time to time as the summons report was awaited i.e. service of summons on the respondent No.1 and as such the observations of the learned Magistrate that the prosecution had failed to secure the presence of the accused, is untenable. He submits that the respondent No.1 is a police officer and as such it was not as if the said respondent could not be traced or the summons could not be served on him. Learned Counsel submits that infact, the respondent No.1 had appeared before the learned Magistrate, alongwith the charge-sheet, on which date he was released on bail.

4. Learned APP has filed an affidavit of Ganesh Vilas Kumbhar, Assistant Police Inspector, Mahatma Phule Chowk Police Station, Kalyan, Thane, pursuant to the order dated 20th February, 2020. In the said affidavit, it is stated that the respondent No.1 was produced before the learned Judicial Magistrate First Class, Kalyan, Thane, alongwith the charge-sheet on 3rd August, 2010 and the respondent No.1 was remanded to Magistrate Custody till 17th August, 2010. It is further stated that on 3rd August, 2010, the respondent No.1 filed an application for bail and was granted bail on the same day in connection with C.R. No.I-511 of 2009 registered with the Mahatma Phule Chowk Police Station, Kalyan. It is stated by the said officer in para 6 that though from the roznama it appears that the matter was adjourned for issuance of summons, however, the summons to be served on the respondent No.1 was never handed over to the concerned Police Station at any point of time. It is stated that the register maintained by the police station does not indicate that any such summons was received by the police station from the Court for effecting service on the respondent No.1. It is stated that the respondent No.1 was produced in Court alongwith the charge-sheet and process was issued and the respondent No.1 was released on bail and as such there was no occasion for issuance of summons to the respondent No.1 and it appears that the

concerned Court Clerk had written the court notings in the absence of the Presiding Judge.

5. It is pertinent to note that Mr. Sachin Chandan appeared in the aforesaid petition on behalf of the respondent No.1 and has filed his vakalatnama on behalf of the said respondent. However, none appears for the respondent No.1 today.

6. Perused the papers. The petitioner is the original complainant. According to the petitioner, an incident took place on 20th October, 2009, in which she sustained an injury due to the rash and negligent driving of the respondent No.1. Pursuant to the said incident, the petitioner lodged C.R. No.I-511 of 2009 with the Mahatma Phule Chowk Police Station, Kalyan, as against the respondent No.1, alleging offences punishable under Sections 279, 337 of the Indian Penal Code and under Sections 184 and 134 of the Motor Vehicles Act. In the said complaint/FIR, the petitioner has alleged that when she was walking on the road on 20th October, 2009 at about 7.00 p.m. the respondent No.1, a member of the Police Force, was driving his motor vehicle in a high speed and in a rash and negligent manner and dashed into the petitioner, resulting in her sustaining injuries. It also appears that after the said incident, the villagers stopped the respondent

No.1's vehicle, resulting in respondent No.1's colleague lodging a complaint/FIR as against the petitioner's son and other family members. The said FIR was registered vide C.R. No.I-510 of 2009, for the alleged offences punishable under Sections 143, 147, 148, 149, 353, 332, 333, 395 397 and 307 of the Indian Penal Code. Pursuant to the investigation carried out in C.R. No.I-511 of 2009, the respondent No.1 was produced before the trial Court along with a copy of the charge-sheet on 3rd August, 2010 and on an application filed by the respondent No.1 seeking bail, respondent No.1 was released on bail. It appears that summons were issued on the very same day. The roznama annexed by the petitioner shows that the matter was adjourned from time to time as the summons report was awaited. Infact, why the summons were required to be served since the respondent No.1 was produced on 3rd August, 2010 and was enlarged on bail on the very same day, is not clear.

7. Nevertheless, the roznama shows that the matter was adjourned on several dates as the report of the summons was awaited. On 7th June, 2012, the matter was adjourned to 7th August, 2012 as the summons report was awaited and on 7th August, 2012 to 8th January, 2013. It appears that the learned Judicial Magistrate First Class, Kalyan, without awaiting service of summons preponed the matter and took up the matter before the

Mahalokadalat on 16th September, 2012 and passed the impugned order dated to 16th September, 2012. The said order is reproduced herein-under:-

“Order Below Exh 1

“Perused chargesheet, evidence on record, prima facie it appears that no sufficient evidence on record to record Plea of accused. Prosecution failed to secure present of the accused. The case is to be tried as Summary Summons case. As the presence of accused is not secured. There is no point in keeping the case pending for long. Hence I proceed to pass following order.

Order

- 1) Proceeding is stopped U/s. 258 of Cr.P.C.
- 2) Accused is released.
- 3) Bail Bonds stands cancelled.
- 4) Muddemal i.d. Nil.”

8. As noted above, learned APP has filed an affidavit of Ganesh Vilas Kumbhar, Assistant Police Inspector, Mahatma Phule Chowk Police Station, Kalyan, Thane, who has specifically stated that after the respondent No.1 was released on bail, no summons were received by them and as such the question of service of summons on the respondent No.1 did not arise. It appears from the roznama that the matter was adjourned on 7 dates for receipt of summons report. Infact, the roznama states that the accused is absent and summons are awaited. Once the respondent No.1 had appeared before the learned Magistrate and was released on bail, why summons were issued to him, is not clear. It appears from the roznama that

out of the aforesaid dates mentioned the concerned Court was on leave on atleast 3 dates. There was no justification for the learned Magistrate to prepone the date and pass the impugned order dated 16th September, 2012, stopping proceeding under Section 258 of the Code of Criminal Procedure. As noted above, Mr. Sachin Chandan is absent today, inspite of being informed that the matter is kept today. Even on the last date, he was absent.

9. Accordingly the petition is allowed. The impugned order dated 16th September, 2012, passed by the learned Judicial Magistrate First Class, Kalyan, in S.C.C. No.1473 of 2010, is quashed and set aside. If the record of the said case is destroyed, the learned Magistrate to reconstruct the same with the assistance and help of the police and the petitioner.

10. Petition is accordingly disposed of on the aforesaid terms.

11. All concerned to act on the copy of this order, digitally signed by the Private Secretary of this Court.

REVATI MOHITE DERE, J.