

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 223 OF 2022

Balu Malhari Bhusari,
Aged : 44 years, Occ: Labour,
R/o R/O- Kharshinde,
Tal- Sangamner, Dist- Ahmednagar

...Petitioner
(Accused No.4)

Versus

1. The State of Maharashtra through the
Police Station In-charge, Sangamner,
Taluka Police Station, Sangamner,
Tal-Sangamner, Dist - Ahmednagar

...Respondents

2. Raghunath Yosef Pandit,
Aged :46 years,
Occu – Labour, R/O : Kharshinde,
Tal- Sangamner, Dist - Ahmednagar

(Accused Nos.
1 to 3 respectively
in Sessions Case
No. 15/2012)

3. Ramdas Nana Pandit,
Aged : 59 years,
Occu – Labour, R/O : Kharshinde,
Tal- Sangamner, Dist - Ahmednagar

4. Bhausahab Tarachand Maid,
Aged : 55 years,
Occu – Labour, R/O : Kharshinde,
Tal- Sangamner, Dist - Ahmednagar

5. X.Y.Z.
(Name and address provided in
sealed envelope)

Mr. V.Y. Bhide, Advocate for Petitioner
Mr P.G. Borade, APP for Respondent No.1/State
Mr Amol P. Khedkar, Advocate for Respondent No. 5

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 10th AUGUST, 2022

DELIVERED ON : 7th OCTOBER, 2022

JUDGMENT :

1. Heard finally with consent of both the sides at admission stage.

2. The petitioner by invoking writ jurisdiction under Article 227 of the Constitution of India is seeking following substantive reliefs :-

17. (B) be pleased to grant a writ of certiorari or any other appropriate writ or direction in the nature of quashing and setting aside the impugned Order dated 07/01/2022 passed below Exh. 67 in Sessions Case No. 15/2012 by the Ld. Extra Joint District Judge and Addl. Sessions Judge, Sangamner, Dist – Ahmednagar;

(C) Consequently be pleased to grant a writ of certiorari or any other appropriate writ or direction in the nature of allowing the application Exh – 67 filed by the Petitioner and others in Sessions Case No. 15/2012 pending on the file of Ld. Extra District Judge and Addl. Sessions Judge, Sangamner, Dist – Ahmednagar;

3. It is necessary to have a brief survey on the facts of the petition.

The petitioner is original accused No. 4. He is facing trial of Sessions Case No. 15/2012. Respondent Nos. 2 to 4 are original accused Nos. 1 to 3. The charges of rape coupled with other offences of Indian Penal Code as well as the provisions of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Atrocities Act' for the sake of convenience) are levelled against all the accused on the basis of FIR lodged by the mother of the victim girl when she noticed pregnancy of her daughter. The petitioner moved an application before the trial Court/Extra Joint District Judge and Additional Sessions Judge, Sangamer vide Exh. 67 to conduct separate trials against each accused in view of nature of allegations and distinct offences. The learned trial Court was pleased to reject that application. The petitioner has challenged the said order by way of this writ petition and assailed the same on various legal grounds.

4. Heard Mr V.Y. Bhide, learned counsel for the petitioner, Mr P.G. Borade, learned APP for respondent No.1/State and Mr Amol Khedkar, learned counsel for respondent No.5/first informant/mother of the victim. Respondent Nos. 2 to 4 (original accused Nos. 1 to 3) are stated to be formal parties.

5. Mr Bhide, learned counsel for the petitioner invited my attention to the copy of charge sheet (page No.30), copy of charge framed by the learned Additional Sessions Judge, Sangamner in Sessions case No.15/2012 against in all 4 accused including the petitioner (page No.37), the copy of application moved by the accused for separate trial (page No.39) and order passed by the learned Additional Sessions Judge, Sangamner below Exh.67 dated 07.01.2022 whereby the application for separate trial came to be rejected. He pointed out that it is alleged by the prosecution that accused No.1/Raghunath alleged to have committed the rape first in time, and thereafter, accused Nos. 2 to 4 alleged to have committed rape on the victim girl on different dates and at different places. It is not a case that all the accused did commit rape at the same time and place. All the alleged incidences of rape are distinct, and as such, it is necessary to separate the trials in respect of each accused. If joint trial is conducted, it may cause prejudice to the rights and interest of the accused/petitioner. He pointed out that the impugned order is perverse. The trial court has committed an error in treating the application Exh.67 under section 317(2) of the Code of Criminal Procedure, 1973.

6. Mr Bhide, learned counsel for the petitioner submitted that the learned trial Judge has failed to appreciate that every distinct offence committed by an accused, a separate charge needs to be framed. Every charge shall be tried separately in view of mandate of section 218 of Cr.PC. There are certain exceptions as provided under section 219 to 222 of the Code which speaks about joinder of charges. Mr Bhide submitted that the learned Judge has failed to appreciate the distinction between joinder of charges committed by accused and joinder of accused persons in a single trial. Mr Bhide also invited my attention to section 223 of the Code of Criminal Procedure, which lays down the rules about the persons, who may be charged jointly.

7. Mr Bhide, learned counsel for the petitioner submitted that even though learned trial Judge has observed in the impugned order that charges levelled against each of the accused persons in reference to the date, time and place of alleged offences are distinct from one another, passed erroneous order by interpreting provisions of section 223 of the Cr.PC. Mr Bhide submitted that in the peculiar facts of the case in hand, there are in all 4 accused persons, who are facing 4 different charges of 4 different and independent offences, which cannot be tried jointly. He, therefore, urged to allow the application filed by the petitioner along with other accused before the trial court vide Exh. 67 regarding separate trial. Mr Bhide has placed his reliance on following citations in support of his submissions :-

- (i) **2021 STPL 10513 SC : AIR 2021 SC 5175 – Nasib Singh Vs. State of Punjab and Anr.**
- (ii) **2000 ALL MR (Cri) 127 (S.C.) – Balbir Vs. State of Haryana and Anr.**
- (iii) **2014 ALL MR (Cri) 1467 Bom. Shaikh Shakil S/o. Shaikh Mohammad Vs. The State of Maharashtra and Anr.**
- (iv) **1995 ALL MR online 1084 Raj HC – Sanwal Ram and others Vs. State of Rajasthan**
- (v) **2014 ALL MR (Cri) 209 Bom. - Jayprakash Laxman Abute Vs. The State of Maharashtra**

8. Mr P.G. Borade, learned APP for the State supported the order passed by the learned Additional Sessions Judge, Sangamner. He also invited my attention to the impugned order passed below Exh. 67 by the trial court, the copy of charge and copy of application moved by the petitioner and others. He submitted that in view of charge framed by the trial court vide Exh. 48, the prayer made by the petitioner/accused for separate trial is bad in law. It cannot be considered. He submitted that such application ought to have been given on behalf of the accused for separating trials at earlier stage. The application came to be filed at a very late stage. The view taken by the trial court cannot be said to be erroneous. He, therefore, urged to dismiss the petition.

9. Mr Amol Khedkar, learned counsel for respondent No. 5/victim argued on similar lines and opposed to allow the petition.

10. On going through the record (copy of charge sheet), it appears that the mother of the victim girl has lodged the FIR with Sangamner Taluka Police Station on 07.12.2011 against the present petitioner and 3

others for committing rape on her daughter on different dates and at different places. She noticed pregnancy of her daughter in the first week of December, 2011 and on the narration given by her daughter, the criminal law was put in motion. On that basis, Crime No.215/2011 came to be registered against the present petitioner and 3 others at Sangamner Taluka Police Station for the offences punishable under section 376 and 506 read with section 34 of IPC and under sections 3(1)(xii), 3(1)(x) and 3(2)(v) of the Atrocities. Section 7 (1) (d) of The Protection of Civil Rights Act, 1955 came to be added during course of investigation. After completion of investigation of above said crime, a charge sheet came to be filed before the JMFC Court at Sangamner and a case was committed to the Sessions Division/Sessions Court at Sangamner for trial in view of sessions triable offences. The charge came to be framed against the present petitioner and 3 others by the learned Additional Sessions Judge, Sangamner vide Exh. 48 for the offences punishable under Section 376 and 506 read with Section 34 of I.P.C. and under Sections 3(1)(x), 3(1)(xii) and 3(2)(v) of the Atrocities Act (page No. 37) on 13.09.2017. It appears from the averments made in the petition para (k) on page No.12 that trial is yet to begin.

11. The question is revolving around separation of trial in view of section 218 and 223 of Cr.P.C.

12. Having regard to the submissions of both the sides, I have gone through the provisions of section 218 to 222 and 223 of the Code of Criminal Procedure.

13. Section 218 of Cr.PC provides separate charges for distinct offences. Section 219 of the Code speaks about 3 offences of same kind within a year may be charged together. Section 220 of the Code provides trial for more than one offence. Section 223 speaks about what persons may be charged jointly.

14. Having regard to the above provisions of the Code and on careful examination of the charge sheet and charge framed against the petitioner and 3 others, it would reveal that the offence of rape coupled with offences under the Atrocities Act, 1989, seems to have been levelled against all the accused pertaining to different dates, time and different place. The offences are *prima facie* found distinct from the other. It is not the same offences or even different offences committed in the course of same transaction.

15. In ***Shaikh Shakil S/o. Shaikh Mohammad Vs. The State of Maharashtra and Anr.*** (supra), this Court has held that normal rule for trial is that there should be a separate trial in respect of each offence and each accused. It is only because of enabling provisions in Code that joinder of charges or of accused becomes possible. The law is that joint trial “may be” held and not that it must be held. The court is never obliged to hold joint trial. In view of section 218 and 223 of Cr.PC, it is the discretion of the court to try certain persons either jointly or separately and that discretion should be exercised judicially.

16. In case of ***Balbir Vs. State of Haryana*** (supra), the Hon'ble Supreme Court held that when two diametrically opposite versions put

against two accused in two cases, joint trial is impossible. In such cases, the most appropriate procedure to be followed by a Sessions Judge should be the same as followed in the cited case i.e. two trials were separately conducted one after the other by the same court before the same Judge and Judgments in both cases were separately pronounced on the same day.

17. In case of **Jayprakash Laxman Abute Vs. The State of Maharashtra** (supra), it is held by this Court, Bench at Aurangabad that in view of scheme of section of 223 of the Code, it is to be seen whether joint trial may cause serious prejudice to the rights of the accused. In the cited case, prosecutrix allegedly raped by four different persons over a stretch of period on different times at different places. As such, this Court has held that the joint trial of the appellants/accused conducted by the trial court has caused serious prejudice to the accused.

18. In case of **Nasib Singh Vs State of Punjab and Another** (supra), the Hon'ble Supreme Court has laid down following principles on the subject of separate trial and joint trial by examining scheme of section 218 and 223 of Cr.PC. :-

(C) Criminal Procedure Code, 1973, Section 218, 223 – Criminal Procedure – Separate trial & Joint trial – From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

(i) Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Section 219 – 221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be

conducted. Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii) While applying the principles enumerated in Sections 218 – 223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix;

(iv) Since the provisions which engraft an exception use the phrase 'may' with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be.

19. Even though, Mr Bhide has referred citations of Madras High Court, Rajasthan High Court, there is no need to discuss them when position of law is made clear by the Hon'ble Supreme Court in case of **Nasib Singh** (supra).

20. Having regard to the principles laid down by the Hon'ble Supreme Court in case of **Nasib Singh**, if the allegations levelled in the FIR are examined carefully, it would reveal distinct offences committed by the accused persons on different date, time and places. In such a scenario, if joint trial is conducted, it may cause serious prejudice to the rights of the accused. The learned Additional Sessions Judge, Sangamner has committed an error in rejecting the application moved by the petitioner/and other co-accused vide Exh. 67 by misreading provisions of section 218 and 223 of Cr.PC. In such a scenario, if the trial is proceeded, the defence of each accused would be jeopardized, which cannot be restored in any manner. The trial court if necessary even direct to the investigating agency to file separate charge-sheet against respective accused.

21. Having regard to the above reasons and discussion, the impugned order passed by the learned Additional Sessions Judge, Sangamner in Sessions Case No.15 of 2012 vide Exh. 67 is liable to be quashed and set aside. The application for separate trial moved by the petitioner along with co-accused needs to be allowed.

ORDER

- (i) The Criminal Writ Petition stands allowed in terms of prayer clause (B) and (C).
- (ii) The learned Additional Sessions Judge, Sangamner, Dist. Ahmednagar shall frame separate charge against each accused in view of distinct offences allegedly committed by them and conduct their separate trials according to the

provisions of the Code of Criminal Procedure, in view of Section 218 of Cr.P.C.

- (iii) The Registry to communicate this order to the learned Additional Sessions Judge, Sangamner, Dist. Ahmednagar for information and necessary compliance.
- (iv) The Criminal Writ Petition is accordingly disposed of.
- (v) Having regard to the old nature of the trial of the Sessions Case, the learned Additional Sessions Judge, Sangamner is requested to conclude the trials of respective accused as expeditiously as possible.
- (vi) Mr Amol P.Khedkar, learned counsel for respondent No. 5 is appointed from Legal Aid Panel. His professional fees is quantified at Rs.5,000/-. The Secretary, High Court Legal Services Sub Committee, Aurangabad is requested to make payment of professional fees to Mr Amol P. Khedkar accordingly.

[SHRIKANT D. KULKARNI, J.]

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