

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

CRIMINAL REVISION APPLICATION NO. 87 OF 2021

1. Sudhakar s/o Baburao Biradar
Age : 54 years, Occu. Agril.,
2. Vaishali w/o Shivprasad Biradar
Age : 49 years, Occu. Agril. and
Household,

Both r/o. : Gangapur, Tq. : Udgir,
Dist. : Latur

.. Applicants

Versus

The State of Maharashtra
Through Police Station, Udgir (Rural),
Tq. : Udgir, Dist. : Latur.

.. Respondent

Mr. Krishna P. Rodge, Advocate for the Applicants.
Smt. G. L. Deshpande, APP for Respondent/State.

CORAM : BHARAT P. DESHPANDE, J.

Date on which closed for judgment : 23rd August, 2022.

Date on which judgment pronounced : 25th August, 2022.

JUDGMENT :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.
2. The applicants are the original accused persons in connection with charge-sheet filed by Udgir Police Station (Rural) in Crime No. 214/2006 dated 26.12.2006, for the offences punishable under Sections 406, 409, 420, 467, 468, 471 r/w Section 34 of the Indian Penal Code (for short "IPC").

3. After filing of the charge-sheet, R.C.C. No. 731 of 2007 was registered and the matter was taken up by the learned Chief Judicial Magistrate (C.J.M.), Latur. Charges were framed against the applicants who pleaded not guilty and accordingly the matter was posted for trial. Though the learned Magistrate issued summonses to the witnesses on various occasions, no witness was examined in spite of giving several opportunities. The charge-sheet shows the names of witnesses and in spite of issuing summonses, prosecution failed to examine any witness. Therefore, the case of the prosecution was closed. The learned C.J.M., Latur vide its judgment dated 02.08.2013 acquitted both the accused persons for all the offences.

4. Udgir Police Station through the State filed criminal appeal before the Sessions Court at Latur vide Criminal Appeal No. 97 of 2013. The learned Sessions Judge vide its judgment dated 13.01.2015 observed that acquittal of both the accused persons for want of evidence is incorrect as in spite of issuing summonses, the witnesses were not examined and it is not the only fault of the prosecution. The learned Sessions Court observed that, charges levelled against accused are serious and therefore, opportunity needs to be given to the prosecution. It further observed that the learned Magistrate ought to have taken due care and caution by keeping the witnesses present and examining them in such matters. Thus, the learned Sessions Court allowed the appeal and remanded the matter to the learned Magistrate by giving opportunity to the prosecution to led the evidence and thereafter to

decide the matter afresh. It so happened that after the said remand by the learned Sessions Judge, the matter was taken up before the learned C.J.M., Latur in R.C.C. No. 731 of 2007. In spite of issuing summonses, only one witness was examined by the prosecution. The learned C.J.M. observed that in spite of issuing summonses from time to time, prosecution failed to keep the witnesses present and examine in support of charges. Accordingly, the case of prosecution was again closed. Vide judgment dated 07.10.2016, the learned C.J.M., Latur acquitted both the accused persons.

5. Interestingly, the State through Udgir Police Station again filed appeal before the learned Sessions Court, Latur vide Criminal Appeal No. 65 of 2016. Vide judgment dated 24.03.2021, the learned Sessions Judge observed that since the offences alleged against accused are serious in nature, the learned Magistrate ought to have taken precaution and care so as to examine the witnesses. It is further observed that, the witnesses mentioned in the list are mostly Government servants and therefore, their presence could have been secured for recording evidence. The learned Sessions Judge then observed that, acquittal of accused persons for want of evidence is improper and since there are only nine (09) witnesses in the charge-sheet out of which seven (07) are in Government service in different departments, their presence could have been secured by the Trial Court. In the result, the learned Sessions Judge allowed the said appeal and remanded

the matter back to the learned C.J.M. again for disposal in accordance with law.

6. Thus, it is clear from the record that on second occasion, the learned Sessions Judge remanded the matter for retrial or for giving opportunity to the prosecution to examine the witnesses mentioned in the list.

7. Heard learned counsel Mr. Rodge for the applicants and learned APP for the respondent/State.

8. Learned counsel for the applicants vehemently submitted that, the applicants are having right of speedy trial and fair trial as provided under Article 21 of the Constitution of India. He therefore submitted that, for no fault of the applicants they have to face the retrial on the second occasion as directed by the learned Sessions Court at Latur in the impugned order. He then submitted that, the learned Sessions Judge exceeded its jurisdiction without giving proper reasons while exercising powers under Section 386 of the Code of Criminal Procedure (for short "Cr.P.C."). According to him, such powers are required to be exercised only in exceptional cases and when it is observed that there is miscarriage of justice or failure of justice. In this respect, he placed reliance on the following decisions.

(I) Bhawna Karir Vs. The State & Anr. reported in 2012 SCC Online Del 1655.

(II) Ajay Kumar Ghoshal Vs. State of Bihar and another reported in (2017) 12 SCC 699.

9. Learned APP appearing for the State while supporting the impugned order submitted that seven (07) witnesses are Government servants and all are working in different departments. At one stage, two witnesses were present and they were released on personal bond. The learned Magistrate did not examine those witnesses for want of time. Therefore, fair opportunity was not given to the prosecution by the learned Magistrate before closing the case of the prosecution even on the second occasion. She therefore submitted that, the learned Sessions Judge rightly observed that in such cases which are having serious implications in the society, the matter needs to be remanded. She therefore submitted that no interference is necessary in the impugned order.

10. From the record of the present matter and more specifically both the orders of the learned C.J.M. as well as both the orders passed by the learned Sessions Judge, Latur show a very sorry state of affairs. First of all, only nine (09) witnesses are shown in the charge-sheet. After framing of charges against both the accused persons on 24.03.2008, the matter was posted for trial. The learned Magistrate in his first judgment dated 02.08.2013 observed in paragraph No. 3 that witness summonses were issued on thirteen (13) occasions, but the prosecution did not show any progress and did not

keep any witness present. Accordingly, the learned Magistrate hold that the prosecution was totally negligent in keeping the witnesses present. The evidence was therefore closed and consequently both the accused persons were acquitted vide judgment dated 02.08.2013.

11. The learned Sessions Judge, Latur in Criminal Appeal No. 97 of 2013 remanded the matter to the learned C.J.M. on the ground that opportunity ought to have been given to examine the witnesses. The judgment was delivered on 13.01.2015 by quashing and setting aside the order of learned Magistrate dated 02.08.2013 and remanding the matter back for disposal in accordance with law. The learned Sessions Judge observed that, original case is of the year 2007 and therefore, directed the learned C.J.M. to expedite the matter by giving fair opportunity to the prosecution to led the evidence.

12. Admittedly, this order of the learned Sessions Judge at Latur in Criminal Appeal No. 97 of 2013 dated 13.01.2015 was not challenged by the applicants. They appeared before the learned Magistrate in R.C.C. No. 731 of 2007.

13. The learned C.J.M., Latur decided the said case vide its judgment dated 07.10.2016. In the said judgment and more particularly paragraph No. 6, the learned C.J.M. observed that, in spite of remand and direction to

expedite the matter, prosecution examined only one witness. From time to time and for twenty five (25) occasions summonses were issued to the witnesses, however, the witnesses failed to appear and led the evidence. It also observed that, even though the learned APP tried his level best to secure presence of witnesses, he was not successful. Therefore, the evidence of prosecution was closed and ultimately both the accused persons were acquitted vide judgment dated 07.10.2016.

14. This judgment of acquittal was again challenged by the prosecution in Criminal Appeal No. 65 of 2016 and the learned Sessions Judge, Latur vide its judgment dated 24.03.2021 again remanded the matter by quashing and setting aside the judgment of the learned C.J.M.

15. In the case of Mohd. Hussain Vs. State (NCT of Delhi) reported in (2012) 9 SCC 408, the Hon'ble Apex Court has observed in paragraph No. 41 as under :

“41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve

upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

16. In paragraph No. 40 of the above judgment of **Mohd. Hussain** (supra), the Hon’ble Apex Court observed thus :

“40. ‘Speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused’s right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social

impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.”

17. The above observations in the case of **Mohd. Hussain** (supra), are quoted in paragraph No. 17 of the decision of the Hon’ble Apex Court in the case of **Ajay Kumar Ghoshal** (supra). It is observed by the Hon’ble Apex Court in paragraph No. 8 as under :

“8. In para 29 of its judgment, the High Court pointed out certain lapses; but has not stated as to how such alleged lapses have resulted in miscarriage of justice necessitating retrial. Certain lapses either in the investigation or in the ‘conduct of trial’ are not sufficient to direct retrial. The High Court being the first appellate court is duty-bound to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice. The circumstances that should exist for warranting retrial must be such that whether the trial was undertaken by the court having no jurisdiction or trial was vitiated by serious illegality or irregularity on account of misconception of nature of proceedings or that irregularity has resulted in miscarriage of justice.”

18. Keeping in mind above settled proposition, let us examine the impugned judgment passed by the learned Sessions Judge, Latur dated 24.03.2021 and whether there are findings that there is miscarriage of justice and it is an exceptional case warranting retrial. It has to be kept in mind that there was earlier order passed by the learned Sessions Judge remanding the matter to the learned C.J.M. in the year 2015 itself. Perusal of the impugned order and more specifically the reasons starting from paragraph No. 7, it is only observed that more efforts could have been made by the Court and the prosecution to keep the witnesses present. Only because the prosecution failed to keep the witnesses present and examining them, closing of the case of prosecution in such serious offences was improper. Though the learned Sessions Judge discussed about the powers under Section 386 of the Cr.P.C., he failed to consider that by closing evidence of the prosecution on the second occasion, there was miscarriage of justice.

19. It has to be kept in mind that there are no findings in the entire judgment of the learned Sessions Judge or even in the submissions of the learned APP appearing before the learned Sessions Judge that the said trial was delayed due to any reason connected with the accused persons. The only reason which is found in paragraph No. 7 of the impugned judgment is that, the witnesses are Government servants and their presence could not be secured after the remand of the case. Thus, there is no observation in the

impugned order that any miscarriage of justice was caused and it is an exceptional case warranting remand on the second occasion. Admittedly, the first order of remand by the learned Sessions Judge, Latur vide judgment dated 13.01.2015 is on the same reasons. At that time, admittedly the prosecution failed to examine single witness. Therefore, the learned Sessions Judge remanded the matter to the learned C.J.M. with direction to give fair opportunity by expediting the matter. The learned Magistrate in its judgment dated 07.10.2016 observed that on twenty five (25) occasions summonses were issued to the witnesses, however, only one witness was examined by the prosecution.

20. It is well settled proposition of law that, accused persons are also entitled for fair trial . In this matter, delay of trial is not attributed at all to the accused persons. Such delay is only because of the inaction and lethargy on the part of prosecution. In spite of issuing summonses for twenty five (25) occasions for examination of only nine (09) witnesses, if the prosecution is not able to secure a single witness, cannot be considered as a case for remand that too on second occasion. Such inaction on the part of prosecution cannot by any stretch of imagination be considered as irregularity or failure of justice as accused persons are entitled for speedy trial. Therefore, the impugned order of the learned Sessions Judge, Latur is certainly beyond the settled proposition of law with regard to retrial or remand as provided under Section 386 of the Cr.P.C. There are no

observations in the impugned order that it was expedient for setting aside and remanding the matter for retrial. The lapses on the part of prosecution cannot be considered in any manner as resulting in failure of justice. The case in hand clearly shows the most casual approach on the part of the prosecution in dealing with the matter specifically when it was remanded by the learned Sessions Judge, Latur in the year 2015 itself. Thus, submissions of the learned counsel for the applicants are fully justified. In the result, it is a fit case for exercising jurisdiction under Section 401 of the Cr.P.C. thereby interfering with the impugned order in revisional jurisdiction. Hence, I pass the following order.

ORDER

- (I) The revision stands allowed.
- (II) The impugned judgment and order dated 24.03.2021 passed by the learned Sessions Judge, Latur in Criminal Appeal No. 65 of 2016 is hereby quashed and set aside.
- (III) The impugned judgment and order passed by the learned C.J.M., Latur in R.C.C. No. 731 of 2007 dated 07.10.2016 is hereby restored and upheld.
- (IV) Rule made absolute in above terms.

(BHARAT P DESHPANDE, J.)

PS.B.