

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1056 OF 2022

1. Sanjay S/o Shankar Bhalkar
Age : 54 years, Occu: Agriculture,
R/o: Near Gavandari Tanda Phata,
Jatwada Road, Aurangabad.
2. Sahebrao S/o Shankar Bhalkar,
Age : 54 years, Occu: Agriculture,
R/o: Near Gavandari Tanda Phata,
Jatwada Road, Aurangabad.
3. Shrinath S/o Shankar Bhalkar,
Age : 52 years, Occu: Agriculture,
R/o: Near Gavandari Tanda Phata,
Jatwada Road, Aurangabad.
4. Manohar alias Shivaji S/o Shankar Bhalkar
Age : 56 years, Occu: Agriculture,
R/o: Near Gavandari Tanda Phata,
Jatwada Road, Aurangabad.
5. Sau Anita W/o Sanjay Bhalkar
Age : 37 years, Occu: Household,
R/o: Near Gavandari Tanda Phata,
Jatwada Road, Aurangabad.

Versus

1. The State of Maharashtra through
P.P. Office High Court, Aurangabad.
2. Aruna w/o Vishwas Shinde (Intervenor)
Age-61 Years, Occu: Household,
R/o. N-3, Plot No. 397, CIDCO,
Aurangabad.

Mr Somnath G. Ladda, Advocate for the petitioners
Mr R.D. Sanap, APP for the Respondent No. 1/State
Mrs Rashmi Kulkarni, Advocate for Respondent No. 2

CORAM : SHRIKANT D. KULKARNI, J.

DATE : 4th AUGUST, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with consent
of both the sides at admission stage.

2. The petitioners, who are original accused Nos. 1 to 5 have challenged the order passed below Exh. 365 in Sessions Case No. 153/2015 by the learned Additional Sessions Judge-12, Aurangabad dated 28th July, 2022. The operative part of the order may suffice the purpose which reads thus -

- (1) The application is rejected.
- (2) The evidence of the accused is deemed to have been closed.
- (3) The Ld. Special P.P. and the Ld. Counsel for the accused shall advance their submissions on the next date without fail.

3. Heard Mr Ladda, learned counsel for the petitioners and Mr Sanap, learned APP for the State/respondent assisted by Ms Rashmi Kulkarni, learned counsel for the first informant.

4. Mr Ladda, learned counsel for the petitioners invited my attention to the impugned order. He submitted that witness summons was issued to Dr Ashish Raut, who was the treating Doctor of the deceased. The witness summons was served. However, Dr Ashish Raut could not remain present on the date fixed before the Sessions Court to tender his evidence since he was not allowed to proceed on leave by the Head of the Department. Dr Ashish Raut is presently at Kozhikode, State of Kerala. Therefore, learned counsel for the petitioners moved an application before the trial court/Sessions Court either to issue bailable warrant or non-bailable warrant against Dr Ashish Raut so as to secure his presence. He submitted that it was beyond the control of the accused to secure

presence of the witness. He submitted that the trial Court thought it fit by invoking section 233 of the Code of Criminal Procedure to secure his attendance in view of defence taken by the accused. He submitted that there was no delay on the part of the accused in conducting the trial. He also invited my attention to the impugned order, that the observations made by the trial Court while rejecting the application that even a Medical Officer had proved some documents but the relevancy of the documents on the examination of Dr Ashish Raut is not in issue now. He submitted that that point has been considered by the predecessor of the Court and application for issuance of defence witness came to be allowed by taking into consideration importance of the defence witness. The trial Court cannot give go-bye to section 233 of Cr.P.C. It was very much necessary to record evidence of Dr Ashish Raut by way of fair trial. The application was rejected by the trial Court, mainly on the ground that the sessions trial has made time bound by the High Court and the time limit fixed by the High Court is coming close. He submitted that it has caused injustice by closing the evidence of defence side. The petitioners/original accused intend to bring on record certain material by examining Dr Ashish Raut, which may support their defence.

5. Mr Ladda, learned counsel for the petitioners has placed his reliance on the following citations in support of his submissions particularly, section 233 of Cr.P.C.

- (i) **T.N. Janardhanan Pillai Vs. State 1991 SCC Online Kerala 187**
- (ii) **Md. Mainul Haque Vs. State of Tripura 2008 SCC Online Gau 569**

(iii) Angadh s/o Rohidas Kadam and Ors. Vs. State of Maharashtra and Anr. 2006 SCC Online Bom 1222 (Aurangabad Bench)

6. By taking help of above said stock of citations, Mr Ladda, learned counsel for the petitioners vehemently submitted that it was improper on the part of the trial Court to reject the prayer made on behalf of original accused to secure the presence of important witness in the capacity of defence witness. It is in contravention of the provision of Section 233 of the Cr.P.C. He submitted that only one witness from defence side is remained to be examined. As such, the defence may be allowed to examine that remaining witness Dr Ashish Raut as a defence witness for fair trial and just decision of the case.

7. Per contra, Mr Sanap, learned APP for the State strongly opposed to allow this application. He took me through the impugned order passed by the learned Additional Sessions Judge, Aurangabad. He submitted that the learned trial Judge has made certain observations about the delay on the part of the defence side in conducting the trial. He pointed out that the High Court has expedited the sessions trial and it was a time bound sessions trial. The Division Bench of this Court vide order dated 25.01.2022 in Criminal Writ Petition No.1514/2021 was pleased to extend the time to dispose of the sessions trial within a period of three months. In the said order, it was observed by the Division Bench of this Court that the defence to extend full co-operation to the trial Court in disposing of the case in the time bound manner as directed. He pointed out another order dated 25.04.2022 passed in Criminal Writ Petition

No. 1514/2021 more particularly, para (3) and pointed out that the matter was delayed on account of defence side and again extension was sought and the Division Bench was pleased to grant extension. The observations made by the Division Bench of this Court in the above said orders are important which focused light on the delay caused by the defence side. He submitted that in the light of observations made by the Division Bench of this Court in above referred two orders, it is very much clear that there was delay on the part of the defence side in conducting the trial and an application for securing the defence witness was one more attempt to prolong the matter. The learned trial Judge has rightly considered all these aspects and objection raised on behalf of the prosecution and trial Court has rightly rejected the application for securing presence of the defence witness Dr Ashish Raut. He submitted that the impugned order is proper, correct and legal and there is no defect.

8. Having regard to the submissions of the learned counsel Mr Ladda for the petitioners and Mr R.D. Sanap, learned APP for the State, I have gone through the impugned order as well as the orders passed by the Division Bench of this Court regarding extension of time sought by the trial Court. Perused the application moved by the defence side to issue bailable warrant/non-bailable warrant against Dr Ashish Raut and the objections raised by the Special P.P. before the trial Court.

9. It is not in dispute that the defence side had moved an application for issuing witness summons to certain defence witnesses. After considering the submissions of both the sides, that application came

to be allowed. The defence side was allowed to examine the defence witnesses five in number. Four witnesses from defence side have been examined. According to submissions of Mr Ladda, only one defence witness is remained to be examined, who is Dr Ashish Raut, presently serving at Kozhikode, State of Kerala, who is doing post-graduation. The application moved by the defence side to issue bailable warrant/non-bailable warrant came to be turned down by the trial Court mainly on the ground that the time limit to dispose of the sessions trial is coming close i.e. 25th August, 2022. Perhaps, that was prompted to the learned Additional Sessions Judge to make such observations resulting in rejection of application moved by the defence side. Admittedly, witness summons was served to Dr Ashish Raut. He could not remain present on the date fixed before the trial Court. In that background, the defence side moved an application so as to secure the presence of Dr Ashish Raut either by service of bailable warrant or non-bailable warrant as provided under the Cr.P.C.

10. The fair trial is the right of the accused as contemplated under Article 21 of the Constitution of India. Section 233 (3) of Cr.P.C. plays important role in this case. In case of **Angadh s/o Rohidas Kadam and Ors. Vs. State of Maharashtra and Anr.**(supra), this Court by relying upon decision of the learned Single Judge of the Rajasthan High Court, in case of **Dhananjay Kumar Singh**, has made following observations in para No.25 which reads thus -

25. I am in full agreement with the views expressed by the learned Judge of this Court in case of *Ramesh*

Wamanrao Babhulkar (supra), and the learned Single Judge of Rajasthan High Court, in case of *Dhananjay Kumar Singh* (supra). It is well settled principle of law, that the prosecution cannot convert itself into persecution. The fundamental right guaranteed under Article 21 of the Constitution of India would recognize the right of an accused for fair trial. If the prosecution is permitted to withhold statements, only on the ground that they do not support the prosecution case, then the very concept of fair trial would be jeopardized. I am unable to persuade myself to agree with the view taken by the learned Single Judge of this Court in case of *Ashok Ananda Hange* (supra); The learned Judge has not taken into consideration the effect of sections 207 and 233 of Criminal Procedure Code. It is a cardinal principle of interpretation, that a single section of a statute cannot be read in isolation but various sections are to be construed harmoniously. Secondly, the learned Judge in this case does not notice the earlier view taken by this Court in case of *Ramesh Wamanrao Bahulkar* (supra). In that view of the matter, I find that the accused was entitled to statement of the witnesses, as prayed for.

11. It is well settled principle of law, that the prosecution cannot convert itself into persecution. The fundamental right guaranteed under Article 21 of the Constitution of India recognizes the right of an accused for fair trial. It would be appropriate to reproduce provision of section 233 of Cr.P.C. which reads thus -

“(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.”

12. Perusal of section 233 (3) of Cr.P.C. makes it clear that application made on behalf of the defence side can be refused only on three grounds. (1) if the application is made for the purpose of vexation or (2) delay or (3) for defeating to the ends of justice.

13. It is true that there are certain observations made by the Division Bench of this Court while granting extension of time to dispose of the sessions trial regarding delay on the part of the defence side. But the trial Court has subsequently allowed the defence side to examine the defence witnesses. There is no material on record to show that the defence side has purposely caused the delay in examining the defence witness particularly this witness Dr Ashish Raut, who is the crucial witness since he had treated the deceased in Government Medical College and Hospital at Aurangabad.

14. Having regard to the scope of scheme of section 233 of Cr.P.C. and in view of the facts of the case in hand, I am of the considered view that the learned trial Judge should not have rejected the application. It was the last witness from the defence side. The learned trial Judge ought to have secured the presence of the witness either by issuing bailable

warrant or non-bailable warrant as thinks fit. The learned trial Judge has committed an error in rejecting the application and that too by closing the defence evidence. Certainly, it has caused injustice to the accused/petitioners. It is not the case that the defence side has taken number of adjournments to examine this witness. Had it been such case, then obviously, the trial court could have been said to be right to reject the application.

15. Having regard to the above reasons and discussion, if an opportunity is given to the defence side to examine its last witness, no prejudice would be caused to the prosecution agency. On the other hand, if the order passed by the learned Additional Sessions Judge is confirmed, certainly, it may cause serious prejudice to the rights and interest of the defence. It may not be proper to reject the prayer to secure the presence of the witness which is very important and crucial only because the time fixed by the High Court to conclude the trial is coming close. That should not be in the way of dispensation of justice. It may violate Article 21 of the Constitution of India. Right to life includes right to justice which provides fair trial.

16. Under these circumstances, the impugned order is liable to be quashed and set aside.

ORDER

- (i) The Criminal Writ Petition stands allowed.
- (ii) The impugned order passed below Exh. 365 in Sessions Case No. 153/2015 by the learned Additional Sessions Judge-12, Aurangabad is hereby quashed and set aside.

- (iii) The application moved on behalf of the defence is hereby allowed.
- (iv) The learned Additional Sessions Judge may issue bailable warrant against Dr Ashish Raut to secure his presence. Equally, the defence side to take steps to secure the presence of Dr Ashish Raut by taking all the measures. The defence side may even exercise the mode of video conferencing facility, if possible to record the evidence of Dr Ashish Raut, if it is found difficult for Dr Ashish Raut to come down to Aurangabad and tender his evidence.
- (v) Accordingly, the date can be fixed before the trial court.
- (vi) Rule is made absolute accordingly in above terms.
- (vii) No order as to costs.
- (viii) Inform to trial Court accordingly.

[SHRIKANT D. KULKARNI, J.]

mta