

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1329 OF 2021

1. Dr. Shantaram Sitaram Nighute
2. Dr. Nilima Shantaram Nighute ... Petitioners

Versus

1. The State of Maharashtra
2. Appropriate Authority and Medical Superintendent Rural Authority, New Nagar Road, Sangamner, Dist. Ahmednagar ... Respondents

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Mr. P. S. Mantri h/f Mr. P. V. Barde, Advocate for petitioners.
Mr. S. P. Sonpawale, APP for the respondents – State.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29.06.2022

ORDER :-

1. Heard learned Advocate Mr. P. S. Mantri holding for learned Advocate Mr. P. V. Barde for the petitioners and learned APP Mr. S. P. Sonpawale for the respondents – State.

2. By present petition, the petitioners intend to invoke the Constitutional Powers of this Court under Article 226 and 227 of the Constitution of India and inherent powers under Section 482 of the Code of Criminal Procedure to challenge the order below Exhibit-17 in Sessions Case No.23 of 2017 passed by the learned Additional Sessions

Judge, Sangamner on 20.10.2021 thereby rejecting the said application filed by the present petitioner and by separate order in Sessions Case No.5 of 2020 remanding the matter back to the Court of Magistrate for its trial as per the procedure provided under the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 (hereinafter referred to as the “PCPNDT Act”).

3. The facts giving rise to the petition are that Dr. Rajeev Ghodke, the Medical Superintendent Rural Hospital, Sangamner, visited the hospital of the petitioner on 08.02.2017 along with his team as per the directions given by the District Collector and Civil Surgeon. He was the appropriate authority under the PCPNDT Act. Upon the said inspection, it was found by the original complainant that there was an illegal abortion of a lady, which was carried out in the hospital of the petitioners. It was the further story that upon the inquiry, it was revealed that the said pregnant lady was admitted in that hospital on 07.02.2017 and the said illegal operation was carried out and, therefore, the panchanama was prepared on 08.02.2017 by the complainant and certain documents/registers were seized. On the basis of report lodged by Dr. Rajeev Ghodke with Sangamner City Police Station, offence under Sections 3(2)(b), (5) of Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the “MTP Act”) and Sections 312, 313, 315,

201 and 511 of Indian Penal Code came to be registered against the petitioners vide Crime No.35 of 2017. The necessary investigation was carried out and then charge-sheet was filed before the learned Judicial Magistrate First Class, Sangamner, who later on committed the said case for trial to the Sessions Court. It was then numbered as Sessions Case No.23 of 2017. Further, the complainant i.e. Dr. Rajeev Ghodke has lodged a private complaint under the provisions of PCPNDT Act when he found alleged irregularities/incompleteness/inaccuracies in the documents/registers. In fact, Dr. Rajeev Ghodke was on leave between 01.03.2017 to 31.03.2017 and, therefore, Civil Surgeon, Ahmednagar has appointed Dr. Bhaskar Bhawar for filing complaint against the present petitioners and, therefore, that complaint came to be filed i.e. R.C.C. No.95 of 2017 before the learned Additional Chief Judicial Magistrate, Sangamner. Learned Additional Chief Judicial Magistrate, Sangamner by order below Exhibit-58 on 19.12.2019 found that the facts are same and related to the inspection that was carried out by Dr. Rajeev Ghodke on 08.02.2017 involved in Sessions Case No.23 of 2017 as well as R.C.C. No.95 of 2017 committed to the Court of Sessions and, therefore, by filing application Exhibit-17, the present petitioners under Section 220(1) of the Code of Criminal Procedure prayed that the trial of both the cases against him be merged/clubbed and be conducted

as single trial.

4. The prosecution objected the said application contending that both the cases are different and separate offences have been made out. It requires separate trial.

5. The learned Additional Sessions Judge, Sangamner taking into consideration the fact that in Sessions Case No.23 of 2017 the offence is in respect of Medical Termination of Pregnancy of the lady and in complaint R.C.C. No.95 of 2017, which was later on numbered as Sessions Case No.5 of 2020, after verification of the record, the complainant Dr. Rajeev Ghodke had arrived at a conclusion that there are violations/irregularities of the provisions of PCPNDT Act. It is then stated that both the offences cannot be tried together in one trial and, therefore, rejected the application and held that separate order will be passed in Sessions Case No.5 of 2020 for remanding back the record and proceeding of that case to the Court of Magistrate for its trial as per the procedure provided under PCPNDT Act.

6. The order passed by the learned Additional Chief Judicial Magistrate, Sangamner dated 19.12.2019 below Exhibit-58 in R.C.C. No.95 of 2017 has been provided, which shows that the learned Additional Chief Judicial Magistrate had taken help of Section 323 of the

Code of Criminal Procedure for committal of the said case to the Court of Sessions. In fact, the present petitioners/original accused had approached this Court in Criminal Writ Petition No.1261 of 2018, which was disposed of on 10.10.2018 with liberty to the accused to file an application before the learned Judicial Magistrate First Class for committal of the case to the Court of Sessions under Section 323 of the Code of Criminal Procedure. It was considered by the learned Additional Chief Judicial Magistrate that if from same incidence an offence is committed and another is committed which is exclusively triable by Sessions Court and another offence is committed which is triable by Court of Magistrate and accused in both the cases are same, then the case which is triable by Court of Magistrate should be committed to the Court of Sessions. It was considered that the case before the said Court was arising out of the same incidence dated 08.02.2017 and, therefore, in view of the order passed by this Court in Criminal Writ Petition and Section 323 of the Code of Criminal Procedure, that case was committed to the Court of Sessions.

7. It is to be noted that by filing application Exhibit-17, the petitioners intended to say that duplication of evidence should be avoided and since he is facing the trial in respect of the same inspection by Dr. Ghodke dated 08.02.2017, his defence need not be repeated and

to avoid a conflicting decision, they should be tried together. This Court agrees with the finding of the learned Additional Sessions Judge that both the cases cannot be merged. In view of the fact that as per PCPNDT Act the complaint will have to be filed by the appropriate authority and it will have to be treated as a separate case under the said Act, though he might be the same informant in another case which came to be filed for the various offences under Indian Penal Code as well as MTP Act. Therefore, application of provisions of Section 220(1) of the Code of Criminal Procedure was out of question, however, the learned Additional Sessions Judge erred in passing the order of remand of Sessions Case No.5 of 2020. First of all it appears that learned Additional Sessions Judge had not taken into consideration the observations by this Court in Criminal Writ Petition No.1261 of 2018 giving liberty to the accused to make an application under Section 323 of the Code of Criminal Procedure. What has not been considered by the concerned Court is that practically all the documents would be the same barring few when it comes to offence under MTP Act and under PCPNDT Act. Further, the witnesses would be same in both the cases, because both the cases arose due to the inspection that was carried out on 08.02.2017 by Dr. Rajeev Ghodke and he had prepared the panchanama. That means not only the complainant Dr. Rajeev Ghodke

would be same in both the cases, the panchas would be same. Though it appears that as Dr. Rajeev Ghodke was on leave, the complaint was then filed by Dr. Bhaskar Bhawar, yet it was on the basis of the inspection carried out by Dr. Rajeev Ghodke on 08.02.2017.

8. The Courts should avoid duplication of evidences, as it may give rise to inconsistency in the testimony of the witnesses and also it may create a hostile atmosphere for the witnesses, as they would be asked to come again and again for giving evidence. This can be avoided by bringing both the cases under one rule i.e. before the same judge and it will also avoid in contrary findings. For that purpose itself, the provisions of Section 323 of the Code of Criminal Procedure has been made. It gives discretion, of course to be applied judiciously, for the Magistrate that if he finds that a case is required to be committed to the Court of Sessions, then he may commit it. In such situation it is not always necessary for the learned Additional Sessions Judge to sit as an Appellate Court to consider the said order of the learned Magistrate to commit the case under Section 323 of the Code of Criminal Procedure.

9. In fact, while considering application Exhibit-17 it can be seen that the learned Additional Sessions Judge has not passed common order in both the Sessions cases. It was stated that he would pass a

separate order in Sessions Case No.5 of 2020. In fact, order below Exhibit-58 in R.C.C. No.95 of 2017 was not under challenge before the learned Sessions Judge when he was deciding application Exhibit-17 in Sessions Case No.23 of 2017. No doubt, the said separate order in Sessions Case No.5 of 2020 is not under challenge before this Court in this writ petition, however, if it amounts to illegality, then definitely this Court can consider, to go on to correct it. It cannot be said that the order of remand in Sessions Case No.5 of 2020 could have been passed by the said Court without adhering to the procedure under Section 228 of the Code of Criminal Procedure. There is no question of remand at that stage. At the cost of repetition, it can be said that while deciding application Exhibit-17 in Sessions Case No.23 of 2017 the learned Additional Sessions Judge, Sangamner ought not to have sit as an Appellate Court over order below Exhibit-58 in R.C.C. No.95 of 2017 dated 19.12.2019 by learned Additional Chief Judicial Magistrate, Sangamner. If he wanted to take up Sessions Case No.5 of 2020 at the stage of Section 228 of the Code of Criminal Procedure, it could have been only transfer of case and not remand. In any way that order would have also been a wrong order taking into consideration the fact that the said case i.e. R.C.C. No.95 of 2017 was committed to the Court of Sessions under Section 323 of the Code of Criminal Procedure. Further,

it was tried to be submitted on behalf of the respondent – State that since trial of an offence under the PCPNDT Act should be before the Magistrate, the Court of Sessions will not have jurisdiction to try the case under the PCPNDT Act. It is to be noted that no doubt a case under PCPNDT Act will have to be tried by the concerned Magistrate is the normal rule, however, in view of the facts in this case and in view of provisions of Section 323 of the Code of Criminal Procedure, the case is required to be tried by the Court of Sessions.

10. As aforesaid, there could not have been merger of both the Sessions cases. To that extent, rejection of application Exhibit-17 was correct, however, by the same order when learned Additional Sessions Judge, Sangamner had decided to remand Sessions Case No.5 of 2020 to the Court of Magistrate is wrong/illegal, that part deserves to be set aside by allowing the petition partly. Hence, the following order :-

ORDER

- I) The Criminal Writ Petition stands partly allowed.
- II) The order passed by learned Additional Sessions Judge, Sangamner on 20.10.2021 below Exhibit-17 to the extent of its rejection is hereby confirmed, however, the order of remanding

Sessions Case No.5 of 2020 to the Court of Magistrate and its trial as per procedure provided in PCPNDT Act stands set aside.

III) The learned Additional Sessions Judge, to decide both the cases simultaneously.

[SMT. VIBHA KANKANWADI, J.]

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