

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

CRIMINAL WRIT PETITION NO. 1259 OF 2022

Omprakash Govindrao Wattamwar
and others

.. Petitioners

Versus

The State of Maharashtra and another

.. Respondents

Mr. Umakant B. Deshmukh, Advocate for the Petitioners.

Mr. P. M. Kulkarni, APP for Respondent No. 1.

Mr. G. J. Karne, Advocate for Respondent No. 2.

CORAM : KISHORE C. SANT, J.

DATED : 13th APRIL, 2023.

P. C. :-

. Heard learned advocate for the petitioners, learned A.P.P. and learned advocate for respondent No. 2.

2. The petition is filed against the judgment and order passed by the learned Additional Sessions Judge, Biloli dated 28.06.2022 in Criminal Appeal No. 32/2018. By way of impugned judgment and order, the appeal filed by the original informant – victim is allowed. The judgment and order of acquittal passed by the learned J.M.F.C., Degloor in R.C.C. No. 202/2011 dated 10.07.2018 is quashed and set aside and the complaint is remanded to the learned J.M.F.C. for fresh trial. The facts in short are that, respondent No. 2 lodged FIR in the

police against the present petitioners for the offences punishable under Sections 323, 324 and 506 of the Indian Penal Code. The trial started, however, after examining only two witnesses since other witnesses could not remain present though bailable warrants issued them, the learned J.M.F.C. passed an order of acquittal as the prosecution could not examine any material witness. Two witnesses were examined that is (i) Vyankatrao Hale – panch to the spot panchanama and (ii) Ashok Rathod – panch to the recovery panchanama and they turned hostile. It appears from the order dated 10.07.2018 that was passed on Exh. 1 that these two witnesses were declared to be hostile as they did not depose against accused persons and on the same day judgment came to be passed of acquittal.

3. The informant – respondent No. 2 therefore filed an appeal specifically contending that he never received any summons to appear as witness in the case. The learned Magistrate has not given proper opportunity to the prosecution to prove its case. No material evidence witnesses are examined. The injured witness and eye witnesses also are not examined. The learned Additional Sessions Judge remanded the matter by directing informant – respondent No. 2 to keep other material witnesses to whom the prosecution wants to examine present on the next date. This order is challenged in this writ petition.

4. This Court by order dated 06.10.2022 issued notice and then after record was also called and therefore, the trial is still not held.

5. Learned advocate for the petitioners vehemently argued that, the criminal case was of the year 2011 wherein, judgment was delivered on 10.07.2018. Thus, for eight years the petitioners have suffered agonies of trial being accused, they were required to remain present on each and every date. It was for the informant to be vigilant and to adduce evidence before the Court. In this case, even the prosecution has not taken prompt steps to get the witnesses served and examined before the Court. The learned Additional Sessions Judge ought to have consider that, for eight long years the trial was going on and if witnesses were not produced by the prosecution, then it was necessary to brought interference that the prosecution has failed to bring on record material evidence. He further submits that, in this case, there is default on the part of the prosecution as well as the informant. After suffering agonies for eight years, the appeal could not have been remanded back for trial afresh. He submits that, now the petitioners will have to face trial again without any fault on their part. Now, the petitioner No. 3 – a lady is more than 70 years of age. Even the petitioner No. 4 has crossed age around 85 years and more. It would certainly cause hardship to these two petitioners. He therefore

prays for quashing and setting aside the judgment and order dated 28.06.2022.

6. Learned A.P.P. opposes the petition stating that, the prosecution should get fair opportunity to prove its case. In fact, in the trial the prosecution had admitted to have served the witnesses and evenailable warrants were issued. However, the same could not be served on the informant. Thus, on this technical ground the accused cannot take benefit and avoid prosecution.

7. Learned advocate for respondent No. 2 vehemently argued the matter. From the judgment of the learned Sessions Court he pointed out that, the learned Sessions Court had rightly observed that, only two panch witnesses were examined by the learned Trial Court. There is injured witness and there are also eye witnesses to the incident. It was necessary for the learned Magistrate to take steps to see that these material witnesses are examined. He submits that, the learned Magistrate cannot be only a silent spectator in the criminal trial, but has to play an active role for bringing truth on record. He thus submits that, the learned Additional Sessions Judge has rightly passed an order and no interference is required.

8. Considering the submissions and material on record, it does

appear that, material witnesses and injured witness were not examined in the trial. This Court had called for the record.

9. From the record, learned advocate for the petitioners pointed out that, in fact,ailable warrant was issued against this informant by order dated 05.01.2018, however, the same was not executed. Thereafter again on 22.03.2018 another warrant was issued. The summons were issued to the witnesses, however, in spite of that, they were not served. He further points out that, on 21.12.2017 there is report showing that the witness was not found. The witnesses at serial Nos. 1 and 2 were given understanding. The witness at serial No. 3 was not found on the address. He submits that, thus, there is failure.

10. Learned advocate for the petitioners further makes a submission that, in fact, the informant and the petitioners are related to each other and there are also proceedings going on before the Civil Court where the informant is very much attending the civil case in the same Court. It cannot be said that, he had no knowledge that any criminal case summons is issued to him. After the judgment of acquittal he immediately filed an appeal.

11. This Court finds that, there is substance in the submission of the

informant that there is no record to show that witnesses were served in the witness summons.

12. This Court finds that, the findings of the learned Sessions Court are based on the record and it is also recorded that, the learned advocate for the petitioners before the learned Sessions Court had admitted that there is no material on record to indicate that the witness summons was served upon the informant and on the material witnesses. This Court finds that, this need not go into the findings of the fact about the said aspect. Interest of justice would be served by holding a trial than to close the doors to the prosecution and the informant.

13. This Court finds that, there is substance in the submission of the learned advocate for the petitioners that they have suffered for eight long years and facing the trial. It could not be in the interest of justice now to prolong the trial and certain directions are necessary to be issued. Hence, the following order is passed.

14. The writ petition is partly allowed.

15. The order remanding R.C.C. No. 202/2011 to the learned J.M.F.C. is maintained, however, the learned Trial Court shall proceed further and to start the proceeding where it was closed instead of

holding entire trial afresh. The remaining order is kept as it is with further direction to the learned Magistrate to complete the trial as expeditiously as possible and preferably by 31.12.2023.

16. With this, the criminal writ petition stands disposed off.

17. The petitioner Nos. 3 and 4 are at liberty to pray for exemption. The learned Trial Court shall consider their applications liberally.

(KISHORE C. SANT, J.)

RS.B.