

(2005) 06 BOM CK 0120

In the Bombay High Court

Case No : Criminal Writ Petition No. 12 of 2005

Miss Anita Keshav Parab and Shri Rupesh Keshav Parab

APPELLANT

Vs

The State and Others

RESPONDENT

Date of Decision : 30-06-2005

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 136
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 307

Citation : (2005) 06 BOM CK 0120

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : S.M. Walwaikar, for the Appellant; W. Coutinho, Assistant Public Prosecutor, for the Respondent

Judgement

V.M. Kanade, J.—By this petition which is filed by the Petitioners under Articles 226 and 227 of the Constitution of India, the petitioners are challenging the impugned Orders passed by the Additional Sessions Judge, Mapusa, whereby their application for seeking examination of defence witnesses was rejected by the learned Sessions Judge.

2. Brief facts which are necessary for the purpose of deciding this petition are as under :-

The petitioners are original accused in Sessions Case No. 11/2001 which is pending in the Court of the Addl. Sessions Judge Mapusa. The petitioners are facing trial under Sections 143, 147, 148, 427, 327, 326 and 307 read with Section 149 of the Indian Penal Code. The statements of the petitioners u/s 313 of the Cr.P.C. was recorded on 28.7.2004. Thereafter the petitioners disclosed their intention to examine defence witnesses. Accordingly an application was made and a list of 24 witnesses was submitted by the accused. The Trial Court allowed the petitioners to examine these witnesses and issued summons to four

witnesses. Accordingly, petitioners examined Clayton Fernandes as defence witness. Further Police Officer Bane was also examined on 2.3.05. Two witnesses namely Parshuram Gharde and Salini Ramjan Nadaf could not be served and therefore the petitioners furnished the new address of the witnesses and requested the Addl. Sessions Judge to issue fresh summons. However, this application was dismissed by the Addl. Sessions Judge by Order dated 6.4.05. The petitioners also had made a further application for issuing summons to the other witnesses which were mentioned in the list of witnesses, who were allowed to be examined by the Addl. Sessions Judge by his Order dated 4.10.04. The learned Sessions Judge dismissed this application by Order dated 11.4.05. The petitioners are challenging both these Orders dated 6.4.05 and 11.4.05. It is submitted by the learned counsel appearing on behalf of the petitioners that it is the petitioners' right to examine defence witnesses. He further submitted that the petitioners' right to a fair trial is denied by not permitting them to examine their defence witnesses and therefore the impugned order is violative of Article 21 of the Constitution and is in breach of the principle of natural justice. The learned counsel further submitted that the Addl. Sessions Judge had misconstrued the Order of the High Court in Writ Petition No. 1/2005 wherein the High Court had disallowed the prayer of the petitioners to refer the disputed handwritings to an expert for the purpose of obtaining his opinion. It was submitted that the said Order was passed in a different set of circumstances. He submitted that though his application for obtaining opinion from the handwriting expert was declined, the accused always had a right to examine a handwriting expert in support of his case.

3. The learned counsel appearing on behalf of the State, opposed the submission of the learned counsel appearing on behalf of the petitioners. She submitted that the Sessions Court had observed that the petitioners were trying to delay and protract the trial by examining the witnesses whose testimony was absolutely irrelevant to disprove the prosecution case. She submitted that by virtue of Section 136 of the Evidence Act the Judge had discretion whether to allow the examination of a witness or not after taking into consideration the relevancy of the facts which the witnesses, if examined, would prove. She has filed a detailed affidavit stating as to how the examination of the witnesses mentioned in the list submitted by the petitioners would be irrelevant for the purpose of the trial.

4. I have heard both the learned counsel at length. I have perused the impugned Orders passed by the Trial Court. It is one of the salutary principles of criminal jurisprudence that the accused has a right to examine defence witnesses in order to disprove the case of the prosecution. This right cannot be curtailed merely on the ground that the examination of the defence witnesses would protract the trial. Mere denial to examine such witnesses would tantamount to depriving the petitioners' right to fair trial of the offences with which they are charged, apart from violating the principles of natural justice and Article 21 of the Constitution of India.

5. By Order dated 6.4.05 the Addl. Sessions Judge rejected the application for issuing summons to two witnesses which could not be served because the address furnished by the Police themselves was insufficient. Thereafter the petitioners had made inquiries and had procured the correct address and furnished the same to the Addl. Sessions Judge. In my view the said Order is liable to be set aside. The learned Addl. Sessions Judge had initially allowed the petitioners to examine the list of witnesses which was supplied by him by Order dated 4.10.04. Merely because the summons could not be served for want of sufficient particulars, was not correct ground or reason for declining the petitioners' application for issuance of fresh process. The second application also for issuance of process was declined and order was passed that the case of the accused was closed. In the impugned Order, the learned Addl. Sessions Judge has practically arrived at its own conclusion as to why the examination of the witnesses was irrelevant without taking into consideration an important fact that most of these witnesses were cited by the prosecution as their own witnesses and the accused had a right to examine them to disprove the prosecution case. The petitioners have furnished a fresh list of 10 witnesses and have stated that they would like to examine these 10 witnesses from the initial list which was submitted by them. In my view the petitioners would be entitled to examine these witnesses after summons is served on them.

6. Accordingly, the petition is partly allowed. The impugned Orders passed by the Trial Court dated 6.4.05 and 11.4.05 are quashed and set aside. The petitioners are permitted to examine the list of witnesses which is given by them and it is at page 32 of the petition. The Trial Court shall issue summons to these witnesses. If summons for some reason is not served on these witnesses, it is open for the Trial Court to pass further appropriate orders. It is clarified that it is open for the Trial Court to regulate the examination of these witnesses and if it is found that these witnesses are not produced before the Court within reasonable period of time, appropriate orders may be passed by the Trial Court. With these directions the Criminal Writ Petition is partly allowed in the above terms.