

(2019) 06 BOM CK 0107

In the Bombay High Court

Case No : Criminal Application No. 486 Of 2019, Criminal Appeal No. 497 Of 2019

Pramod Radhakisan Thakre

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 25-06-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 489C
Code Of Criminal Procedure, 1973 — Section 82, 157, 164, 167(2), 173(2), 207, 208, 312, 313, 319, 319(1), 367, 367(1), 389, 391
Evidence Act, 1872 — Section 30, 114
Constitution Of India, 1950 — Article 215

Citation : (2019) 06 BOM CK 0107

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : Aniket U. Nikam, Aashish Satpute, S.S. Pednekar

Final Decision : Dismissed

Judgement

1. The applicant herein is convicted for the offence punishable under Section 489A read with Section 34 of Indian Penal Code and sentenced to

suffer Rigorous Imprisonment for seven years and fine of Rs.25,000/â, in default, to suffer further Simple Imprisonment for one year by the Sessions

Judgeâ6, Nashik vide judgment and order dated 15th March 2019.

2. While arguing the application under Section 389 of Cr.P.C., the learned counsel for the applicant vehemently submitted that there is no concrete and

comprehensive material to lead to a conclusion that the applicant is in any way guilty of the offence punishable under Section 489 (c). The raid was

conducted on 20th November 2008 in a Mobile Shoppee which was owned by Sudhakar Pande.

3. On the basis of the information given by Sudhakar Pande a car was also raided. The applicant is a registered owner of the said car from which 900

counterfeit notes of 1000 denomination were seized. It was also urged by the learned counsel for the applicant that the said car belonged to the

applicant, but at the relevant time, it was being used by his friend Sudhakar Pande, who is the principal accused and is yet absconding. It is also

submitted that the applicant had no knowledge that the said counterfeit notes were being transported or concealed in the said car which belonged to

him and hence, it was prayed that he be enlarged on bail as he is not even remotely connected with the said offence.

4. Upon perusal of the original records and proceedings, it is seen that in the course of enquiry, the investigating agency had recorded statements of

Vasant Gite and Kishor (Baba) Shankar Gurav under Section 164 of Cr.P.C. According to Vasant Gite, he was in custody in Central Jail at Nashik in

an offence and at that time, the present applicant was also in custody as he was arrested in some other offence. They got acquainted with each other.

The applicant had learnt that Vasant Gite is a Driver and therefore had offered him to join his services after being enlarged on bail. Accordingly, in

September 2008, he had joined the services of the present applicant. When they were attending the scheduled dates in the Court, they had met Sanjay

Varma, who was also an accused in some other case.

5. It was learnt that Sanjay Varma owned a shop which was attached in some criminal proceedings. The applicant got acquainted with him and

thereafter, he had been to see the shop of Sanjay Varma and since then, they had become good friends, so much so that, they used to meet practically

every day. That, Sanjay Varma also owned a shop near D'souza Colony. He had shown a shop which was located in Aditya Society and was known

as 'Mobile World'. He had expressed financial stringency and therefore, the applicant had helped him financially. At this stage, it is pertinent to note

that the secret information, which was received by the police was in respect of manufacturing of counterfeit notes in the said shop.

6. Sudhakar Pande was in the services of Sanjay Varma. In fact Gite had disclosed a lot of facts in his statement under Section 164 of Cr.P.C., which

would clearly be a pointer to the nefarious activities of the present applicant and his involvement in Crime No. I 226 of 2008. There they were

accompanied by the present applicant and Jitu Khairnar and they were manufacturing/printing counterfeit currency notes. They had misled the witnesses by saying that they were going to open shop for enlargement and printing photos.

7. The witness was also introduced to one person who was well versed with printing technology of computer. He had asked the witness Gite to take the car of Sanjay Varma and thereafter he had seen that Sanjay Varma was carrying 2 to 3 bundles of counterfeit notes. Mr. Gite had actually seen Sanjay Varma, the present applicant Thakare and Gurav printing counterfeit notes in the shop 'Mobile World'. Although a statement was recorded under Section 164 of Cr.P.C. and despite the fact that summons were issued to Mr. Gite, the prosecution did not insist upon the issuance of a bailable or non-bailable warrant to summon him as a witness.

8. It is further pertinent to note that the learned Judge while recording the statement under Section 313 of Cr.P.C., has posed a question to the applicant, which is reproduced herein below:

Question " 26

It has come in the statement of Vasant Shankar Gite recorded under Section 164 of the Cr.P.C. that he was in Jail in July 2008. You accused were with him in same Barrac, you offered him a job of Driver it was accepted by him, what do you wish to say about it? Answer : It is false.

9. In fact, the said question could not have been put to the accused under Section 313 of Cr.P.C. and the court instead of acting as an umpire in the criminal proceedings should have summoned Vasant Gite as a witness. As it prima facie appears that the learned Sessions Judge had gone through the statement recorded under Section 164 of Cr.P.C.

10. In the course of enquiry, the investigating agency had also recorded the statement of Kishor (baba) Shankar Gurav, who was expert in printing technology and has infact, shown the art of printing counterfeit notes on the computer to the present applicant and just two days thereafter the said offence had come to light. The prosecution had not made any efforts to call upon Mr. Kishor as the witness at the time of trial.

11. Upon perusing the evidence adduced by the prosecution, it is more than clear that the prosecution has failed to conduct a fair trial and to reach to the root of the matter. In fact, the investigating officer Mr. Vivek Saraf has given

evasive answers and has created a confusion as to whether the secret information was received on 19th or 20th November 2008. That the investigating agency had also not clarified whether the raid was conducted on 19th or 20th of November 2008.

12. PWÂ2 has deposed before the Court that the seized muddemal is not seized on 20th November 2008. He has also stated that on 20th November 2008 while lodging the report he had no knowledge regarding the involvement of other accused, except Sudhakar Pande in the alleged offence.

13. The Investigating Officer PWÂ6 Mr. Vivek Saraf has deposed before the Court that raid was conducted on 19th of November 2008, whereas the record shows that the raid was conducted on 20th November 2008. He has also admitted that there is no station diary entry to the effect that they had been to D'silva Colony at about 9.30 p.m. He has admitted that he has not recorded the statement of nearby persons/shop owners of the mobile shopee. No special report was forwarded to the superior officer either about the secret information or the raid which was conducted. No report was submitted under Section 157 of Cr.PC. It is also admitted that while seizing the articles the counterfeit notes were not tied with thread or any other material, neither official seal was embossed on it. It has been stated in Panchnama that the articles were collected and not seized.

14. PWÂ7 happens to be the investigating officer, it is pertinent to note that as far as Sudhakar Pande was concerned, he was arrested and was in custody from 20th November 2008. The chargeÂsheet was not filed within 60 days and therefore, the benefit of Section 167 (2) of Cr.P.C. was extended to him. The 12th Joint Judicial Magistrate First Class, Nashik had also issued notice to the Investigating Officer in Crime No. I 226 of 2008 i.e. to Vivek Saraf as to why the chargeÂsheet was not filed within limitation.

15. It appears that no explanation was forwarded by PWÂ7. Sudhakar Pande was released on bail and thereafter, has absconded. The act of the Investigating Officer and the Prosecutor cannot be brushed aside lightly as a matter of negligence on their part, but it appears that steps were taken to cooperate with the accused persons. It is in these circumstances, in view of the above discussions, that this court would pass an order under Section 367 of Cr.P.C., which reads as follows:Â?

â??Power to direct further inquiry to be made or additional evidence to be taken--

If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

16. In the case of Hardeep Singh Vs. State of Punjab and Ors. Reported (2014) 3 SCC 9,2 the Constitution Bench of the Supreme Court has held that

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â??For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Cr.P.C. indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law.â??

17. In fact, learned Sessions Court ought to have impleaded and arraigned Gurav as an accused under Section 319 of Cr.P.C. and his statement could have been used under Section 30 of the Indian Evidence Act. Section 319 of Cr.P.C., reads as under:

â??Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed

any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detailed by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such

person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

18. Since after the filing of charge sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319 (1) Cr.P.C. can be exercised at any time after the charge sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion.

This stage cannot be said to be a judicial step in the true sense, for it only requires an application of mind rather than a judicial application of mind.

19. Under Section 391 of Cr.P.C., while dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reason and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

20. The powers of the Sessions Court while conducting a trial are not unguided, uncontrolled or uncanalised. The Sessions Court, in order to find out the truth, can exercise the powers under the provision of the Code of Criminal Procedure, even in the absence of an application either by the prosecution or by the defence. Since the Court in the course of enquiry is not an umpire and which is a process for getting at the truth by all lawful means. Therefore, it should be borne in mind that Section 319 of Cr.P.C. should be invoked only with the object of discovering relevant facts or obtaining proper proof for a just decision of the case and also in order to ensure that no guilty persons escape from the clutches of law. The only embargo is that the powers must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the powers may lead to undesirable results.

21. In the case of Anju Choudhari Vs. State of Uttar Pradesh and Anr. reported in (2013) 6 SCC 384 has observed as follows:

“Even in the cases where report under section 173(2) of the Code is filed in the Court and investigation records the name of a person in column

(2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under Section 319 can summon the person as an

accused and even at that stage of summoning, no hearing is contemplated under

the law??.

22. It is further pertinent to note that although Sudhakar Pande was arrested, he had absconded after was released under Section 167(2) of Cr.P.C.,

Kishor Gurav was never arraigneded as an accused. Vasant Gite was not summoned as a witness and Sanjay Varma could never be arraigned. Kishor

Gurav also deserves to be arraigned as an accused. It is not known as to how many more people he had trained for printing counterfeit notes. The

said act would damage the economy of the nation.

23. The matter deserves to be remanded for examining Kishor Gurav and Vasant Gite as necessary witnesses. In the eventuality, they do not appear,

the learned Sessions Judge shall issue nonÂailable warrant and secure the presence of the witnesses. It is more than clear that the Investigating

Agency, at that relevant time, had knowledge about the whereabouts of the accused persons. However, no application under Section 82 of Cr.P.C.

has been filed either against Sudhakar Pande or Sanjay Varma for the reasons best known to the prosecution and the Investigating Agency.

24. The Hon'ble Apex Court in Case of Mohanlal Shamji Soni Vs. Union of India reported in 1991 AIR 1346 has held as follows:Â?

â??It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue.

But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not

empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their

sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced be unfavourable to the party

withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act.

25. In the present case, neither the Investigating agency nor the prosecution has made any attempt to reach to the root of the matter. It appears to be

a deliberate inaction on the part of the Investigating Officer. The Court cannot act as an umpire in the course of imparting justice and therefore, strong

action is warranted against such police officers, such as PWÂ?6 and PWÂ?7, who tend to join hands with the accused persons.

26. In view of this, the matter needs to be remanded back to the Sessions Court,

Nashik for examining Kishore Gurav and Vasant Gite as witnesses

and also record the evidence of any other witnesses as Court Witnesses for sifting the grain from the chaff. In view of the fact that on the basis of the

evidence, which is recorded by the prosecution, the claim of the applicant, that he is in no way concerned with manufacturing, circulating or even

possession of the said counterfeit notes cannot be accepted. The matter is remanded to the Sessions Court. The evidence be recorded within six

months from the date of the receipt of the order. The copy of this order be sent to the Director of Prosecution and Director General of Police, State of

Maharashtra. The learned Sessions Court shall not be influenced by the observations made hereinabove as this Court has prima facie recorded the

observations on the basis of the material collected in the course of investigation and statements recorded under Section 164 Cr.P.C.

27. The prosecution has failed to conduct a fair trial. Time has come to take a judicial notice of the manner in which there are deliberate lapses in the

investigation and negligence and callousness in conducting trial.

28. It is the responsibility of the trial Court to conduct a fair trial, record evidence of all witnesses who could throw light upon the entirety of the case.

A High Court is a Court of Records as contemplated under Article 215 of the Constitution of India. In most cases the High Court appreciates the

evidence recorded by the trial Court and in few cases powers under Section 367 (1) are exercised which ultimately ends in dealing the whole

procedure.

29. Needless to say that for examining the witnesses the expenses shall be borne by the prosecution (State Government) as contemplated under

Section 312 of the Code of Criminal Procedure.

30. In view of the above observations, the application under Section 389 of Cr.P.C. stands rejected.