

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 226 OF 2013.

Sudhakar s/o Vithoba Misalwar ..vs.. The State of Mah.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr.R.M.Daga, Advocate for the appellant/accused.
Mr.R.S.Nayak, APP for the respondent/State.

**CORAM : A.B.CHAUDHARI AND
P.N.DESHMUKH, JJ.**

DATED : AUGUST 6, 2015.

1. The Appellant/accused has preferred this appeal being aggrieved by the judgment and order dated 27th of February, 2013 passed in Sessions Case No.98 of 2012 by learned Additional Sessions Judge, Chandrapur, by which he came to be convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay fine of Rs.1000/- and in default of payment of fine, to suffer rigorous imprisonment for one month.

2. In brief, it is the case of prosecution that accused along with Mayabai were residing together when their son Ravindra was residing elsewhere, who was addicted to liquor and on this count was quarrelling with his wife Mayabai and was also beating her. On 25th of June, 2012 deceased Mayabai, after she slept in the morning was found lying on the ground in dead condition and blood was oozing out of her nostril having marks over her body. On the basis of report lodged vide Exh.13 by Anita Misalwar, offence vide Crime No.14 of 2012 under Section 302 of the Indian Penal Code was registered, which was investigated by PW 6 Chandewar, API, during the course of which he visited the spot, drew spot panchanama and seized articles from the spot, like pillow cover, pieces of bangles, etc. under seizure

panchanama vide Exh.22 and obtained photographs as per Exh.23. Inquest panchanama came to be drawn vide Exh.25 and he forwarded dead body for its Post Mortem. Accused came to be arrested under arrest memo vide Exh.38. His blood sample was collected and was sent for medical examination. Clothes of accused were seized under seizure panchamama vide Exhs.29 and 30 and on recording statement of witnesses and on forwarding seized muddemal for its analysis to Chemical Analyzer, investigation came to be completed and charge-sheet was filed in the court of Judicial Magistrate (F.C.), Gondpipari. In the course of time, case came to be committed for trial to the Sessions Court. Charge was framed against both the accused, which came to be denied and accused claimed to be tried. The defence of accused is of total denial.

3. During the preliminary hearing of this appeal, we have noted that PW 1 Dr.Madhavi Babarao Ramteke, PW 2 Anita Ajay Misalwar and PW 3 Ravindra Sudhakar Misalwar are not cross-examined by the learned counsel, who was representing the appellant/accused before the trial Court since absent and thus, accused-in-person has cross-examined said witnesses. Learned counsel for the appellant, in view of these facts, has contended that since there is no effective cross-examination of above material witnesses, due process is not complete and for that purpose has relied upon judgment of Division Bench of this Court in the case of **Lilabai @ Kalipili Shankar Raut ..vs.. State of Maharashtra**, reported in **2013 ALL MR (Cri) 556** in which this Court has referred the decision of the Apex Court in the case of **Mohd.Hussain @ Julfikar Ali ..vs.. The State (Govt. of NCT) Delhi**, reported in **2012 ALL SCR 2209**, where, in paragraph no.42, provisions of Section 386 of the Criminal Procedure Code has been quoted, as under -

“42. The appellate court hearing a criminal

appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked”.

4. In view of above, Division Bench of this Court in its judgment in the case of **Lilabai @ Kalipili Shankar Raut** (supra), in para no.8, has observed as follows -

“We are convinced that this is an exceptional case in which the right of the appellant/accused to the

fair trial and due process ought to have been completely protected, but was not, in the trial Court. The accused was not provided with the assistance of a Counsel of her choice in a substantial and meaningful sense at the crucial stage of trial when a medical witness was put to an examination-in-chief in the trial Court in the absence of the Advocate representing the illiterate accused.”

5. In the present appeal, as already stated aforesaid, we have noted that three witnesses being PW 1 Dr.Madhavi Babarao Ramteke, who has performed the autopsy is not cross-examined as the learned counsel for the appellant/accused was absent while accused has declined to cross-examine the witness. Similarly, no effective cross-examination of PW 2 Anita Misalwar is held as said witness is cross-examined by accused-in-person, while PW 3 Ravindra Misalwar also appears to have been cross-examined by accused-in-person. In the above set of facts, we thus find that the accused remained undefended to cross-examine material witness being PW 1 Dr.Madhavi who has performed autopsy and that the learned trial Judge, instead of taking steps to insist upon the presence of the Advocate who was representing him, unfortunately chose to proceed further in the absence of his Advocate and thus we find that accused who is old labour and as such illiterate, was called upon to cross examine the medical witness, which he declined. We are aware of the fact that under Section 303 of the Code of Criminal Procedure accused is entitled to be defended by his counsel who is bound to attend the proceedings as it is his professional duty towards his client. Having considering above facts and on going through the record, we are of the opinion that the appellant is denied of due process of law and the trial held was contrary to the procedure

prescribed under the provisions of Code of Criminal Procedure. Provisions of Section 303 of the Code confers a right upon any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code mandates legal aid to accused at State's expenses in a trial before the Court of Session where the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader.

6. In that view of the matter, we find that the impugned judgment and order cannot sustain and matter is necessary to be remanded back to the Trial Court with direction to give an opportunity to respondent/accused to cross-examine the witnesses and if necessary by providing him an Advocate from Legal Aid Panel, if accused is unable to engage Advocate of his choice.

7. Needless to say that the trial Court shall recall above named witnesses for cross-examination.

8. In the circumstances, we pass the following order.

ORDER

(i) Criminal Appeal No.226 of 2013 is partly allowed.

(ii) The conviction and sentence imposed by learned Additional Sessions Judge, Chandrapur vide judgment dated 27th of February, 2013 is set aside.

(iii) The case is remanded back to the trial Court for fresh disposal, in accordance with law, by holding *de novo* trial in the light of observations made aforesaid.

(iv) Since the incident in question is of the year 2012 and the age of respondent/accused is above 70 years, and as the case is based on circumstantial evidence, we find it just and proper to release the respondent/accused on bail pending *de novo* trial, on his executing P.R. Bond in the sum of Rs.20,000/- with one surety in the like amount to the satisfaction of the trial court.

(v) The learned trial Judge is further directed to conclude the trial as expeditiously as possible and in any case within a period of six months from the date of writ of this appeal.

(vi) To ensure early completion of trial, the respondent/accused shall remain present before the Trial Court on 1st of September, 2015, without fail.

JUDGE

JUDGE

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