

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 100 OF 2009

1. Balbhim Shamrao Barawkar
(deleted as per Court order
dated 20.10.2016)
2. Bharat Balbhim Barawkar,
Age. 30 Years, Occ. Agri.
3. Dattatraya Balbhim Barawkar,
Age. 40 Years, Occ. Agri.
4. Bibishan Suryabhan Barawkar,
Age. 30 Years, Occ. Agri.
5. Dattatraya Sopan Barawkar,
Age. 25 Years, Occ. Agri.

All R/o. Pimpalgaon Alva,
Tq. Jamkhed, Dist. Ahmednagar.

...Applicants

Versus

1. The State of Maharashtra.
 2. Subhash Madhavrao Barawkar,
Age. Major, Occ. Agri,
R/o. Pimpalgaon Alva,
Tq. Jamkhed, Dist. Ahmednagar.
- ...Respondents

Advocate for Applicants : Mrs. S K Doke and Mr. K.R. Doke
APP for Respondents: Mr. P.G. Borade

.....

CORAM : V. K. JADHAV, J.
DATED : 20th OCTOBER, 2016

ORAL JUDGMENT:-

1. Learned counsel for the applicants submits that during pendency of this criminal application, applicant No.1 Balbhim

Shamrao Barawkar, died and his name is required to be deleted from the array of appellants. In the light of above, name of applicant No.1 Balbhim Shamrao Barawkar, be deleted from the array of applicants. Deletion be carried out forthwith.

2. Being aggrieved by the order dated 17.3.2008 passed by the learned J.M.F.C. Jamkhed on the application filed on 23.7.2007 annexed at Exhibit A to this criminal application, the applicants preferred preset criminal application.

3. Brief facts giving rise to the present criminal application are as follows:-

a) The applicants are facing trial for having committed the offences punishable under Sections 143, 147, 148, 323, 504, 506 of I.P.C. in R.C.C. No. 165 of 2001 in the Court of J.M.F.C. Jamkhed, District Ahmednagar. In the cross case bearing S.T.C. No. 454 of 2001 one Shri Bankatrao Madhavrao Baravkar, who is an advocate, is one of the accused. It was thus difficult for the applicants herein to get the advocate to defend their case. The advocates engaged by them from time to time remained absent in the trial and at some time the trial was proceeded without their advocate on record. Thus, on 23.7.2007, the applicants original accused filed an application under

Section 311 of Cr.P.C. before the Magistrate for recalling three prosecution witnesses, including the complainant for their cross-examination. The learned Magistrate, by impugned order dated 17.3.2008 rejected the said application. Hence, this criminal application.

4. Learned counsel for the applicants original accused submits that in the cross case, before the same Court, bearing S.T.C. No. 454 of 2001 one Bankatrao Madhavrao Barawkar is one of the accused and is an advocate by profession. Thus, the advocates engaged by the applicants accused, in the above case to conduct the case, continuously remained absent at the time of trial. Initially, the applicants accused had engaged one advocate, who has conducted the case to the extent of releasing the applicants accused on bail only, however, he has refused to conduct the trial. Thus, the applicants accused engaged another advocate from Ahmednagar but he also remained absent in the case and indirectly refused to conduct the case. On all the dates, the applicants accused constrained to pay Bhatta of the witnesses. Thereafter, the applicants accused had engaged one advocate from Ashti and he attended only three dates in the Court for trial. However, the said advocate did not cross examine the complainant, whose examination in chief was recorded on 22.4.2004 at Exh.24 and witness Houserao

whose statement was recorded on 18.08.2004 at Exh.30. The applicants accused then engaged another advocate to file an application for recalling of witnesses for cross examination at Exh.46 and the same was allowed. However, when the witnesses remained present before the court in compliance with the order passed by the court in application Exh.46, the said advocate remained absent and another advocate, though was present, refused to cross examine the same witnesses. Even one of the accused by name Datta personally cross examined the witness himself, however, he could not effectively cross examine the witnesses for want of legal knowledge. Learned counsel submits that it is well settled that if the accused is unrepresented by the advocate, then it becomes the duty of the Court to provide him advocate at the instance of the State or other means. At present, the applicants accused engaged one advocate, who assured them to remain present in the court. However, the application submitted by the accused for recalling of three prosecution witnesses was turned down by the Magistrate on the ground that their earlier application came to be entertained by the court, however, witnesses were not subjected to cross examination. Learned counsel submits that the Magistrate ought to have allowed the said application filed under Section 311 of Cr.P.C.

Learned counsel in order to substantiate her submissions,

placed reliance on the judgment of Supreme Court in the case of ***T. Nagappa vs. Y.R. Murlidhar, reported in 2008 DGLS (SC) 599.***

Learned counsel submits that in the light of ratio laid down in the above cited case, the applicants accused cannot be convicted without an opportunity being given to them to present their case and if it is denied to them, there is no fair trial. "Fair trial" includes fair and proper opportunity to prove the innocence.

5. Respondent No.2 though duly served with Rule notice, remained absent.

6. In the instant case, it appears that though examination in chief of the complainant Subhash Exh.24 was recorded on 22.4.2004 and witness Hauserao was recorded on 18.8.2004 at Exh.30, they could not be cross examined by the applicants accused for the reason that the advocates engaged by them from time to time remained absent before the court under one or the other pretext. It is not necessary to consider here the reason for absence of those advocates when the case was posted before the court for examination and cross examination of the witnesses. However, the fact remains that the applicants accused could not cross examine the aforesaid witnesses due to absence of their advocates. It is now possible for the applicants accused to cross examine those witnesses by recalling

them, through their advocate engaged by them. Even on earlier occasion though the application filed by the accused under Section 311 of Cr.P.C. came to be allowed by the court and witnesses were permitted to be recalled and remained present before the court, the applicants accused could not cross examine those witnesses due to absence of their advocates. Learned Magistrate has not considered the same while rejecting the application (Exh. A) dated 23.7.2007 on the ground that opportunity was given to the applicants accused but the same was not utilized by them.

7. In the light of observations made by Supreme Court in the case of ***T. Nagappa vs. Y.R. Murlidhar, (supra)*** "fair trial" includes fair and proper opportunities allowed by law to the accused to prove his innocence. I do not think that the proper opportunity is given to the applicants accused to prove their innocence.

8. In the light of the above discussion and in the light of ratio laid down by the Supreme Court in the case of ***T. Nagappa vs. Y.R. Murlidhar, (supra)***, I am inclined to allow this criminal application with certain directions. Hence, I proceed to pass the following order:-

O R D E R

- I. Criminal application is hereby allowed in terms of prayer clauses "B" and "C".
- II. The applicants accused shall remain present before the trial court on 17.11.2016. The learned Magistrate shall recall the witnesses as mentioned in the application dated 23.7.2007 (Exhibit "A") by issuing summons, returnable one month thereafter and the applicants accused shall cross examine the said witnesses on the date fixed for their attendance before the court either in person or through advocate.
- III. Criminal application is accordingly disposed of. Rule made absolute in the above terms.

(V. K. JADHAV, J.)

rlj/