

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 192 OF 2016

1. Dagadu s/o Rajaram Kolhe,
Age : 62 years, Occu. Agriculture,
R/o. Village Rahati, Taluka: Limbgaon,
District : Nanded.
2. Sanjay s/o Dagadu Kolhe,
Age : 26 years, Occu. and R/o. As above. .. Appellants

Vs.

The State of Maharashtra,
through the Police Inspector,
Limgaon Police Station, Limbgaon,
Taluka : Limbgaon, District : Nanded. .. Respondents

.....
Mr R. S. Deshmukh, Sr. Advocate for the appellants
Mr A. R. Kale, APP for respondent/State
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CORAM : M.T. JOSHI, J.
DATE : 29/02/2016

ORAL JUDGMENT:

. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. Aggrieved by the order dated 05.02.2016 passed by the learned Sessions Judge under the provisions of Section 311 of the Code of Criminal Procedure, thereby directing to examine witness Raju s/o complainant

Vaijnath Kolhe, claiming to be eye-witness, the original accused are before this Court.

3. The prosecution case would show that on 24.06.2014 there was altercation between the deceased and the present petitioners in the noon near a field. In the following night, the dead body of the deceased was found in the field. In the circumstances, on the complaint of P.W. 3 – Vaijnath, son of the deceased, crime came to be registered.

4. During the investigation, the statement of said Raju was not recorded. The deposition of the complainant was recorded by the learned Additional Sessions Judge as P.W. 3 on 17.11.2015. After examination of some more witnesses, out of which as some of the witnesses did not support the prosecution, the State filed an application at Exh. 43 under Section 311 of the Code of Criminal procedure. It was claimed by the State that, at the time of the commission of the crime, one child witness namely; Raju was present at the time of the incident. The Investigation Officer, however, did not record his statement and therefore it is necessary to examine the said witness.

5. The petitioners opposed the application contending therein that there is nothing on record to show that the said witness is eye-witness and there is absolutely no reason to come to the conclusion from the statement of any of the witnesses that said Raju was present at the time of occurrence.

6. The learned Additional Sessions Judge, however, concluded that there would be no prejudice to the petitioners as they can very well cross-examine him. It was further observed that, the prosecution should not suffer for the fault of Investigating Officer and that it was expedient for the just decision of the case to call the said witness and therefore the said application was allowed.

7. Mr. R. S. Deshmukh, learned counsel for the petitioners, points towards the fact that, none of the statement of any of the witnesses as well as the deposition of the complainant recorded before the Court would show that said Raju was eye-witness to the said incident.

8. On the other hand, learned APP points towards the Statement of the witnesses, which would show that, at the time of filing of the complaint said Raju i.e. child of the complainant has accompanied him to the Police Station.

9. In the application at Exh. 43, the State has contended that, at the time of commission of crime one child witness namely; Raju was present. He has seen the incident and the complainant P.W. 3 has deposed about his presence at the time of incident. The deposition of complainant however would not show that child Raju was present at the time of the commission of offence. The deposition would show that when the complainant and all others went to the field, they found the dead body and at that time his son i.e. Raju was there.

10. If all these facts are taken into consideration and when the deposition of the complainant also would not show that at any time it was disclosed to him that his son Raju was eye-witness to the said incident, fishing and roving enquiry by examining the said Raju

would be nothing but filling up of lacunae in the prosecution case. In that view of the matter, the following order.

ORDER

(I) The Writ Petition is hereby allowed.

(II) The order dated 05.02.2016 passed by the learned Additional Sessions Judge, Nanded below Exh. 43 in Sessions Case No. 108/2015 thereby the said application came to be allowed by summoning the child witness namely; Raju, as prosecution witness, is hereby set aside.

Instead the said Application Exh. 43 is dismissed.

11. Rule is made absolute in the aforesaid terms.

[M.T. JOSHI]
JUDGE