

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 4718 OF 2015

- 1] Sopan Baburao Wakchaure,
Age 52 years, Occu.: Agri.,
R/o – Punatgaon, Tq.- Newasa,
District – Ahamadnagar
- 2] Dnyandeo Baburao Wakchaure,
Age : 51 years, Occu.: Agri.,
R/o – Punatgaon, Tq-Newasa,
District – Ahamadnagar
- 3] Machindra Sopan Wakchaure,
Age : 28 years, Occu.: Agri.,
R/o-Punatgaon, Tq.-Newasa,
District – Ahamadnagar
- 4] Ekbal Amin Shaikh,
Age : 26 years, Occu.: Agri.,
R/o-Punatgaon, Tq.-Newasa,
District – Ahamadnagar

.. Applicants
(Orig. Accused)

Vs.

- 1] The State of Maharashtra
- 2] Bapusaheb Vitthal Wakchaure,
Age : Major, Occu.: Agri.,
R/o-Punatgaon, Tq-Newasa,
District – Ahmednagar

.. Respondents
(Orig. Complainant)

AND

CRIMINAL APPLICATION NO. 5528 OF 2016

IN

CRIMINAL APPLICATION NO. 4718 OF 2015

(Sopan Baburao Wakchaure and ors.

Vs.

The State of Maharashtra and anr.)

Mr. M.G. Kolse Patil, Advocate for the applicant in both Applications

Mr. A.R. Kale, APP for the respondent/State

Mr. K.B. Jadhav, Advocate for respondent no.2 in both Applications

CORAM : V.K. JADHAV, J.

DATE : 18/10/2016

ORAL ORDER :

Criminal Application No. 4718 of 2015 is heard finally with consent of the parties at the admission stage.

2. Being aggrieved by the judgment and order dated 21/6/2014 passed by the Additional Sessions Judge, Newasa in Criminal Appeal No. 29 of 2014, the original accused have preferred this Criminal Application.

3. Brief facts giving rise to the present Criminal Application No.4718 of 2015, are as follows :-

. On the basis of the complaint lodged by the respondent no.2, crime no. 209 of 2005 came to be registered at Police Station, Newasa against the present applicants for having committed offences

punishable under section 325, 324, 323, 504, 506 r/w. 34 of the Indian Penal Code. After due investigation, the concerned Police Station has submitted chargesheet before the Court against the present applicants for having committed offences punishable under section 325, 324, 323, 504, 506 r/w. 34 of the Indian Penal Code and the case is registered as R.C.C. No. 13 of 2006. The learned Judicial Magistrate First Class, Newasa by order dated 16/10/2010, framed the charge against the present applicants for the offences punishable under section 325, 324, 323, 504, 506 r/w. 34 of the Indian Penal Code. The applicants/accused pleaded not guilty to the charge and claimed to be tried. The learned Judicial Magistrate First Class Court No.2, Newasa by judgment and order dated 18/3/2013 in the said R.C.C. No. 13 of 2006 acquitted all the applicants for the aforesaid offences.

. Being aggrieved by the same, the respondent no.2 has preferred criminal appeal no. 29 of 2014 against the judgment and order of acquittal passed by the learned Magistrate, as aforesaid. The learned Additional Sessions Judge, Newasa by judgment and order dated 21/6/2014, in the said Criminal Appeal No. 29 of

2014 partly allowed the appeal and thereby quashed and set aside the judgment and order passed by the learned Magistrate dated 18/3/2013 in R.C.C. No. 13 of 2006 and further directed the Magistrate, retrial of the case against the applicants, to be disposed of within three months and accordingly remanded the matter. Hence, this Criminal Application No.4718 of 2015.

4. Learned counsel for the applicants submits that the said appeal was preferred before the Sessions Court without obtaining leave of High Court, as required under sub-section 3 of section 378 of the Code of Criminal Procedure. Learned counsel submits that the right to prefer an appeal is conferred upon the victim including the heirs and others under the proviso to section 372 of the Code of Criminal Procedure but the said right is conferred only after obtaining leave of the High Court, as required under section 378(3) of the Code of Criminal Procedure. Learned counsel submits that proviso to section 372 of the Cr.P.C. must be read alongwith the main enactment i.e. together with sub-section (3) of section 378 of the Cr.P.C. Learned counsel submits that thus the appeal before the Sessions Judge was not maintainable and the judgment

and order passed by the learned Additional Sessions Judge in Criminal Appeal No. 29 of 2014 is liable to be quashed and set aside on this ground alone. Learned counsel also submits that even though the summons were issued to the respondent no.2-original complainant and the witness many times, however, only one witness has attended the Court date and he has also not supported the prosecution case. Even though, the respondent no.2/original complainant has engaged a private counsel, respondent no.2 or his counsel failed to attend the said case. Learned Magistrate has therefore rightly acquitted the applicants/accused persons in the said case. Thus, the judgment and order passed by the learned Additional Sessions Judge, directing retrial of the present applicants, is not proper, correct and legal.

5. Learned counsel for the applicants, in order to substantiate his contentions, places his reliance on the following cases :-

i) **Satya Pal Singh V. State of Madhya Pradesh and others 2015 AIR SCW 6251**

ii) **Subhash Chand Vs. State (Delhi Administration) 2013 AIR SCW 356**

iii) **Mohd. Azim Sheikh Iibrahim Vs. Mehamuda Anjum**
Mohd. Azim LAWS (BOM)-2013-8-231

iv) **Balasaheb Rangnath Khade Vs. State of**
Maharashtra and Ors. 2013 ALL MR (Cri) 1153

v) **Balasaheb Rangnath Khade Vs. State of**
Maharashtra and Ors. 2012 (3) Bom.C.R.(Cri.) 632

6. Learned counsel for respondent no.2-original complainant submits that so far as case of "**Subhash Chand Vs. State (Delhi Administration)**" (cited supra), relied on by learned counsel for the applicants, is concerned, in the said case, the appeal filed by the complainant was considered with the observation that the complainant's appeal against the order of acquittal is a category by itself and it is finally observed by the Supreme Court that the complainant can file an application for special leave to appeal against the order of acquittal of any kind only to the High Court and he cannot file such appeal in the Sessions Court. Learned counsel submits that the provisions of section 378(4) of the Cr.P.C. are considered by the Supreme Court with the observation that the complainant's appeal against the order of acquittal is a category by itself. Learned counsel submits that ratio in the case

of "**Subhash Chand Vs. State (Delhi Administration)**" (cited supra) cannot be made applicable in the facts and circumstances of the present case.

7. Learned counsel for the respondent no.2 submits that in **Satya Pal Singh's** case (cited supra), the Sessions Court has passed order of acquittal and the victim has preferred the appeal under the provisions of section 372 of Cr.P.C. The High Court, however, has disposed of the appeal by passing order without examining, as to whether leave to file appeal filed by the appellant, as provided under sub-section 3 of Section 378 of the Cr.P.C. can be granted or not. The correctness of the said order passed by the High Court was questioned before the Supreme Court urging various grounds. The Supreme Court, while concluding the said issue, has observed that the appellant in that case being the father of the deceased, has statutory right to prefer an appeal against the order of acquittal under the provisions of section 372 of the Cr.P.C. but only after obtaining the leave of the High Court, as required under sub-section (3) of section 378 of the Cr.P.C.

. Learned counsel for respondent no.2 submits that the provisions of sub-section (3) of section 378 of the Cr.P.C. applies if the appeal is preferred to the High Court under sub-section (1) of section 378 of the Cr.P.C. and the same shall not be entertained except with the leave of the High Court. Learned counsel submits that in the instant case, the judgment and order of acquittal came to be passed by the Magistrate and, therefore, in terms of the proviso to section 372 of the Cr.P.C., such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. Learned counsel submits that the provisions of sub-section (3) of section 378 of the Cr.P.C. does not apply to such category of appeal. The learned Sessions Judge has therefore rightly entertained the appeal and there is no substance in the submissions made on behalf of the applicants in that regard. Learned counsel submits that in the case of **"Balasaheb Khade Vs. State of Maharashtra"** (cited supra at Paragraph No. 5(iv)), the Division Bench of this Court, while dealing with the same issue, took a different view. Justice Kanade held that the proviso makes an exception and makes exception to the general rule provided under section 372 of the

Cr.P.C. It is therefore not necessary to obtain leave from the High Court in three types of cases as provided in proviso to section 372 of the Cr.P.C., however, dis-agreeing with the view, Justice Thipsay held that the requirement of leave as envisaged under section 378(3) of the Cr.P.C. cannot be dispensed with merely because such appeal has been filed by victim as defined in section (2) (wa) of the Cr.P.C.. Thus, the matter was referred to the third Judge and accordingly, it is held that the victim is not required to apply for obtaining leave of the High Court to file any of the appeals under the proviso to section 372 of the Cr.P.C. Learned counsel submits that this view was taken prior to **Satya Pal Singh's** case as decided by the Supreme Court referred supra. Furthermore, the Bombay High Court has taken the said view in terms of the provisions of section 372 proviso read with section 378(3) of the Cr.P.C.

8. Learned counsel for respondent no.2/original complainant submits that the Magistrate has observed in paragraph no.10 of the judgment of RCC No.13 of 2006 that even though 13 times, the witness summonses were issued, no report of the service of the said summons

was placed before the Court nor the witnesses remained present before the Court. Even though the Court has passed various orders below Exhibit 1 directing the prosecution to keep the witnesses present, however, the prosecution has not brought the witnesses before the Court. It has also observed by the Court that the complainant has also remained absent before the Court and there is no report of service of summons on him, placed before the Court. Learned counsel submits that the prosecution could examine only one prosecution witness, who has also turned hostile and the Magistrate has therefore acquitted all the applicants. Learned counsel submits that respondent no.2/complainant was not at fault. There is no service report placed before the Court and it is clear that the complainant and the prosecution witnesses never served with the witness summons. Under these circumstances, the learned Additional Sessions Judge has rightly directed the Magistrate retrial of the applicants/accused. Thus, no interference is required. There is no substance in the Criminal Application No.4718 of 2015 and the same is liable to be dismissed.

9. I have also heard learned A.P.P. for the State.

10. In the instant case, the learned Magistrate has acquitted all the applicants for having committed offences punishable under section 325, 324, 323, 504, 506 r/w. 34 of the Indian Penal Code. Being aggrieved by the same, respondent no.2-the victim has preferred appeal before the Sessions Court. On the basis of his complaint, the police machinery was set in motion and after due investigation, the chargesheet came to be submitted before the Court and the applicants/accused came to be tried by the Magistrate.

11. In **Subhash Chand**'s case (cited supra), relied on by learned counsel for the applicants, a Food Inspector purchased a sample of sweetened carbonated water for analysis and after following the necessary procedure, sent the said sample to the Public Analyst for analysis. Public Analyst opined that the sample does not conform to the prescribed standard. After conclusion of the investigation, the respondent State through its Local Health Authority filed a complaint before the Magistrate against the applicant/accused in that case for violating the provisions of Food

Adulteration Act, 1954. Thus, the short point which arose for consideration before the Supreme Court was as to whether in a complaint case, an appeal from order of acquittal of the Magistrate would lie to the Sessions Court under section 378(1)(a) of the Cr.P.C. or to the High Court under section 378(4) of the Cr.P.C. The Supreme Court, by referring the provisions of subsection (4) of section 378 of the Cr.P.C., observed that for an appeal against an order of acquittal passed in case instituted upon a complaint, and in such case, if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. The Supreme Court further held that the complainant's appeal against an order of acquittal is a category by itself and, therefore, the complainant can file application for special leave to the appeal against order of acquittal of any kind only to the High Court and, he cannot file such an appeal to the Sessions Court.

12. In the instant case, the appeal has been preferred by the victim before the Sessions Court against the judgment and order of acquittal passed by

the Magistrate and, therefore, the provisions of section 378 sub-section (4) of the Cr.P.C. does not attract. There is no question of obtaining any special leave by the victim in terms of the provisions of section 378(4) of the Cr.P.C. Thus, the ratio of **Subhash Chand**'s case (cited supra) cannot be made applicable to the instant case.

13. In order to appreciate the legal position, it would be appropriate if the provisions of section 372 and section 378 of the Code of Criminal Procedure are reproduced hereinbelow :-

"372. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

...

378. Appeal in case of acquittal.

(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5) —

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal —

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

14. As per the provisions of section 372 of the Cr.P.C., no appeal shall lie from any judgment or order of a criminal court except as provided by the Code or by any other law for the time being in force. Proviso to section 372 of the Cr.P.C. reads that the victim shall have right to prefer appeal against any order passed by the Court : (i) acquitting the accused, (ii) convicting for a lesser offence and (iii) imposing inadequate compensation and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. Section 378 sub-section 1(a) speaks that the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence and clause (b) of sub-section (1) of section 378 of the Cr.P.C. empowers the State Government to direct the Public Prosecutor to

present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-section (3) of section 378 contemplates leave of the High Court in case appeal is preferred under sub-section (1) or sub-section (2) of Section 378 of the Cr.P.C. Sub-section (3) of section 378 speaks that no appeal to the High Court would be entertained except with the leave of the High Court. Sub-section (3) of section 378 came to be amended by the Act No. 25 of 2005 and the words "No appeal" is substituted by the words "No appeal to the High Court" with effect from 26/3/2006. In view of this substitution, if the appeal is to be preferred to the High Court as provided under sub-section (1) or sub-section (2) of section 378 of the Cr.P.C., the same shall not be entertained except with the leave of the High Court. In the instant case, the appeal is not required to be filed before the High Court and, therefore, the provisions of sub-section (3) of section 378 of the Cr.P.C. does not apply.

15. Thus, the Supreme Court has concluded the issue in **Satya Pal Singh's** case (cited supra) in different context. The Hon'ble Supreme Court has concluded that the legal heirs of the victim has statutory right to prefer an appeal to the High Court against the order of acquittal under proviso to section 372 of the Cr.P.C. but only after obtaining leave of the High Court, as required under sub-section (3) of section 378 of the Cr.P.C. It is thus clear that in case if the appeal is to be preferred by taking recourse to the provisions of section 378(1)(a) of the Cr.P.C., the question of obtaining leave of the High Court, as required under sub-section (3) of section 378 of the Cr.P.C. does not arise.

16. Division Bench of the Bombay High Court in the case of **Balasaheb Khade Vs. State of Maharashtra** (cited supra at paragraph no.5(iv)), has taken a different view, however, in the light of the observations made by the Supreme Court in **Satya Pal Singh's** case (cited supra), the issue is now finally dealt with and the Supreme Court has held, as aforesaid.

17. In view of the above discussion, the learned Additional Sessions Judge has rightly entertained the appeal. There is no question of filing the application for obtaining leave of the High Court in such type of cases and, thereafter, to prefer an appeal before the Sessions Court. The submissions made on behalf of the applicants are thus devoid of any merit.

18. On perusal of the judgment and order passed by the learned Additional Sessions Judge, I find that the learned Additional Sessions Judge has rightly directed the Magistrate retrial of the applicants/accused in the said case. The learned Additional Sessions Judge has observed that the respondent no.2/original complainant was not at fault. The respondent no.2/original complainant has lodged complaint in the Police Station against the applicants for having committed the offences punishable under section 325, 324, 323, 504, 506 r/w. 34 of the Indian Penal Code. The prosecution has not examined any witness except one witness before the Magistrate. Even though the service report of the witness summons was never produced before the Court, the Magistrate has closed the prosecution evidence and acquitted the

applicants/accused for want of evidence. I do not find any fault in the judgment and order passed by the learned Additional Sessions Judge, directing retrial of the case. In view of above, there is no substance in the Criminal Application No.4718 of 2015. Criminal Application No.4718 of 2015 is thus liable to be dismissed. Hence, the following order :-

ORDER

I) Criminal Application No. 4718 of 2015 is hereby dismissed.

19. In view of dismissal of Criminal Application no. 4718 of 2015, Criminal Application No. 5528 of 2016, filed in the above Criminal Application, seeking restoration of the interim relief granted earlier, does not require any consideration and the same stands disposed of.

[V.K. JADHAV]
JUDGE

arp/