

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 3126 OF 2017

Nandkumar S/o Baburao Warule
Age : 60 years, Occ : Agri.,
R/o Jalgaon, Tq. Rahata,
Dist. Ahmednagar.

..APPLICANT

VERSUS

1. Mahesh Prakash Shelke
Age : 25 years, Occ : Agri.,
R/o Wakadi Shivar, Rahata,
Tq. Rahata, Dist. Ahmednagar.
2. The State of Maharashtra
Through Police Inspector,
Shrirampur Police Station,
Tq. Shrirampur, Dist. Ahmednagar.

..RESPONDENTS

...

Mr. Sandeep Gorde Patil, Advocate for the Applicant.
Mr. D.R. Kale, APP for Respondent/State
Mr. K.G. Patil, Advocate for Respondent No.1

**CORAM: S.S.SHINDE &
MANGESH S. PATIL,JJ.**

**RESERVED ON : 16th November, 2017
PRONOUNCED ON : 21st November, 2017.**

ORDER (Per S.S.Shinde, J.):

. Heard the learned counsel appearing
for the applicant, learned A.P.P. appearing
for the respondent/State and the learned

counsel appearing for Respondent No.1.

2. The learned counsel appearing for the applicant submits that, though the statements of the eye witnesses were recorded, the prosecution did not examine those two eye witnesses viz:- Sunil Bhausaheb Shelke and Dnyaneshwar Kashinath Wagh during the course of trial. He submits that, it was the duty of the trial Court to invoke the provisions of Section 311 of the Code of Criminal Procedure and summon those eye witnesses in the interest of justice. However, the trial Court failed in its duties to summon the eye witnesses. In support of the aforesaid contentions, the learned counsel appearing for the applicant placed reliance on the exposition of law by the Supreme Court in the cases of **Shailendra Kumar V/s State of Bihar¹** and **Inspector of**

1 2002 AIR (SC) 270

Police, Tamil Nadu V/s John David² and submits that, the application seeking leave to appeal may be allowed.

3. The learned counsel appearing for Respondent No.1 submits that, failure to examine the material, independent or other witnesses cannot be a ground to entertain the present application. He submits that, in fact there were no eye witnesses to the incident. It is submitted that, once the benefit of doubt is given to the accused for failure to examine the material or other witnesses, and if the order of acquittal is supported by cogent reasons, there is no reason to interfere in the order of acquittal. He submits that, in the present case, the trial Court after appreciation of evidence on record has granted benefit of doubt. In support of the submissions made across the

2 2011 AIR (SCW) 2764

Bar, he placed reliance on the exposition of law by the Supreme Court and the High Court in the cases of **Takhaji Hiraji V/s Thakore Kubersing Chamansing and others³**, **Satyajit Banerjee and others V/s State of W.B. and others⁴** and **State of Maharashtra V/s Rohan Pushpraj Fanasgaonkar⁵**. Therefore, the learned counsel appearing for Respondent No.1 submits that, the application seeking leave to appeal may be rejected.

4. Upon hearing the learned counsel appearing appearing for the applicant, the learned A.P.P. appearing for the Respondent/State and the learned counsel appearing for Respondent No.1, and upon perusal of the notes of evidence and the fact that, the prosecution did not examine the alleged eye witnesses and the trial Court did not invoke the provisions of Section 311 of

3 (2001)6 SCC 145

4 (2005) 1 SCC 115

5 2010(3) Mh.L.J. (Cri.) 121)

the Code of Criminal Procedure to summon those alleged eye witnesses, keeping in view the judgment of the Supreme court in the case of **Shailendra Kumar (supra)**, we are of the opinion that, the application seeking leave to appeal deserves to be allowed. Even otherwise, under section 372 of the Code of Criminal Procedure the right is given to the victim to prefer an appeal.

5. For the reasons aforesaid, the application is allowed and the same stands disposed of.

6. **Appeal is admitted.** On admission, the learned A.P.P. waives service on behalf of the Respondent/State and Mr.K.G. Patil, learned counsel waives service on behalf of Respondent No.1.

7. Action under section 390 of Code of

Criminal Procedure to follow against
Respondent No.1-accused before the Court of
the Additional Sessions Judge, Kopargaon.

[MANGESH S. PATIL, J.]

[S.S. SHINDE, J.]

SGA