

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 922 OF 2013

Siraj S/o Daulatkhan Pathan,
Age : 33 Years, Occ : Business,
R/o. Mangalgate, Ahmednagar,
Dist. Ahmednagar.

...PETITIONER

VERSUS

- 1] The State of Maharashtra
- 2] Balu @ Balasaheb S/o Arjun Ralebhat,
Age : 32 Years, Occ. Nil,
- 3] Gulshan S/o Hiranman Andhare,
Age : 28 Years, Occ. Nil,
- 4] Baliram S/o Arjun Ralebhat,
Age : 30 Years, Occu. Nil,
- 5] Nishal S/o Pralhad Raut,
Age : 33 Years, Occ. Nil,
- 6] Uddhav S/o Arjun Ralebhat,
Age : 25 Years, Occ. Nil,
- 7] Rahul S/o Hiranman Andhare,
Age : 20 Years, Occ. Nil,
- 8] Hiranman S/o Dasu Andhare,
Age : 60 Years Occ. Nil,
- 9] Jaya D/o Hiranman Andhare,
Age : 25 Years, Occ. Nil,

All Resident of Jamkhed,
Tal. Jamkhed, Dist. Ahmednagar.

..RESPONDENTS

...
Advocate for Applicant : Mr. Mazhar Jahagirdar
A.P.P. for Respondent-State: Mr. G.O.Wattamwar
Advocate for Respondent nos. 2 to 9 : Mr. N. B. Khandare
...

CORAM : MANGESH S. PATIL, J.

Reserved on : 14.06.2018
Pronounced on : 13.07.2018

JUDGMENT:

A very interesting point has cropped up in this Writ Petition. Whether a person who is posed to be an eye witness to a crime can prefer a Writ Petition impugning the Judgment and order of acquittal and insist for re-opening the trial and examining him as a witness.

The facts leading to filing of this Writ Petition may be summarized as under :-

2] The prosecution case was to the effect that on 31 March 2009 at about 9.00 p.m one Avinash Bharate was found murdered near Beed-Jamkhed road near Bhagyalaxmi Kala Kendra at Jamkhed. The motive sought to be attributed was that the dispute had arisen between the accused persons that is the respondents here-in and the deceased when the latter insisted for a specific act to be played at the dance show. It was alleged that the respondent/accused no.1 had assaulted Avinash with a tommy on the head and the other accused having beaten him with sticks and stones. It was prosecution case that the incident was

witnessed by several persons including the petitioner. During the course of the trial the witnesses who were cited as eye witnesses turned hostile, similarly, even the panch witnesses turned hostile. By the judgment and order dated 30.10.2010 the respondent/accused were acquitted of all the charges. Since the petitioner was also cited as an eye witness but was not examined, he has preferred this Writ Petition.

3] According to the learned Advocate for the petitioner, though he was an eye witness and, his statement was recorded under Section 161 of the Code of Criminal Procedure, which was annexed with the charge-sheet, still no attempt was made to examine him. The prosecution for ulterior reasons avoided to call him as a witness. Even the learned Additional Sessions Judge failed to exercise the powers under Section 311 of the Code of Criminal Procedure. All this has resulted in miscarriage of justice. The learned Advocate also placed heavy reliance upon the decision of the Supreme Court in *Zahira Habibulla H Sheikh And Another Vs. State of Gujarat and others ; A.I.R. 2004 Supreme Court 3114* ; known as Best Bakery Case. The learned Advocate therefore submitted that the Judgment and order passed by the learned Additional Sessions Judge acquitting the respondents be quashed and set aside and to remand the Sessions case for trial afresh.

4] The learned A.P.P. referring to the affidavit of the Investigating

Officer, submitted that an attempt was made to examine the petitioner by issuing a witness summons. However it could not be served as he was not found at the residential address and a report was made by the concerned Police Constable (Exhibit R-1). He would also submit that the whereabouts of the petitioner were not known and even a second report to that effect was submitted by the concerned police constable on 29th September 2010 (Exhibit R-2). He then pointed out that all the material witnesses had turned hostile to the prosecution and even a friend of the petitioner who was also an eye witness by name Subhash Appasaheb Markad was not ready to co-operate the prosecution. A specific pursis was moved by the prosecutor on 11 October 2010 (Exhibit R-3) discharging him. The learned prosecutor would further submit that even an application was again moved by the prosecutor (Exhibit R-4) requesting for re-issuing the witness summons to the petitioner. However, after obtaining say of the respondent/accused, by an order the learned Additional Sessions Judge rejected the application (Exhibit R-4). The learned A.P.P. would submit that every attempt was made to procure presence of the petitioner and to examine him as a witness.

5] The learned Prosecutor would further submit that in fact it would be in the interest of the prosecution even if the Sessions case is remanded for trial afresh allowing the petitioner to be examined. He

would then point out that the Investigating Officer in his affidavit has specifically mentioned about having submitted a proposal to the District Government Pleader, Ahmednagar requesting for preferring an appeal against the order of acquittal on 25.12.2013 itself. (Exhibit R-5). However, the State has not yet preferred any leave to appeal.

6] The learned Advocate for the respondent nos. 2 to 9 by referring to the affidavit in reply of the respondent Uddhav Arjun Ralebhat strongly opposed the petition. He submitted that after a full-fledged trial the respondents have been acquitted. An attempt was also made to examine the petitioner. Witness summons was issued. He was not traceable. It is not that the trial was closed abruptly or hurriedly without extending any opportunity to the prosecution to examine him. There is no substance in the allegation that the prosecution was remiss. He would further submit that the petitioner has no *locus standi* to impugn the Judgment and order in a circuitous manner. The only remedy to impugn the Judgment and order of the acquittal is to prefer an appeal under Section 378 of the Code of Criminal Procedure by seeking leave of the Court. Section 372 of that Code does not empower a witness to prefer an appeal and therefore, the writ petition may be dismissed.

7] The learned Advocate for respondent nos. 2 to 9 would further

submit that the decision in the case of Best Bakery Case (supra) is not applicable to the facts and circumstances of this case, and the course adopted therein cannot be followed in the matter in hand.

8] I have carefully gone through the record and proceedings. Needless to state that several witnesses who were posed to be the eye witnesses, had turned hostile to the prosecution. Even the panch witnesses had turned hostile. It is only after examining as many as 16 witnesses, by the impugned Judgment and order, the respondent nos. 2 to 9 were acquitted. It is also apparent that a witness summon was also issued to the petitioner who was cited as witness no. 27. Initially a report was submitted that it could not be served (Exhibit R-1). Again the witness summons was issued but it was reported by the concerned Constable that he was not traceable (Exhibit R-2). Another request was made to issue him a fresh witness summon by submitting an application (Exhibit R-4) but it was rejected by the learned Additional Sessions Judge. Therefore, there is no room to believe that the prosecution was acting with some ulterior motive which is sought to be attributed to it. Similarly, even no fault can be found with the learned Additional Sessions Judge. It is to be noted that the first witness Sanjay Maruti Janjire was examined on 4 May 2010 and the last witness i.e. the Investigating Officer namely Gulab Kisan Ahire was examined on 22 October 2010. Therefore, it does not appear that the trial was

concluded in a hurried manner, so as to give rise to any doubt sufficient to attribute any motive on the part of the Prosecutor.

9] In this regard it is also pertinent to note that several persons who were cited as eye witnesses had turned hostile to the prosecution. For that matter, even the friend of the petitioner who was accompanying him to the spot by name Subhash Appasaheb Markad was served with a witness summons and had turned up to the Court but was discharged by the prosecution by submitting a pursis (Exhibit R-3) since he was not ready to co-operate the prosecution and had denied to have any knowledge of the incident. If such was the State of affairs, there is no room to believe that either the prosecution was indifferent or had some oblique motive or that the learned Additional Sessions Judge had been indolent.

10] It is apposite to note that the petitioner is a witness, who has no right to prefer any appeal, since he is not a victim as contemplated under Section 372 of the Code of Criminal Procedure. Therefore, he has no right to prefer any appeal against acquittal under Section 378 of the Code of Criminal Procedure. When the law requires a thing to be done in a particular manner and confers the right to appeal only to a victim of a crime, that thing should be done, only in that particular manner. It cannot be done circuitously. Precisely for these reasons, the present

attempt being made by the petitioner is nothing but a circuitous attempt to impugn the Judgment and order when he is not authorized in law to impugn it.

11] It is further pertinent to note that even without attributing the *mala fides* and doubting the bona fides of the petitioner, it is important to note that the impugned Judgment and order was passed on 30 October 2010 and according to the petitioner he only came to know about the order in January 2013. Conspicuously, he has avoided to mention in the petition as to the source of his knowledge. It is interesting to note that going by his statement recorded under Section 161 of the Code of Criminal Procedure, he had arrived at the scene along with his friend, witness Subhash Markad on a motorcycle and it was there routine to attend the dance show at least twice a month and it was their hobby. If such was the state of affairs, as is pointed out herein-above, Subhash Markad was duly served with a witness summons and had even attended the Court. Even the Prosecutor had an occasion to talk to him and it is only thereafter that the Prosecutor had discharged him by submitting a pursis, since he was not ready to co-operate (Exhibit-R-3). It seems highly improbable and therefore unbelievable that the petitioner inspite of being a fast friend of Subhash Markad could not have been aware of either the trial or its ultimate decision. Therefore, even if one decides not to doubt the bona fides of

the petitioner, the delay in preferring the Writ Petition, in my considered view, also needs to be taken into account, else such a practice of allowing a witnesses to impugn the Judgment of acquittal after a lapse of some time, would give a handle to unscrupulous witnesses.

12] In the Best Bakery case the fact situation was entirely different as can be seen from the Judgment and order of the Supreme Court. There were several serious angles. The witness was already examined during the trial but had approached the Supreme Court by filing an affidavit, stating the circumstances which had compelled her to depose in a manner in which she had deposed. Taking into account several such factors the Judgment and order of acquittal was quashed and set-aside at the instance of the witness and the matter was remanded for a fresh trial outside the State of Gujarat. With respect, the fact situation in the matter in hand is altogether different and one cannot draw a parallel. The petitioner therefore, is not entitle to seek any benefit from the decision in the case of Best Bakery. The Writ Petition does not hold merit and is liable to be dismissed.

13] The Writ Petition is dismissed.

14] The rule is discharged.

(MANGESH S. PATIL, J.)