

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

CRIMINAL REVISION APPLICATION NO. 63 OF 2019

1. Vitthal Sitaram Thange,
Age: 49 years, Occu. Agriculturist,
2. Haribhau Suryaji Thange,
Age: 69 years, Occu. Agriculturist,
3. Naba Bhojuml Manchare,
Age: 59 years, Occu. Agriculturist,
4. Bhausahab Bhojuml Manchare,
Age: 61 years, Occu. Agriculturist,

All R/o Tikhhol, Tq. Parner,
Dist. Ahmednagar.

... **APPLICANTS**

Versus

1. The State of Maharashtra,
Through Police Inspector,
Parner Police Station,
Taluka – Parner, Dist. Ahmednagar.
2. Kundanmal Bandulal Katariya,
Deceased through his legal heir
and injured witness
Santosh Kundanmal Katariya
Age: 53 years, Occ. Agriculturist,
R/o Tikhhol, Tq. Parner,
Dist. Ahmednagar.

... **RESPONDENTS**

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Advocate for Applicants : Mr. Amol K. Gawali
Advocate for Respondents/State : Mr. S.B. Joshi
Advocate for Respondent No.2: Mr. R.S. Kasar

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CORAM : MANGESH S. PATIL, J.
RESERVED ON: 04.10.2019
PRONOUNCED ON: 06.11.2019

JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned A.P.P. waives service for the respondent no.1, learned advocate Mr. R.S. Kasar waives service for the respondent no.2- original complainant. With the consent of both the sides the matter is heard finally at the stage of admission.

2. Only a short point which arises in this revision is as to whether the learned Additional Sessions Judge was right in allowing the appeal preferred by the respondent no.2 who is the heir of the original complainant and remanding the matter back to the trial Court for further inquiry.

3. According to the prosecution on account of a previous civil dispute between the deceased and his cousins a suit for partition was filed which was decreed. His cousins then put the decree to execution. During pendency of the execution cousins sold some of the disputed property to the present applicants-accused. On that basis they tried to take forcible possession of the disputed property. The deceased therefore filed Regular Civil Suit against them and an injunction was clamped against the applicants which was in operation for about ten years. However, the injunction was vacated in an

appeal preferred by the applicants but was again restored by this Court. It was alleged that annoyed by injunction only three days after their appeal against the order of injunction was vacated by the District Court the applicants tried to take forcible possession of the disputed property and in the process caused grievous hurt to the deceased and the respondent no.2 who is his son. The matter was reported to the police. The offence was registered and in due course of time the applicants were charge-sheeted for the offence punishable under Section 325, 324, 504, 506 read with Section 34 of the I.P.C. The learned Magistrate however framed charge for the offences punishable under Section 326, 504, 506 read with Section 34 of the I.P.C. At the conclusion of the trial the learned Magistrate acquitted the applicants of all the charges.

4. The respondent no.2 being aggrieved and dissatisfied by the judgment of acquittal preferred appeal under Section 372 of the Cr.P.C. before the Sessions Court.

5. It was submitted before the learned Additional Sessions Judge that there was no fair trial. Material witnesses were not examined. An eye witness, the Medical Officer, the Officer In charge of the Police Station and even the Investigating Officer were not examined. On 10.02.2011 the Investigating Officer was present in the Court but the Magistrate was on leave and therefore his evidence could not be recorded on that day. On the next

date the Investigating Officer was absent but without directing the witness summons to be issued to the Investigating Officer and the Medical Officer, the Magistrate closed the evidence for the prosecution which deprived the respondent no.2 of a fair trial. Following decisions of the Supreme Court were also cited before the learned Appellate Court:

- i) *State of Maharashtra Vs. Champalal Punjaji Shah; 1981 Cri.L.J. 1273.*
- ii) *Himanshu Singh Sabharwal Vs. State of M.P. & Ors.; 2008 AIR SCW 2206.*
- iii) *Akalu Ahir and Ors Vs. Ramdeo Rama; AIR 1973 Supreme Court 2145.*

6. As against this the learned advocate for the applicants opposed the request for remand and supported the judgment of acquittal. After appreciating the arguments and the record, by the judgment and order the learned Additional Sessions Judge allowed the appeal of the respondents. He set aside the judgment and order passed by the Magistrate and remanded the matter for further inquiry by giving direction to the trial Court to extend fair opportunity to the prosecution to examine material witnesses. Hence this revision.

7. The learned advocate for the applicant vehemently submitted that the learned Additional Sessions Judge ought to have re-appreciated the evidence which was already recorded by the trial Court and should have examined the judgment and order passed by the Magistrate objectively. Without resorting to such an exercise, the learned Additional Sessions Judge

has taken a shortcut in straightway directing remand. Once the Magistrate has already appreciated the evidence and had come with plausible reasons for acquittal the learned Additional Sessions Judge ought not to have abdicated his duty.

8. The learned advocate for the applicants would then submit that fair opportunity was extended to the prosecution to examine its witnesses. It was unable to procure the Medical Officer for four years. The trial was going on for ten long years and the learned Magistrate was left with no other alternative but to close the evidence of the prosecution and to proceed with the trial. Thus according to the learned advocate, the impugned judgment and order directing remand is illegal and may be quashed and set aside by invoking the revisional powers of this Court under Section 397 of the Cr.P.C.

9. Per contra, the learned A.P.P. and the learned advocate for the respondent no.2 supported the impugned judgment and order. They submitted that it was a case of brutal assault causing grievous injuries to the deceased and the respondent no.2. There was a strong motive. An injunction was clamped against the applicants in a suit filed by the deceased. Soon after the injunction was vacated by the Appellate Court in an appeal preferred by them they had attempted to take forcible possession of the disputed land and in the process had assaulted them. It was therefore essential for the Magistrate to

have made every attempt to procure presence of the material witnesses like one eye witness Chetan, the Medical Officer who had examined the deceased and the respondent no.2 and even the Investigating Officer. They submit that non-examination of such vital witnesses has resulted in causing serious prejudice. No prejudice is likely to be caused to the applicants since they would be given an opportunity to cross-examine these witnesses.

10. I have carefully gone through the papers. At the outset, it is necessary to note that this Court will have to be very careful in scanning the evidence which has already been recorded by the learned Magistrate. Needless to state that in spite of the charge-sheet having been filed *inter alia* for the offence punishable under Section 325 of the I.P.C. the Magistrate had found the case to be fit enough to frame a charge for a more serious offence punishable under Section 326 of the I.P.C. Since the impugned order directs remand for further trial by extending opportunity to the prosecution to lead evidence, the observations and the conclusions of this Court should not cause any prejudice to either of the parties if at all this Court decides to dismiss the revision, since the Magistrate would once again be required to re-appreciate the evidence.

11. True it is that the trial was going on before the Magistrate for ten long years. Attempts were made to procure presence of the witnesses but in

futility.

12. Without repeating the prosecution version one can proceed to appreciate the facts and circumstances. The father of the respondent no.2 who was stated to be aged 65 years in the F.I.R. lodged by him had alleged that on account of the dispute pertaining to land in the evening of 06.05.2001 the applicants assaulted him. In the process even the respondent no.2 was injured. It was alleged that the left hand of the respondent no.2 and right hand of the informant had sustained fracture. However, the Magistrate refused to rely upon such version of the respondent no.2 on the ground that it was not supported by medical evidence.

13. The Magistrate thereafter found that both the Panch on the spot Panchanama Madhukar (PW-1) and Bhanudas (PW-5) had turned hostile and the recovery of weapon was not duly established. The Magistrate further held that though the incident had taken place on 06.05.2001 the F.I.R. was lodged on 07.05.2001 and therefore there was delay and there was no proper explanation. The Magistrate further observed that since the informant had died during pendency of the trial his testimony could not be recorded. The learned Magistrate also appreciated the testimony of respondent no.2 and found that it was pregnant with contradictions and improvisation. The prosecution had also examined the mother of the respondent no.2 by citing

her to be an eye witness. The learned Magistrate discarded her testimony by holding that she was not an eye witness since she had arrived at the scene after the incident. As far as testimony of Lata (PW-4) who is the wife of respondent no.2 is concerned the Magistrate found that she was also not a witness to the incident and her testimony was of no help.

14. It is important to note that the Magistrate has nowhere mentioned as to why and how the eye witness Chetan who was specifically mentioned in the F.I.R. to be present at the scene of the offence, the Medical Officer and the Investigating Officer could not be examined. The judgment is absolutely silent as to what efforts were made to call these witnesses. As has been rightly observed by the learned Additional Sessions Judge it was expected of the trial Magistrate to be more active. Instead of making all out efforts to trace out and call the material witnesses the Magistrate seems to have taken a passive approach and without even demonstrating as to what attempts were made to procure presence of these witnesses had concluded the trial and acquitted the applicants with whatever evidence that was available.

15. The learned Additional Sessions Judge noticed that though the trial was pending for long, in fact the applicants absence had caused delay in framing the charge. The charge was framed on 31.03.2008 and the trial was concluded on 09.08.2011. After going through the Roznama the learned

Additional Sessions Judge clearly noted that on 10.02.2011 the Investigating Officer was present but the Magistrate was on leave. On the next date the Investigating Officer was absent but Magistrate closed the evidence for the prosecution and posted the matter for examination of the accused under Section 313 of the Cr.P.C. The learned Additional Sessions Judge also noticed that the Magistrate took two to three days for examining the applicants and many more days for hearing the arguments. He further noticed that the arguments were heard on 16.06.2011 and the judgment was delivered by the Magistrate two months thereafter. He also observed that the Magistrate had shown unnecessary promptness in closing the evidence for the prosecution but had not shown equal diligence in concluding the trial. It is for these reasons that the learned Additional Sessions Judge found it fit to remand the case for further trial.

16. In my considered view, the aforementioned facts and circumstances clearly indicate that there has been no fair trial. If the Magistrate was fair enough he could have specifically mentioned in the judgment as to what steps had he taken to secure presence of the material witnesses. It was not expected of him to have played a passive role. Rather he should have been more positive and should have taken all out efforts to procure presence of the witnesses. Nothing of the sort can be made out from

the record. In my considered view, the learned Additional Sessions Judge was not left with any other alternative in the peculiar facts and circumstances of the case but to direct remand. He is justified in expecting the Magistrate to conduct the trial by extending opportunity to the prosecution to examine material witnesses. I find no apparent perversity or arbitrariness in the impugned order so as to enable this Court to cause any interference in exercising powers under Section 397 of the Cr.PC.

17. However, it is necessary to mention that the learned Additional Sessions Judge has not specified as to exactly what he means by extending fair opportunity to the prosecution to examine material witnesses since the impugned order is vague. It would certainly be a matter of serious prejudice being caused to the applicants if the prosecution is to recall and re-examine the witnesses who have already been examined and cross-examined. It is therefore necessary to clarify that the material witnesses to be examined by the prosecution after remand would not include the witnesses who have already been examined and cross-examined.

18. The revision is dismissed. However it is clarified that during such re-trial the prosecution shall not be entitled to recall and re-examine any of the prosecution witnesses whose testimonies have already been recorded. With this clarification the revision is dismissed.

19. The rule is discharged.

[MANGESH S. PATIL, J.]