

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

CRIMINAL WRIT PETITION NO.1919 OF 2019

Sau.Vidya Subhash Saindانشiv
Age: 54 Yrs., occu. Service,
R/o Belapur, Tq.Shrirampur,
Dist.Ahmednagar.

= **PETITIONER**
(orig.Complainant)

VERSUS

1. The State of Maharashtra
Through its Addl.Public
Prosecutor, Kopargaon,
Tq.Kopargaon. Dist.Ahmednagar
2. Subhash s/o Eknath Saindانشiv
Age: 51 Yrs., occu. Service.
3. Eknath Rupanya Saindانشiv
Age: 68 Yrs., occu. Retired.
4. Indubai Rupanya Saindانشiv
Age: 64Yrs. Occ. Business.
5. Vilas Rupanya Saindانشiv
Age:43 Yrs., occu. Service.
6. Shobha Vilas Saindانشiv
Age: 36 Yrs., occu. Business

Resp.Nos.2 to 6 all are
R/o Phadke Plot, Yeola Road,
Tq.Kopargaon,Dist. Ahmednagar. = **RESPONDENTS**
(orig.Complainant)

Mrs.Manjushri V.Narwade, Advocate for Petitioner;
Mr.BV Virdhe, APP for Respondent No.1-State;
Mr.AS Gandhi, Adv. For Resp.Nos.2 to 6.

CORAM : SMT.VIBHA KANKANWADI,J.

DATE : 29th JANUARY,2020.

ORAL JUDGMENT

1. Rule. Rule is made returnable forthwith by consent of learned counsel appearing for the parties.

2. Present petition has been filed by the informant-wife, who had filed First Information Report against present Respondent Nos.2 to 6, contending that they have committed offence punishable under Sections 498-A, 323, 504, 506 read with 34 of Indian Penal Code. After the investigation, the police filed charge sheet vide RTC No.270/2009 before the Judicial Magistrate First Class, Kopergaon District Ahmednagar. After the trial was over, learned Magistrate has acquitted the accused persons on 30th of October, 2015. The informant then filed Criminal Appeal No.4/2016 before the Additional Sessions Judge, Kopergaon. The said appeal was preferred under Section 372 of the Code of Criminal Procedure. However, it appears that by order dated 20th April, 2017, the learned 2nd Additional Sessions Judge,

Kopargaon, has dismissed the appeal in default. Hence the present petition has been filed, invoking the constitutional powers of this Court under Article 227 of the Constitution of India for setting aside the said impugned order and for restoration of the criminal appeal.

3. Heard both sides.

4. In order to cut-short, it is to be mentioned that both the learned Advocates appearing for the respective parties have made submissions in support of their contentions.

5. The record shows that the criminal appeal was presented on 14.1.2016 and that appeal was under Section 372 of Cr.P.C. and the proviso of the same gives right to the victim to prefer an appeal. Photo copy of the Case status report would show that on 7.10.2016, the matter was sent for preparation of paper book. This has to be observed on the basis of the fact that the photo copy of Exhibit-1 in Criminal Appeal No.4/2016 does not show that a specific order of admitting the appeal

was ever passed. From 28.1.2016, till 31.8.2016, the matter was adjourned for first time. But, thereafter, as aforesaid, on 31.8.2016, the matter was sent for preparation of paper book. That means the appeal was admitted by the learned court. Thereafter till 14.3.2017, the matter was for preparation of paper book and on 14.3.2017, it appears that after the paper book was prepared, the matter was posted for hearing. Only two dates have been consumed for the stage of hearing i.e. 14.3.2017 and 31.3.2017 and on 20th April, 2017, the impugned order of dismissing the appeal has been passed.

6. It has been tried to be contended on behalf of the appellant that the learned Advocate, who was representing the appellant before the learned Additional Sessions Judge on the date of the impugned order, was present before Shrirampur court. We may not go into all those aspects. A simple law point that is involved in this case is that the appeal is admitted by the court then it cannot be dismissed in default.

7. This Court, while issuing notice to the respondents by order dated 21.6.2019 has specifically stated that in Bani Singh Vs. State of Uttar Pradesh - AIR 1996 SC 2439, it has been held by the Apex Court that the Criminal Appeal cannot be dismissed in default. A chance ought to have been given by the learned 2nd Additional Sessions Judge to the appellant.

8. In Shankar v/s. The State of Maharashtra [CRIMINAL APPEAL NO.1106 OF 2019 (@ SPECIAL LEAVE PETITION (CRL.) NO. 7230 OF 2018] decided on 23rd July 2019 it has been observed by the Hon'ble Apex Court that, "When the accused has preferred the appeal against the conviction, the appeal can be disposed of on merits only after hearing the appellant or his counsel. When there was no representation for the appellant, in our considered view, the High Court ought not to have disposed of the case on merits. It was held in 2005 (11) SCC 185 titled Mangat Singh vs. State of Punjab that, "where the advocate for the appellant is absent on the date of hearing, the Court shall either appoint an *amicus curiae* and then decide the appeal. Once

the appeal against the conviction is admitted, it is the duty of the Appellate Court either to appoint an advocate as *amicus curiae* or to nominate a counsel through Legal Services Authority and hear the matter on merits and then dispose of the appeal. When the appellant was not represented by the advocate, in our view, the High Court ought not to have decided the matter on merits and the impugned order is liable to be set aside and the matter is remitted back to the High Court". Though this case pertains to appeal against conviction; the same principle is required to be adopted for appeal against acquittal by victim under Section 372 of Code of Criminal Procedure, when it was already admitted by the Appellate Court". In the instant case, that course was definitely available to the learned 2nd Additional Sessions Judge, which he did not avail. Therefore, the writ petition deserves to be allowed. Accordingly, it is allowed in terms of prayer clause (B). The said appeal is restored to file of learned Additional Sessions Judge, Kopergaon, who should deal with the appeal in accordance with law.

9. Since the present petitioner as well as Respondent Nos.2 to 6 are represented by the Advocates before this Court, certainly, directions can be issued to both of them to remain present before the learned Additional Sessions Judge, Kopergaon on 24.2.2020.

(SMT. VIBHA KANKANWADI,J.)

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