

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

**CRIMINAL APPLICATION NO.2550 OF 2018  
IN REVN/5/1990 WITH REVN/5/1990**

**ABDUL RASHEED S/O. ABDUL GANI QURESHI  
VERSUS  
THE STATE OF MAHARASHTRA AND ANR**

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Advocate for Applicant : Mr. Zia Ul Mustafa And Mr. Quadri Taher Ali

APP for Respondents: Mrs. P. V. Diggikar

Advocate for Respondent Nos. 1, 5 and 6 : Mr. Anant Devakate

Advocate for Respondent No.4 : Mr. A. M. Gaikwad

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**CORAM : BHARAT P. DESHPANDE, J.**

**DATE : 2<sup>nd</sup> AUGUST 2022.**

**Per Court :**

1. The present application is filed for substituting the Original Revisional Petitioner by name Abdul Gani S/o Shaikh Maheboob by the present Applicant namely Abdul Rasheed s/o Abdul Gani Qureshi on the ground that Original Revisional Petitioner in Criminal Revision Application No.5/1990 by name Abdul Gani s/o Shaikh Maheboob expired on 16.07.2004.
2. Heard learned Counsel for the parties.

3. The present matter is having a chequered history. Abdul Gani s/o Shaikh Maheboob was the Informant, who lodged the complaint to the Police in connection of death of his son Abdul Quvi on 01.05.1988. The report was lodged at Shivaji Nagar Police Station, Nanded. On the basis of such information, offence was registered vide Crime No. 33/1988 for the offences punishable under Sections 147, 148, 302 read with 149 of the Indian Penal Code. The present Respondent Nos. 2 to 7 were shown as Accused persons. After filing of the charge-sheet, a case was committed to the Court of Sessions. The Additional Sessions Judge, Nanded in Sessions Case No. 106/1988 acquitted all the accused persons vide its judgment dated 27.09.1989.

4. It is a fact that the State did not file any appeal challenging the said decision.

5. The Original Informant by name Abdul Gani, thus filed Criminal Revision Application No.5/1990 under Section 401 of the Code of Criminal Procedure (Cr.P.C. for short), challenging acquittal of the accused persons in Sessions Case No.106/1988.

6. Vide order dated 18.11.2000, this Court allowed the said Revision Application to reconsider the material placed before it and decide it afresh.

7. The Respondent Nos. 2 to 7 challenged the said judgment of this Court in Criminal Appeal No. 2161/2009 before the Hon'ble Apex Court. Vide order dated 11.07.2018, the Hon'ble Apex Court quashed and set aside the judgment of this Court only on the ground that no opportunity was given to the present Respondents to argue the matter in the said Revision Application, since by that time Advocate appearing for them expired. The Hon'ble Apex Court directed this Court to decide Revision Application as expeditiously as possible after hearing Respondent Nos. 2 to 7.

8. In this back drop, the matter i.e. Criminal Revision Application No.5/1990 was taken up and notices were issued to the Original Applicant and the Respondents.

9. The Applicant, who is the son of Original Revisional Petitioner

preferred present application for substitution in place of the deceased Original Applicant with permission to prosecute the Revision Application on the ground that he is the brother of deceased and the son of Original Revisional Petitioner and therefore he be permitted to continue with the present Revision by substituting his name in place of Original Revisional Petitioner.

10. Learned Counsel for the Applicant specifically submitted that during pendency of the matter before the Hon'ble Apex Court, Original Revisional Petitioner expired and present Applicant came to know about the matter only when he received notice from this Court on remand. He submitted that the present Applicant being the brother of deceased and one of the charge-sheet witness as well as the son of Original Revisional Petitioner is entitled to continue by substituting him in the matter. In this respect, he placed reliance on the decision of the Hon'ble Apex Court in the case of **Ashwin Nanubhai Vyas Vs. State of Maharashtra and Another AIR 1967 SC 983**.

11. Learned Counsel for the Applicant submitted that provision of

Section 302 of Cr.P.C. could be placed in operation in order to permit him to substitute.

12. Learned Counsel for the Respondent Nos. 2, 6 and 7 strongly opposed the present Applicant on the ground that if such substitution is allowed, it would amount to amending the order of the Hon'ble Apex Court. He then submitted that the judgment in the case of Ashwin Vyas (supra) is not applicable as it deals with only private complaints and not charge-sheet filed by the Police. He then submitted that Original Revisional Petitioner was notified and served before the Hon'ble Apex Court and even he was represented by an Advocate, who sought time to file counter affidavit, which is recorded in the order dated 10.10.2007. He submits therefore the present Applicant was aware about the matter before the Hon'ble Apex Court.

13. Learned Counsel for the Respondent Nos. 2 and 4 supported the contentions raised by learned Counsel appearing for other Respondents.

14. Learned APP submitted that she is supporting the contentions

raised by the Applicant for substituting and to allow him to prosecute the matter.

15. In the case of Ashwin Vyas (*supra*) though the matter was with regard to complaint and substitution of the original Complainant, the analogy which has been propounded in the said judgment is found specifically in Paragraph Nos. 6 and 7, which read thus:

6. Mr. Keswani, however, contends that S. 198 provides that the cognizance of the case can only be taken on the complaint of a person aggrieved and the only exception to this general rule is where the complainant is a woman, who according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint. He contends that what applies to the initiation of the proceeding must also apply to the continuance of the proceeding. He submits that if cognizance could not be taken unless a complaint was made in the manner provided in the section, the court cannot proceed with the inquiry unless the same condition continues to exist. In other words, because the section insists on a complaint of a person aggrieved, Mr. Keswani contends that continued presence of the person aggrieved throughout the trial is also necessary to keep the court invested with its jurisdiction except in the circumstances mentioned in the proviso and summarised above. We do not agree. The section creates a bar which has to be removed before cognizance is taken. Once the bar is removed, because the proper person has filed a complaint, the section works itself out. If any other restriction was also there the Code would have said so. Not having said so, one must treat the section as fulfilled and worked out.

There is nothing in the Code or in Chapter XVIII which says what, if any, consequence would follow if the complainant remains absent at any subsequent hearing after filing the complaint. In this respect Chapter XVIII is distinctly dissimilar to the Chapters dealing with the trial of summons and warrant cases where it is specifically provided what consequence follows on the absence of the complainant.

7. Mr. Keswani contends that the Presidency Magistrate has made a "substitution" of a new complainant and there is nothing in the Code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word "substitute" but that is not the effect of the order. What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power was undoubtedly possessed by the Presidency Magistrate because of s. 495 of the Code by which courts are empowered (with some exceptions) to authorise the conduct of prosecution by any person. The words 'any person' would indubitably include the mother of the complainant in a case such as this. Section 198 itself contemplates that a complaint may be made by a person other than the person aggrieved and there seems to us no valid reason why in such a serious case we should hold that the death of the complainant puts an end to the prosecution.

16. It is an admitted fact that in this case, Police filed charge-sheet against the Respondents in view of Section 173 and thereafter the matter was committed to the Court of Sessions as offence punishable under Section 302 alleged against Respondents, it was squarely travelled by the Court of Sessions.

17. Learned Counsel for the Applicant as well as learned APP placed reliance on Section 302 of Cr.PC. and more particularly sub-section 2.

Section 302 of Cr.PC. reads thus;

“302. Permission to conduct prosecution.

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission: Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

18. In view of the above facts and the history of the present litigation, it is clear that Original Revisional Petitioner expired during pendency of the matter and after remand by the Hon'ble Apex Court with directions to decide the Revision Petition as expeditiously as possible, it is necessary to allow the application of the present Applicant to substitute himself in place of his father as the Original Revisional Petitioner, so as to prosecute the Revision, in the interest of justice. Unfortunately, it was not brought to the notice of the Hon'ble Apex Court, while deciding

the said Criminal Appeal about the death of Original Revisional Petitioner/ Respondent No.1 therein. The provision of Section 302 of Cr.P.C. needs to be placed in operation for this purpose, as there is no other provision. A chapter XXIV of Cr.P.C. deals with general provision as enquiry the trial. Therefore, this matter being a Session trial squarely covered under the provisions of this chapter. Therefore, the submissions advanced by the Counsel for the Applicant, in this respect needs to be accepted. Hence the following order.

### **ORDER**

- (i) Application is allowed.
- (ii) Applicant is permitted to substitute himself in place of Original Revisional Petitioner being a son as well as brother of the deceased. He is also permitted to prosecute the Revision.
- (iii) The amendment to be carried out forthwith.
- (iv) The main Revision Petition is kept for final hearing as per the directions of the Hon'ble Apex Court on 10.08.2022.

**[ BHARAT P DESHPANDE, J.]**

*Najeeb.*