

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.21 OF 2018

The State of Maharashtra,
Through Incharge of Police Station
Renapur, Tq. Renapur, Dist. Latur

.. Applicant

Versus

1. Balasaheb s/o Pundlik Gitte
Age: 23 years, Occu.: Education,
R/o. Chandrapur, Tq. Parali, Dist. Latur
2. Gotya @ Dnyanoba Maruti Gitte
Age: 28 years, Occu.: Agri.,
R/o. Nandagoul, Tq. Parali, Dist. Beed.
3. Sachin s/o Uttam Bamne
Age: 27 years, Occu.: Agri.,
R/o. Mahi Jalgaon, Tq. Karjat,
Dist. Ahmednagar.
4. Sunny s/o Murlidhar Sadaphule,
Age: 25 years, Occu.: Agri.,
R/o. Sadaphule Wasti, Jamkhed,
Dist. Ahmednagar

.. Respondents

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Mr. A. M. Phule, APP for the applicant – State.

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**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 28th March, 2023.

ORDER :- (Per Smt. Vibha Kankanwadi, J.)

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure by the prosecution seeking leave to

file criminal appeal challenging the judgment and order dated 03.10.2017 passed by the learned Assistant Sessions Judge, Latur in Sessions Case No.18 of 2016, thereby acquitting the respondent/original accused from the offence punishable under Section 395 and 216 of Indian Penal Code and Section 7 read with Section 25(3) of the Indian Arms Act, 1959.

2. Heard learned APP Mr. A. M. Phule for the applicant – State. With the help of learned APP, we have gone through the material which was before the learned Trial Judge.

3. The prosecution story in short is that informant Dnyaneshwar was serving as driver in Agrawal Packers and Movers, Company. He was carrying household goods from Surat to Guwahati in a Container bearing registration No. TS-08-UB-0124. On 23.08.2015, he was proceeding towards Hyderabad by Renapur road. He was accompanied by one Lingraj Birajdar as cleaner. Informant's brother Yogesh was sleeping in the cabin. The Container crossed Renapur around 6.30 a.m. and when they had gone at a distance of 2 kms from the village Kharola, one Indica Car was trying to overtake the container. He, therefore, slowed down the speed of the container. The Indica Car went ahead and blocked the road of the Container. Therefore, he also halted his Container. Four persons alighted from

the Indica Car. One person having black complexion entered into the container from cleaner's side. He was holding a sharp weapon "*Katti*". After abusing them, he asked them to give money. The said person was showing fear with the help of said *Katti*. Birajdar told the said person that he is possessing only Rs.500/- and gave that amount to the said person. One more person then boarded the cabin and assaulted Birajdar with fists and also by knife. They checked the pockets of Birajdar and took out the cash of Rs.20,500/- from the pocket of Birajdar. Another person climbed on the container from driver's side and assaulted the informant with sickle. One more person having wheat complexion was standing outside and abusing them. Further amount of Rs.15,850/- was snatched by those persons from the pocket of the informant's pant. Mobile phone of the Birajdar was also snatched and its battery was removed. Those persons fled away after robbing amount of Rs.36,350/-. The said Indica Car was without number plate. The informant with his friend then went to Police Station Nalegaon, however, they directed him to go to Renapur Police Station. After coming to Renapur Police Station, he lodged the report.

4. During the investigation, in all six accused persons came to be arrested. Identification parade was held and after completion of the investigation, charge-sheet was filed. The prosecution has examined

in all 12 witnesses to bring home the guilt of the accused and after considering the evidence on record, the learned Assistant Sessions Judge, Latur has acquitted all the accused persons. Hence, this application.

5. Before considering the evidence on record the fact which goes to the root of the case is that with the narration of the FIR and the material in the charge-sheet, the learned Sessions Judge ought to have come to the conclusion which offence is made out and then charge can be framed when it comes to Chapter XVIII of the Code of Criminal Procedure, which deals with Trial before a Court of Sessions which starts with Section 225 of the Code of Criminal Procedure. Section 226 of the Code of Criminal Procedure provides that when the accused appears or is brought before the Court after committal of the case, the prosecutor shall open his case by describing the charge brought against the accused. Definitely, we presume that this stage would have been followed by the learned Trial Judge. Then if upon consideration of the record of the case and the documents submitted therewith and after hearing the submission of the accused and the prosecution, if the judge considers that there is no sufficient ground for proceeding against the accused, then he shall discharge the accused under Section 227 of the Code of Criminal Procedure by giving reasons for doing so. Here, the charge has been framed, that

means the concerned Trial Judge was of the opinion that it is not a case for discharge under Section 227 of the Code of Criminal Procedure. The next stage comes of framing of charge and as per Section 228 of the Code of Criminal Procedure, at that stage, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, which is not exclusively triable by the Court of Sessions. Then the recourse that is provided under subsection (1)(a) of Section 228 has to be taken and if the Judge is of the opinion that the accused has committed offence, which is exclusively triable by the Court of Sessions, then he should proceed to frame charge against the accused in view of Section 228(1)(b) of the Code of Criminal Procedure. At this stage itself, we would also like to consider that the facts as narrated above discloses that there is involvement of six accused persons, who had committed dacoity and while doing so, it is alleged that they have used dangerous weapons like knife and sickle. It is the cardinal principle that while framing a charge, the concerned Court should see what is highest/aggravated form of offence which is made out and then the charge should be framed. If aggravated charge is not proved, but the lesser offence is proved, then it is possible to hold an accused guilty of lesser offence, but vice versa is not possible. Therefore, care has to be taken at the time of framing of charge itself that it should be framed for the

aggravated form. Here, the aggravated form is Section 397 of the Indian Penal Code. Even if for the sake of arguments it is accepted that the learned Trial Judge in this case was considering the offence under Section 395 of Indian Penal Code, then the maximum punishment that he could have awarded was imprisonment for life or with rigorous imprisonment for a term which may extend to ten years. Here, we would like to highlight the fact that the trial which has been conducted in this matter is before Assistant Sessions Judge. Section 28 of the Code of Criminal Procedure deal with sentences which High Court and Sessions Judges may pass. Sub-section (3) of Section 28 of the Code of Criminal Procedure provides that Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years. Therefore, taking into consideration Section 28 of the Code of Criminal Procedure, the trial ought not to have been conducted before the learned Assistant Sessions Judge. This is our *prima facie* opinion on the impugned judgment. If the trial is before a wrong forum, then whether it should be considered in favour of accused only, is a point which is required to be dealt with. No doubt, at present accused Nos.1 to 6 have undergone the trial, but at the same time, we cannot forget the rights of the other side. It is not a point of law that only accused has a right of fair trial.

Even the victim or the prosecution should also have a fair trial.

6. On these two aspects, we would like to rely on the decision in ***State of Maharashtra Vs. Vinayak Tukaram Utekar and others (MANU/0157/1997)*** and also the Single Judge Bench decision of this Court in ***Prabhakar @ Babu Laxman Pawar Vs. State of Maharashtra and another, [2013 (1) Mh.L.J. (Cri.) 411]***, wherein it has been observed that Section 28 of the Code of Criminal Procedure imposes bar on Sessions Judge in assigning cases to the Assistant Sessions Judge, where the sentence above ten years can be awarded. The Assistant Sessions Judge cannot try cases where offence is punishable with life imprisonment or imprisonment for a term exceeding ten years. Therefore, in this case, all the Sessions Judges in the State were directed not to assign cases wherein the punishment is above ten years to the Assistant Sessions Judge. This aspect is definitely required to be gone into and, therefore, we are of the opinion that the leave is required to be granted to file the appeal. In view of this point, which is going to the root of the case, we do not wish to assess the evidence at this stage. We are of the opinion that the leave deserves to be granted. Accordingly, it is granted.

5. The application stands allowed.

6. Registry to register the appeal.

8. The said appeal stands **admitted**.
9. Action under Section 390 of the Code of Criminal Procedure be taken against the respondent to the satisfaction of the Trial Court.

[Y. G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm