

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

916 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.61 OF 2020

THE STATE OF MAHARASHTRA
VERSUS
VISHAL VITTHAL TUPSAMINDRE AND OTHERS

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Mr. S.J. Salgare, APP for applicant

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**CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.**

DATE : 07th JUNE, 2023

ORDER :

1 Present application has been filed by the prosecution seeking leave under Section 378 (1)(b) of the Code of Criminal Procedure, 1973 to file appeal challenging the Judgment of acquittal dated 29.02.2020 passed by learned Additional Sessions Judge, Parbhani in Sessions Trial No.38/2013, thereby acquitting respondents – original accused persons from the offence punishable under Section 341, 323, 324, 307, 504, 506 read with Section 34 of the Indian Penal Code, 1860.

2 Heard learned APP Mr. S.J. Salgare for the prosecution and with

his help we have gone through the record which was available before the learned Trial Judge.

3 The prosecution story in short was that - one Balu Laxman Tupsamindre was admitted in Aadhar Hospital, Nanded on 15.11.2012. His statement was recorded by one PSI Mr. Vyankat Vitthalrao Utkar of Manwat Police Station, Dist. Parbhani. Said Balu explained the circumstances, in which he had sustained the injuries by saying that he was proceeding along with one Ram, who is his brother and relative Arun around 8.15 p.m. on 14.11.2012 to Manwat Bus Stand for taking tea. They were intercepted by accused Nos.1 to 4, who were holding big knives (katti). Accused persons abused them and asked as to why they had instigated nephew Arun and sister Sakhubai. Thereafter accused Vishal had given blow of katti on the head of Balu, causing serious injury to him. Accused No.2 Yashpal gave blow to the shoulder, left side of chest and right hand of Ram, causing him serious injuries. Then accused Vitthal and Dipak had kicked and given fist blow to nephew Arun. Accused Dipak caused fracture to Arun's left hand. When they raised cries, people started gathering and by giving threat to kill, then the accused persons fled away. The injured persons were taken to Manwat Police Station, but then referred them to Government Hospital, Manwat. After taking treatment there they were shifted to Parbhani Hospital where Arun

and Ram were treated. But then Balu was referred to Nanded.

4 After the completion of investigation, charge sheet was filed and trial was conducted. The prosecution has examined in all 09 witnesses to bring home the guilt of the accused and taking into consideration the evidence as well as hearing of both sides, all the accused persons have been acquitted. Hence, the present application.

5 Perusal of the evidence of PW 1 Balu, PW 2 Ram and PW 5 Arun would show that they have tried to corroborate each other in their examination-in-chief, however, in their cross-examination the omissions and improvements have been brought on record. Sakhubai Gaikwad is the sister of accused Vitthal and PW 5 Arun Gaikwad is son of Sakhubai. It has been tried to be stated that accused Vitthal was saying as to why the informant and other witnesses have become arrogant and instigating Sakhubai. Interesting point to be noted is that PW 2 Ram has not stated as to what were the dialogues between him, informant and Arun with accused or accused had some dialogues with them. The story of instigation to Sakhubai has not been told by him. Therefore, if independently his testimony is considered, it will not give any motive on which accused might have done such act. PW 5 Arun has also not stated anything about it. In fact, he is the son of Sakhubai and

was in a better position to say something more than even PW 1 Balu. Prosecution has not examined Sakhubai. What type of instigation was given and for what reason it was given is all silent. Mere by making statement that such instigation was given would not prove the motive. PW 5 Arun does not say that there was any dispute between Sakhubai and Vitthal. Though all of them have stated about the injuries caused to all those three persons; yet, prosecution had not brought the injury certificates of witness Ram and Arun. The Medical Officer, who had examined them, has not been examined. Under such circumstance, except the bare words there is nothing to support their contention. The another fact to be noted is the injury certificate of PW 1 Balu Exh.74 and in order to prove the same prosecution has examined PW 7 Dr. Satish Swami. He has stated that Balu was admitted to his hospital i.e. Aadhar Hospital, Nanded on 15.11.2012. He found that Balu had sustained head injury and after the C.T. scan was done it was noticed that skull of Balu was fractured and there was swelling over his brain. He has stated that the injury to Balu would have been possible by iron katti. But in his cross-examination he has admitted that when Balu was admitted to his Hospital, Balu's relative had told that Balu had sustained injury in a road accident. The injuries noted by him on the person of Balu are possible by accident. Thus, when the history to the medical practitioner was of the accidental injury, it creates doubt over the prosecution story itself. PW 3 Avinash

Nimbalkar has deposed that at about 8.00 p.m. on 14.11.2012 he was in Maharanapratap Chowk, Manwat. He was along with one Ramesh Pandit. He says that he had seen Lakhan Tupsamindre, Balu Tupsamindre and Arun Gaikwad. He had talked with them and went ahead with bike. According to him, accused Vishal, Yashpal and Vitthal came there and started beating Ram, Balu and Arun. But then he says that by which weapon they had beaten those injured persons was not seen by him. He specifically stated that Vishal had not assaulted Balu by means of katti on his head. Thereafter he has been declared hostile and questions in the nature of cross were permitted to be asked to him. Accordingly, they have been asked, and then he has admitted that accused had asked him, as to why he is intervening in the quarrel and threatened him, but then he has attributed role to the accused persons. In his cross-examination by the accused he has clearly admitted that it did not happen in his presence that accused Vishal, Yashpal and Vitthal had beaten Ram, Balu and Arun. Thus, there is a somersault in the cross-examination. Same is the case with PW 4 Ramesh Pandit, who was stated to be along with PW 3 Avinash. PW 6 Babasaheb Sontakke appears to be the panch witness to the seizure of clothes, but he has turned hostile. PW 8 and 9 are the Investigating Officers. Thus, it is to be noted that when the incident has taken place in a chowk, which appeared to be in the traffic, still no further eye witness has been examined when the testimony of PW Ramesh and

Avinash cannot be believed. All these things have been considered properly by the learned Additional Sessions Judge while acquitting the accused persons and, therefore, we do not find any reason to interfere in the decision. The Judgment is absolutely not perverse.

6 Before parting we would like to observe that we come across many applications seeking leave to appeal filed by the prosecution, but it appears that the prosecution is not applying proper filters when such leave is asked. In each and every acquittal, the State or the prosecution cannot ask for leave to appeal. It should depend upon the material. We would like to take help of the observations by the coordinate Bench at Principal Seat in **State of Maharashtra vs. Devidas Nivrutti Gavali and another in Criminal Application No.508 of 2012** decided on 26.04.2012. We would like to reproduce those observations -

“11. We can understand the State is filing the applications for seeking leave to appeal when cases are border line cases and there is some scope for interference for this Court. However, like in the present case when there is no material at all, still the application is preferred by the State for seeking leave to appeal. Apart from the fact that State is expected to be a model litigant, the expenses of filing such proceedings are borne from the public funds which is a tax payers' money. Merely because the money spent on such a litigation is from the public funds, cannot be a ground for filing the applications

for seeking leave to appeal as a matter of routine. Not only that but the valuable time of the Court as well as the Public Prosecutors is wasted in such unnecessary exercise. As it is, the Court are burdened with heavy pendency of matters. Such unwarranted challenges to findings of acquittal, unnecessarily adds to the already heavily burdened Courts. In that view of the matter, we are inclined to issue following directions to the State Government :

(i) After the Judgment and orders are delivered by the learned trial Judges, the concerned APPs appearing in the trial Court shall personally go through the evidence and the Judgment and after scrutiny thereof, if satisfied, that the view taken by the learned trial Court is either perverse or impossible, shall recommend filing of an application for leave to appeal.

(ii) On receipt of such proposals, the Secretary or the concerned Joint Secretary shall again verify the proposal and if it is found that the view taken by the trial Court is neither perverse nor impossible, shall decide not to challenge findings of acquittal.

(iii) If the proposal is received by the office of the Public Prosecutor in the High Court, the concerned Public Prosecutor to whom the files are assigned, shall again go through the evidence on record and the Judgment to find out as to whether the view taken by the trial Court is perverse or impossible. If the learned APP is of the view that the view taken by the learned trial Court is a possible view and it is neither impossible nor perverse view, it shall give its opinion in writing to the Secretary or concerned Joint Secretary of law and Judiciary Department.

(iv) After the receipt of the opinion of the learned APP that the case of acquittal is not a fit case to challenge, the Secretary or the concerned Joint Secretary shall re-examine the matter and decide as to whether the application for leave to appeal should be filed or not. However, if the officer disagrees with the opinion of the APP and decides to grant sanction to file an application for leave to appeal, it shall record reasons as to why it disagrees with the opinion of the learned APP.

12. In the applications for leave to appeal filed hereinafter, if we come across that the same are filed by the State challenging the findings of acquittal which cannot be said to be perverse or impossible, we will be constrained to take serious view of the matter. We clarify that in case the learned APPs give their opinion in a casual manner without applying their mind, we will hold such APPs responsible for proposing such unwarranted applications. We further clarify that if, even after the opinion of learned APP that the finding of acquittal is not perverse or impossible, still the appeal is filed at the instance of concerned Secretary or Joint Secretary and if we ultimately find that finding is neither perverse or impossible, we will be constrained to hold such a Secretary or a Joint Secretary responsible for filing the unwarranted application seeking leave to appeal.”

7 Further, in paragraph No.13 it was clearly stated that the authenticated copy of the order should be supplied to the learned PP who shall in turn forward the copy to learned Principal Secretary, Law and

Judiciary Department who shall circulate the same amongst all the Joint Secretaries and the Public Prosecutors. We hope and trust that this compliance would have been made way back in the month of May, 2012, but it appears that it has not been put to implementation in its proper letter and spirit. State cannot act like an ordinary citizen, when it comes to filing of appeal. Unless there would be a material to support, the prosecution should not seek leave to appeal, when the acquittal is based on the proper scrutiny of the evidence led by the prosecution before it by a competent Court. The casual approach by the prosecutors has to be deprecated in giving opinion about filing of the appeal. The State is the protector of the life and liberty of every citizen. The accused, who is the citizen of every State, who has faced the trial i.e. the procedure established by law and then when there is acquittal, unless there is perversity which can be pointed out specifically in the appreciation of evidence or it would have been the result of not taking into consideration any material evidence by the Trial Court, then only such endeavour of filing such applications should be taken. We once again, therefore, bring the fact to the notice of learned PP to this Bench and with a similar request that he should forward the copy of this order to the learned Principal Secretary, Law and Judiciary Department, who should once again shall circulate not only the decision referred above but also the present decision to all the Joint Secretaries and the Public Prosecutors for its

implementation in letter and spirit. Such meritless cases are also causing the docket explosion. With these observations the application stands rejected.

(Abhay S. Waghware, J.)

(Smt. Vibha Kankanwadi, J.)

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