

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.505 OF 2021

Vahida Begum Ajij Khan Momin,
Age-56 years, Occu:Housewife,
Near Yaseen Masjid, Neharu Nagar,
Katkot Gate, Aurangabad-01

...APPELLANT

VERSUS

- 1) The State of Maharashtra,
Through the Police Inspector,
Police Station – Jinsi, Aurangabad-01,
- 2) The Superintendent of Police,
Jinsi Police Station, Aurangabad,
- 3) Sayyad Jaheh Ali @ Bablu Bhangarwala,
S/o-Sayyad Mohemmad Ali,
Age-34 years, Occu:Business,
R/o-Neharu Nagar, Katkot Gate,
Behind Faisal Kirana Shop, Aurangabad,
- 4) Sadekh Chaus S/o Samad Chaus,
Age-30 years, Occu:Grocery Shop,
R/o-Babar Colony, Katkot Gate, Aurangabad,
- 5) Habib Abubakar Chaus S/o Sale Chaus,
Age-32 years, Occu:Rikshaw Driver,
R/o-New ST Colony, Katkot Gate, Aurangabad,
(Appeal abated as against Resp. No.5 as per
order dated 14th September 2022),
- 6) Sultan Chaus S/o Ali Chaus,
Age-49 years, Occu:Business,
R/o-Nehru Nagar, Katkot Gate,
Aurangabad.

...RESPONDENTS

...
Mr.Niranjan M. Deshpande Advocate for Appellant.
Mr.R.V. Dasalkar, A.P.P. for Respondent Nos.1 and 2.
Mr.B.P. Pande Advocate and Mr. M.A. Madani Advocate
for Respondent Nos.3, 4 and 6.
Appeal abated as against Respondent No.5 vide order
dated 14th September 2022.
...

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

DATE OF RESERVING ORDER : 24th FEBRUARY 2023

DATE OF PRONOUNCING ORDER : 28th MARCH 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the mother of the informant – Azimkhan Ajij Khan to challenge the acquittal of respondent Nos.3 to 6 by learned Additional Sessions Judge, Aurangabad on 22nd July 2021 from Sessions Case No.48 of 2011 when they were prosecuted for allegedly committing offence under Section 307 read with Section 34 of the Indian Penal Code. It has been contended that the Appeal has been filed under the Proviso to Section 372 of the Code of Criminal Procedure. However, on 31st January 2023 when we have extensively heard learned Advocate for the appellant, we could find out the basic question about the maintainability of the

Appeal under the Proviso to Section 372 of the Code of Criminal Procedure, hence we had directed the learned Advocate for the appellant to make submissions on the said point.

2. The present appellant – mother of the original informant is not an eye witness. As per the prosecution story, the original informant was assaulted by the accused persons around 10.00 p.m. on 17th August 2010 near the shop of one Amar Tailor situated at Neharu Nagar, Katkat gate, Aurangabad. It is alleged that original accused No.3 Habib Chaus had assaulted the informant by knife, accused No.4 Sultan by hockey stick, accused No.1 Bablu by knife and accused No.2 Sadik by stick. According to the prosecution the informant had received grievous injuries and the attack by the accused on the informant was with an intention to commit his murder and the motive is stated to be the previous enmity.

3. The appellant is contending that the informant is suffering from mental illness and is under psychiatric care. When the witness summons was issued to the informant, the report was submitted to the Court stating about the mental illness of the informant and it was stated that taking into consideration the said mental illness he would be unable to appear before the

Court. The report paper of Mental Health Center run by one Shri Mairaj Aziz Quadri was also attached with the summons report. But then again when the APP had given application for re-issuance of witness summons to the informant, it came to be rejected on 24th June 2021. The matter further proceeded and many of the witnesses had turned hostile. Ultimately, according to the appellant the decision has been given in a hurry by the concerned Additional Sessions Judge and the accused persons have been acquitted and therefore she has filed the present Appeal challenging the acquittal of the original accused.

4. The basic question was, whether the mother of the informant who is still alive, can be considered as "victim" as defined under Section 2(wa) of the Code of Criminal Procedure. We would like to reproduce the said definition of the word "victim" and also Section 372 of the Code of Criminal Procedure, for the sake of convenience:-

" 2(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir. "

" 372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of a Criminal

Court except as provided for by this Code or by any other law for the time being in force:

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. "

5. It will not be further out of place to mention here that the appellant – mother of the informant has not got herself declared as guardian of a person who is mentally challenged. In fact along with the Appeal, copy of the certificate issued by Mental Health Center run by Dr. Quadri Aziz Ahmed from Aurangabad dated 22nd December 2018 has been produced, which states that informant Azim Khan was admitted in the said hospital from 27th November 2018 to 18th December 2018 as he was suffering from Poly substance Abuse with Substance induced Mood disorder with cluster 'B' traits and it is then further stated that he will require long term treatment and regular follow up. Thus, the said report does not completely declare informant Azim Khan as a mentally challenged person. When questions in respect of the mental status or physical status of the informant on the day of witness summons were asked to the learned Advocate for the

appellant when we had extensively heard the matter on 31st January 2023, he submitted that he wants to file certain documents on record as a part of his probable answer and sought accommodation. We had then permitted the learned Advocate to produce those documents. Thereafter the matter was on Board on 15th February 2023 when once again accommodation was sought on behalf of the appellant to produce the documents and on 24th February 2023 also the learned Advocate could not bring those documents. The said report dated 22nd December 2018 along with the prescription issued by the same doctor on 11th June 2021 appears to be produced before the learned Additional Sessions Judge but no care was taken on behalf of the informant to produce appropriate documents on record. Merely by producing the prescription it cannot be inferred that the informant is unable to give testimony. Though application Exhibit -144 came to be rejected on 24th June 2021, there appears to be another order on the next date i.e. 25th June 2021 below Exhibit 147 that "prosecution has liberty to produce any witness if they want to examine any witness by producing with the help of concerned police station on 26.06.2021." Ultimately, the learned Sessions Judge closed the evidence of the prosecution on 2nd July 2021.

6. As on today, before this Court there is no documentary evidence which would show that on 24th June 2021 and 25th June 2021 the informant was in such a mental state that he was prevented from appearing before the Court. Further, now the appellant is not explaining as to why the informant is unable to file appeal under the Proviso to Section 372 of the Code of Criminal Procedure. By withholding documents which would throw light on the mental status of the informant the appellant cannot be allowed to file Appeal. The said right under the Proviso to Section 372 of the Code of Criminal Procedure is substantive right conferred on the victim defined under Section 2(wa) of the Code of Criminal Procedure. At the cost of repetition we would like to say that when the definition of word "victim" as defined under Section 2(wa) of the Code of Criminal Procedure is clear enough and at the most it will include his or her guardian or legal heir, then it will have to be interpreted that it is in absence of the victim's competency, otherwise only the victim who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged, would alone be the person who would file such Appeal under the Proviso to Section 372 of the Code of Criminal Procedure. We

reiterate that present appellant – mother of the original informant has not come before this Court in the capacity as guardian. Merely because she is mother of the informant, she will not get a right to file the Appeal. There is a procedure prescribed as to who can be appointed as guardian of the mentally challenged or mentally ill person, then that procedure ought to have been undergone.

7. Here the learned Advocate appearing for the appellant has relied on the Full Bench decision of Hon'ble Delhi High Court in ***Ram Phal vs. State and others, 2015 Cri. LJ 3220***. However, it is to be noted that in the said decision, which was in fact a reference, following two questions were put for the reference:

“(a) Whether the word ‘victim’ in Section 2(wa) of the Cr.PC. would mean only the legal heirs entitled to the property of the victim under the law applicable of inheritance or would embrace any person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged.

(b) Whether the appellate remedy is available with respect to only such offences which were committed as on the date when the appellate right was conferred by law or the appellate right would be available with respect to the date of the decision or the appellate remedy is without any reference to the two points of time i.e. the date when the

offence was committed or when the appellate right was conferred by law, (Act No.5 of 2009 with effect from 31.12.2009)."

8. The above two questions are not before this Court. The present appellant – mother of the informant cannot be considered as 'legal heir' as the learned Advocate for the appellant was repeatedly conveying, for the simple reason that the informant is still alive. The other decision that has been relied upon by the learned Advocate is in the case of ***Naval Kishore Mishra vs. State of Uttar Pradesh and others, (2019) 13 SCC 182***. However, the question before the Hon'ble Supreme Court was that the deceased was unmarried and victim was real brother and therefore was held to be under the category of legal heir of deceased and considered as victim. The facts before us are different.

9. Learned Advocate for the appellant has further relied on the decision in ***Mallikarjun Kodagali (Dead) represented Through Legal Representatives vs. State of Karnataka and others, (2019) 2 SCC 752***, wherein in fact it was reiterated that the right available to the victim as defined under Section 2(wa) of the Code of Criminal Procedure is a substantive right and not a mere procedure. In the said case the point that was

dealt with was since the victim has a substantive right to file the appeal then he need not ask for leave to appeal.

10. No doubt it appears that the informant had received severe injuries in the said incident, however the other record which has been produced along with the fresh affidavit that has been filed by the appellant on 21st February 2022 would show that in the past the informant who was accused in one of the crime in 2011, was referred to mental hospital, Yerwada for treatment. The copy of Reception and Maintenance Order issued by the Superintendent of Regional Mental Hospital, Yerwada, Pune has been produced, but those documents further do not show as to how the informant came out of the jail as well as the mental hospital. But then there is also a certificate issued by the said Mental Health Center, Aurangabad dated 14th May 2012 stating that Azeem Khan was treated as IPD patient from 23rd January 2012 to 17th February 2012 and then again between 23rd March 2012 to 7th April 2012, and from 18th February 2012 to 21st February 2012 and then between 8th April 2012 to 5th May 2012 as OPD patient and then again between 6th May 2012 to 14th May 2012 as IPD patient. It is further stated in the certificate that treatment was for Poly Substance Abuse with substance induced Mood Disorder with Cluster "B" traits. Patient is known case of

Epilepsy and needs prolonged treatment. Thereafter many prescriptions and documents have been produced, which show that informant Azeem Khan was taking treatment as OPD patient. None of these documents rather show or certify that informant is mentally challenged or mentally ill person.

11. From the record that has been produced, one more aspect can be seen is that the father of the informant was taking objections and seeking adjournments before the learned Additional Sessions Judge on the ground of illness of the informant. He could have requested the APP presenting the case for prosecution before the learned Additional Sessions Judge, that they should examine Dr. Quadri under whose treatment the informant was, to bring on record the mental health of the informant. No such method was adopted. Only allegations are then made against the learned Additional Sessions Judge. Nobody had prevented the appellant or the informant and even the prosecution to bring on record the present mental health of the informant before the learned Additional Sessions Judge. The case was pending for more than ten years. Under such circumstance, it could not have been just prolonged in order to make available an opportunity to the informant to testify him before the Court. When the witness summons was issued, the

informant remained absent on the ground of mental health and now objection is being taken that without getting him examined the case has been decided. Such attitude was impermissible when no care was taken on behalf of the informant to produce appropriate documents on record.

12. Coming back to the point regarding the maintainability of the present Appeal, as aforesaid and at the cost of repetition it can be said that the mother of the informant cannot be taken as "victim" as per the definition in Section 2(wa) of the Code of Criminal Procedure when the mental status of the informant is not conclusively brought on record and proper procedure to get herself declared as guardian has not been adopted and therefore the Appeal deserves to be dismissed at the threshold being not maintainable.

13. Accordingly, the Appeal stands dismissed, as it is not maintainable.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE