

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.414 OF 2021

Sanjay Dayaram Jadhav

.. Appellant

Versus

1. The State of Maharashtra
Through Police Station Officer,
Chalisgaon Police Station,
Tq. Chalisgaon, Dist. Jalgaon.
2. Sambhaji Baburao Jadhav
3. Hemant @ Bandu Lahu Kale

.. Respondents

...

WITH
APPLICATION FOR LEAVE TO APPEAL BY STATE NO.80 OF 2021

The State of Maharashtra
Through Police Inspector,
Chalisgaon Police Station,
Tq. Chalisgaon, Dist. Jalgaon

.. Applicant

Versus

1. Sambhaji Baburao Jadhav
2. Hemant @ Bandu Lahu Kale

.. Respondents

...

Mr. Shailesh P. Brahme, Advocate for appellant in Criminal Appeal No.414 of 2021.

Mr. A. M. Phule, APP for respondent No.1 - State in Criminal Appeal No.414 of 2021 and for appellant - State in ALS No.80 of 2021.

Mr. Ujwal S. Patil, Advocate for respondent Nos.2 and 3 in Criminal Appeal No.414 of 2021 and for respondent Nos.1 and 2 in ALS No.80 of 2021.

...

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

DATE : FEBRUARY 28, 2023.

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

. Criminal Appeal No.414 of 2021 has been filed by the original informant challenging the acquittal of original accused - respondent Nos.2 and 3 by learned Additional Sessions Judge, Jalgaon on 07.07.2021 in Sessions Case No.60 of 2015 after holding them not guilty of committing offence punishable under Section 307 read with Section 34 of Indian Penal Code. It will not be out of place to mention here that by Application for Leave to Appeal By State No.80 of 2021, the prosecution is also challenging the same judgment.

2. Heard learned Advocate Mr. Shailesh P. Brahme for the appellant in Criminal Appeal No.414 of 2021, learned APP Mr. A. M. Phule for appellant - State in ALS No.80 of 2021 and for respondent No.1 - State in Criminal Appeal No.414 of 2021 and Mr. Ujwal S. Patil for respondent Nos.2 and 3 in Criminal Appeal No.414 of 2021 and for respondent Nos.1 and 2 in ALS No.80 of 2021.

3. Learned Advocate appearing for the appellant/informant and learned APP strongly submitted that the learned Trial Judge has not appreciated the evidence properly. In short, the prosecution story

was that informant was admitted in Deore Hospital, Chalisgaon when he gave statement to the police and which has been treated as FIR. It was alleged that he was proceeding on motorcycle towards his maternal uncle's house around 6.00 p.m. on 06.04.2014. When he was near Abhinav High School, at that time, accused Nos.1 and 2 stopped his motorcycle and asked him as to why he had hit them. Then Accused No.1 and another unknown person started beating him. At that time, accused No.2 and one more unknown person had caught hold of the hands of the informant. Accused No.1 had given assault by sharp weapon on the stomach of the informant, which was with an intention to commit his murder. At that time, the maternal uncle of the informant, one Rahul Pawar, Sumit Bhosale came to the spot and then accused persons ran away.

4. After the case was committed to the Court of Sessions, the prosecution has examined in all twelve witnesses to bring home the guilt of the accused persons and after considering their testimonies, other evidence on record and hearing both sides, it is then stated that the accused persons have been acquitted, however, the appreciation is wrong and perverse.

5. With the able assistance of the learned Advocates and learned APP, we have gone through the depositions of the witnesses of which

copies were provided. It can be seen from the entire bunch that P.W.1 Vijay - Panch to the seizure of clothes, P.W.2 Sumit Bhosale - eye witness, P.W.3 Rahul Pawar - eye witness, P.W.4 Kalpesh Deshmukh - panch to the spot panchanama, P.W.9 Vanesh Khairnar - another panch to the discovery panchanama on memorandum allegedly given by accused No.1, all have turned hostile. Permission was sought on behalf of the prosecution to put the questions in the nature of cross, however, no supportive facts have come on record, yet it has been tried to be stated by the learned Advocate for the informant and learned APP that testimony of P.W.6 Shivaji, who is the eye witness, has been discarded only on the ground that he is the maternal uncle of the informant. Unfortunately, the informant has not been examined. He was sent for mental examination under the orders of learned Sessions Judge, Jalgaon and accordingly, the report was submitted. It was stated by the experts committee i.e. Dean of the Government Medical College and Hospital, Jalgaon and Psychiatrist attached to Government Medical College and Hospital, Jalgaon that though the informant can speak, but he might be suffering from Neuropsychiatric sequale following head injury, but then it was observed that the patient requires further Neurological assessment and management. However, thereafter he was also sent for further examination at KEM Hospital, Mumbai and it has been ultimately

reported that the informant is not in a fit mental state to depose. Under the said circumstance, the statement of the informant that was recorded by the Executive Magistrate P.W.11 Nanasaheb Aagle and then certified by P.W.12 Dr. Jaywant Deore ought to have been considered under Section 32 of the Indian Evidence Act. What the informant had stated before P.W.11 Nanasaheb Aagle was relating to the injury that was sustained by him. However, the learned Trial Judge has discarded it on the ground that it is impermissible/not relevant under Section 32 of Indian Evidence Act. This aspect will have to be gone into. Further, the testimony of P.W.6 Shivaji should not have been discarded only on the ground that he being the maternal uncle was interested witness. All these aspects are required to be considered and, therefore, the matter deserves to be admitted.

6. Per contra, the learned Advocate appearing for respondent Nos.2 and 3 has supported the reasons given by the learned Trial Judge while acquitting them and submitted that the FIR/statement recorded by P.W.11 Nanasaheb cannot be considered as a relevant fact or cannot be admitted by resorting to the provisions of Section 32 of the Indian Evidence Act when he is alive.

7. At the outset, it is to be noted that the informant is alive. He is the appellant before this Court under the proviso to Section 372 of

the Code of Criminal Procedure. A mentally challenged person cannot directly file any proceeding in a Court of law. No doubt, he has rights, but the law requires that a guardian, who is taking care of the property and person of such mentally challenged person, should then act on behalf of such disabled person. But here in this case surprisingly the informant has directly come to this Court. Rather the disability which is stated to have occurred to the informant is stated in view of ground (X) due to the subsequent assault and then the said statement was recorded by P.W.11 and 12. In other words, the said statement recorded by P.W.11 Nanasaheb and certified by P.W.12 Jaywant Deore was not in respect of the incident in question i.e. the incident that had taken place on 06.04.2014 at 6.00 p.m. Some references about the incident in the past in that statement that was recorded by P.W.11 Nanasaheb cannot be said to be covered under Section 32 of the Indian Evidence Act. Section 32 of the Evidence Act makes provision for the relevant fact in cases in which the person is dead or cannot be found etc. The statements, written or verbal of relevant facts made by a person who is dead or who cannot be found **or who has become incapable of giving evidence** or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts, but the said

Section made the said provision in following cases only :-

- (i) When it relates to cause of death;
- (ii) or is made in course of business;
- (iii) or against interest of maker;
- (iv) or gives opinion as to public right or custom, or matters of general interest;
- (v) or relates to existence of relationship;
- (vi) or is made in will or deed relating to family affairs;
- (vii) or in document relating to transaction mentioned in section 13, clause (a);
- (viii) or is made by several persons and expresses feelings relevant to matter in question;

Thus, the situation in this case is absolutely not covered under Section 32 of the Indian Evidence Act. The injury certificate which was before the learned Additional Sessions Judge would show that the informant was discharged on 15.05.2014. It presupposes that his health condition was improved and, therefore, he was discharged. The said record does not show that during the period of his admission, his mental health got deteriorated and even as per the above ground No.(X), the said situation had arisen in a subsequent assault to the informant and, therefore, the learned Trial Judge has rightly held that the said statement recorded by P.W.11 Nansaheb cannot be considered under Section 32 of the Indian Evidence Act. At

the most it can be considered, in view of the fact that he is alive, under Section 161 of the Code of Criminal Procedure, but for that purpose examination of the informant was mandatory.

8. In such situation, we agree to the submission made on behalf of the appellant that if the witness thereafter becomes incapable of giving evidence, then that cannot be the only point or reason for acquitting the accused. Definitely the other evidence will have to be considered in such situation. Much reliance has been placed on the testimony of P.W.6 Shivaji. Important point to be noted is that he states that on 06.04.2014 around 5.30 p.m., he worked in his office and thereafter started to go towards his house on motorcycle. When he was going towards his house on motorcycle, on the road, he found that the accused persons were assaulting his nephew and according to him other two eye witnesses were along with him. No doubt, the said two eye witnesses have turned hostile. In his cross-examination he has admitted that it was Sunday on 06.04.2014 and normally his office remains closed. Then it raises doubt about his statement that he has worked in his office till 5.30 p.m. on that day. He appears to be the got-up witness because in spite of the fact that his nephew was severely assaulted, he had not made much efforts to lodge the report. He had not gone to the police station immediately to record his statement. He has also not stated that he had tried to intervene in

the assault. Another fact that is coming from the cross-examination that informant was severely beaten by the opposite party on 28.12.2018 and in that assault, the mental condition of the nephew got worst. That means, the inability occurred to the informant after 28.12.2018 and not because of incident dated 06.04.2014. Another fact is that accused No.1 has filed criminal case against the informant, this witness i.e. P.W.6 Shivaji and others in Chalisgaon Court and it was still pending when his testimony was recorded in this case. Therefore, when he is an accused in the case filed by accused No.1 against him, informant and others, he will have to be branded as interested witness and in absence of any corroboration to his testimony, it could not have been accepted. We do not found any illegality or error committed by the learned Trial Judge in acquitting the accused persons. No case is made out to grant leave to appeal or admit the appeal and, therefore, both the proceedings stand rejected.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm