

(2010) 03 BOM CK 0095

In the Bombay High Court

Case No : Criminal Revision Application No. 263 of 2006

Kocharya Valvi

APPELLANT

Vs

The State of Maharashtra and Kamruddin Shaikh

RESPONDENT

Date of Decision : 19-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 307, 386, 389, 390, 391

Motor Vehicles Act, 1988 — Section 184

Penal Code, 1860 (IPC) — Section 279, 304A, 337, 338, 427

Citation : (2010) 112 BOMLR 1975 : (2011) CriLJ 1434 : (2011) 3 RCR(Criminal) 285 : (2011) 3 RCR(Criminal) 285

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : Rashmi P. Hardas, instructed by C.R. Deshpande, for the Appellant; B.J. Sonwane, Assistant Public Prosecutor and D.K. Tiwari, for the Respondent

Final Decision : Allowed

Judgement

S.B. Deshmukh, J.—Heard learned Counsel for the respective parties.

2. Rule, made returnable forthwith, heard finally with consent of the parties.

3. This revision application takes an exception to the judgment and order passed by the learned Judicial Magistrate, First Class, Nandurbar dated 13th April, 2006 in S.T.C.C. No. 2901 of 2004.

4. In S.T.C.C. No. 2901 of 2004 Respondent No. 2 was the accused, charged for the offences punishable under Sections 304A, 279 and 338 of Indian Penal Code and Section 184 of the Motor Vehicles Act, 1988. Respondent No. 2/ accused has been acquitted of the offences charged against him by the Judicial Magistrate, First Class, Nandurbar by the judgment and order, which is impugned in the present revision application. This revision application has been filed by the present petitioner who, indisputably, is father of deceased Kashibai W/o Vinayak Valvi. Copy of the first information report is annexed with the petition at

Annexure A .

5. Respondent No. 2 informed the occurrence of accident to Nandurbar City Police Station on 6th September, 2004. It was oral report, which has been reduced into writing in the nature of statement of Respondent No. 2. Based on this report of the occurrence/ motor vehicular accident, entry was taken in the station diary at No. 28/12/10 by the Police Station Officer who was present at the Police Station. It was registered as Motor Accident Register No. 36 of 2004. Case was handed over for inquiry/ investigation to Head Constable Mr. Harishchandra Bhau Pawar, who, at the relevant time, was attached to Mangal Bazar Outpost. Head Constable Mr. Pawar, reported the matter, which was treated as first information report on 6th of September, 2004. After registration of the crime, the case was handed over to police officer concerned. In the report filed by Mr. Pawar, it has been contended that at the relevant time the bus, owned by the M.S.R.T. Corporation, was being driven by Respondent No. 2. Accident occurred on 6th of September, 2004. According to the report, the bus bearing No. MH20D/ 5146, which was driven by Respondent No. 2, dashed the motorbike i.e. MH39/ 5639. The deceased Kashibai was the pillion rider of the motorbike. Mr. Vinayak Valvi, according to this report, was riding with the bike, was dashed by the bus owned by the M.S.R.T. Corporation. Resultantly, rider Mr. Vinayak Valvi and his wife Kashibai sustained injuries. Both the injured persons, after the accident, were rushed to the hospital. Kashibai was rushed to hospital at Sanjivni Hospital, Deopur, Dhule. Kashibai succumbed to injuries. It was accordingly reported to Police Sub Inspector, Nandurbar Police Station by the Police Station Officer, Deopur Outpost. Communication is dated 11th September, 2004. Death of Kashibai on account of this motor vehicular accident is not in dispute. Based on this report, offence u/s 279, 337k, 338, 427 of Indian Penal Code and u/s 184 of the Motor Vehicles Act, 1988 initially was registered. It was Crime No. 134 of 2004.

6. After investigation of the crime, charge sheet was filed in the Court of Judicial Magistrate, First Class, Nandurbar. Respondent No. 2 was the accused in the case. This Court, by the earlier order has called for the record and proceeding. Entire record and proceeding of the S.T.C.C. concerned is available. This record was made available to the learned Counsel appearing for the respective parties. From the record it appears that the Respondent No. 2/ accused, after the accident and registration of the offence, was arrested, produced before the learned Judicial Magistrate, First Class, Nandurbar, applied for bail and was released on bail. His bail bond was accepted.

7. The record and proceeding, which is available with this Court, do show the nature of the investigation. Without bloviation, I shall refer to the record.

(i) First information report dated 6th of September, 2004 (Page No. 1).

(ii) Spot Panchanama dated 6th September, 2004 (Page 2).

(iii) Statement of Respondent No. 2 Mr. Kamruddin dated 6th September, 2004.

Since occurrence was reported by Respondent No. 2 and it has been reduced into writing in the nature of statement, is part of the record, dated 6th September, 2004 (Page No. 3.)

(iv) Since A. D. was also registered, those papers are included by the police station concerned in the papers of the investigation of the case. I have seen those papers also. Compilation is at page 33 of the record and proceeding.

(v) Inquest was drawn. It is dated 11th September, 2004 (Page 9).

(vi) Postmortem report is dated 11th September, 2004 (Page 41).

(vii) Statement of Vinayak Jaising Valvi (person who allegedly was riding with the motorbike at the relevant time) (page 13) dated 6th September, 2004.

(viii) Statement of Kailas Dnyandeo Patil is dated 6th September, 2006 (Page 67). (It appears that this witness was traveling with the bus involved in the accident.

(ix) Statement of Mr. Arun Shivram Bhadane (alleged eye witness) dated 8th September, 2004.

(x) Statement of Sandeep Popat Shinde dated 8th September, 2004 (Page 73) (alleged eye witness).

(xi) Statement of Mr. Vinayak Jaising Valvi (Page 77) is dated 14th September, 2004.

(xii) Statement of Mr. Dinesh Jaising Valvi is dated 14th September, 2004 (Page 79).

(xiii) Statement of Jaising Fattu Valvi dated 14th September, 2004 (Page 81) (father of Vinayak).

(xiv) Statement of Jaywantibai W/o Vinayak Valvi dated 14th September, 2004 (Page 830).

(xvi) Statement of Govind Valvi dated 4th September, 2004 (Page 85).

(xvii) Statement of Sau. Rekha W/o Govind Valvi dated 14th September, 2004. (Page 86).

8. Counsel for the petitioner submitted that only two witnesses have been examined on behalf of the prosecution. First one is Mr. Vinayak Jaising Valvi. Copy of his evidence is annexed with the petition at Annexure B. Other witness examined on behalf of the prosecution is Mr. Dinesh Jaysing Valvi. He is brother of Mr. Vinayak. Copy of his evidence is also on record, page 20. Apart from these two witnesses, no other witness is examined on behalf of the prosecution despite the fact that the case was pending trial before the learned Judicial Magistrate, First Class for pretty long time. According to the learned Counsel for the Petitioner, even the first information report is not exhibited, medical officer is not

examined, postmortem report is also not exhibited. Learned Judge, based on the evidence of two prosecution witnesses, recorded acquittal of the Respondent No. 2. She, therefore, submitted that it is a case wherein retrial can be ordered by this Court, exercising powers u/s 401 of the Code of Criminal Procedure [the Code, for short]. In support of his submissions, she relied on a judgment of the Honourable Supreme Court in the case of K. Chinnaswamy Reddy v. State of Andhra Pradesh and Anr. reported in 1963 (1) Cri. L. J.

9. Another judgment brought to my notice, on behalf of the petitioner, is in the matter of Janata Dal Vs. H.S. Chowdhary and Others, .

10. Mr. Sonwane, learned A.P.P., on behalf of the State, submitted that summons was issued to the complainant/ police head constable Mr. Pawar. He points out report of the Police Station, page 135, part of the record. It is dated 5th April, 2006. Mr. Pawar, Police Head Constable / complainant, by this report, appears to have requested the learned Judge for some time. He also points out Roznama and the fact that there is no order on this report, passed by the learned J.M.F.C.. The case was proceeded further and ended in acquittal.

11. Mr. Tiwari, who appears for Respondent No. 2, submitted that there is no case for interference and/ or converting the acquittal to that of conviction. According to him, the learned Judge has considered the evidence, which was adduced on behalf of the prosecution and acquitted the Respondent No. 2/ original accused. He has pointed out the date of accident, time passed over after acquittal of the Respondent No. 2 by the learned J.M.F.C. He, therefore, seeks dismissal of the revision petition, filed by the present Petitioner.

12. This petition is filed by the hapless father of deceased Kashibai. Question for consideration before this Court is within narrow compass. Petitioner seeks retrial of the case. For such retrial, submissions are based on Section 401 of the Code. It would be appropriate to consider the provision laid down u/s 401 of the Code. In view of the facts of the case on hand, Sub-section (1) of Section 401 of the Code is relevant, which reads:

401. High Court's powers of revision. (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections, 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

A look to Sub-section (1) of Section 401 makes it clear that if the record and proceeding has been called for by the High Court on its own motion or which otherwise comes to the knowledge of the High Court, discretion is vested with the High Court to exercise the powers conferred on a Court of appeal by various sections of the Criminal Procedure Code. These sections also have been quoted in Sub-section (1) of Section 401. They are 386, 389, 390, 391 and 307. Sub-

section (2) of Section 401 puts an embargo or rider for affording opportunity of being heard to the accused either personally or by pleader in his own defence. In other words, while exercising the powers under Sub-section (1) of Section 401 of the Code it is made obligatory on the High Court to afford hearing to the accused either personally or through a lawyer representing the accused. Sub-section (3) of Section 401 of the Code provides that finding of acquittal cannot be converted into one of conviction. It is relevant, at this stage, to notice that revisional powers were conferred upon the High Court earlier by Section 439 of the Code. The Honourable Supreme Court, in the matter of K. Chinnaswamy (Supra) has considered the scheme of Section 439 of the Code which seems to be *pari materia* to Section 401 of the Code. I have considered the judgment of the Honourable Supreme Court.

13. Powers of the Appellate Court have been laid down u/s 386 of the Code. Section 386(a) empowers the High Court, being Appellate Court, to reverse order of acquittal and direct further inquiry or that the accused be retried or committed for trial. Thus, retrial can be ordered by the High Court, being Appellate Court. Thus, if Section 401 and Section 386 of the Code are read conjointly, it can be said that High Court does has a power to direct retrial of the case. As held by the Supreme Court in the case of K. Chinnaswamy (supra) this is a discretionary power vested with the High Court, in an appropriate case, can be exercised by the High Court. Some instances have been noticed by the Honourable Supreme Court in the matter of K. Chinnaswamy (supra). These are the illustrative examples noticed by the Honourable Supreme Court in the matter of K. Chinnaswamy (supra).

14. Turning to the facts of the present case, it is not disputed by the learned Counsel for the Respondent Nos. 1 and 2 that there were only two witnesses examined in the trial Court. The first information report, postmortem report, spot Panchanama were not exhibited. Exhibition of the document is a matter governed by the provisions of the Code read with the provisions of Indian Evidence Act. It was for the prosecution to see that the documents, which are brought on record, are formally or properly proved. In the case on hand, it was the duty of the prosecution atleast to see that the first information report, spot Panchanama, the postmortem report are established and exhibited. Even though two witnesses were examined, the prosecution ought to have examined the investigating officer. Even for the accused person, if some omission or contradiction is to be established, to be brought on record, examination of investigating officer is necessary. Thus, in fair trial, even from the view point of the accused person, the prosecution ought to have atleast examined the complainant, investigating officer, medical officer and eyewitness, if any.

15. In a criminal trial, Court has to take into consideration right of complainant/victim and right vested with the accused person. The court seized with the trial is under legal duty to give proper and fair opportunity to all the parties, however, shall not ignore the injustice likely to be caused to the complainant on account of

lethargy on the part of the prosecution. Pendency of the cases before the Court is a matter of concern not only for the accused person or others but every one involved in the process of administration of justice. But, then, the Court has to see that justice will be done to every one i.e. to the complainant and accused as well. The Court seized with the criminal trial is armed with sufficient power to enforce the attendance of any of the witness. In the case on hand, only because the occurrence is dated 6th September, 2004, the accused suffered the trial for around 21/ years, cannot be a reason to dismiss the present criminal revision application. In my view, petitioner has established a case for interference by this Court u/s 401 of the Code for directing retrial of the case by the learned Judicial Magistrate, First Class.

16. In the case on hand, I have referred virtually every document since report of the Respondent No. 2 and first information report of police Head Constable Mr. Pawar till filing of the charge sheet. This exercise, I have undertaken, to find out that entire investigation papers were part of the record and were available to the learned J.M.F.C. I have not recorded any opinion on the merits of the case and/or defence, if any, of the Respondent No. 2. Status of witness, I have referred as witness alone. This Court has not recorded any opinion that particular witness is an eyewitness in the case on hand. It is for the prosecution to bring the evidence before the Court and for the Court to decide the case in view of retrial which I am ordering in this revision application.

17. Criminal Revision Application is partly allowed. Order of acquittal, recorded by the learned Judicial Magistrate, First Class in favour of Respondent No. 2 is quashed and set aside with further direction to the learned Judicial Magistrate, First Class, Nandurbar for retrial of the Respondent No. 2, from the stage of plea. It is clarified that such plea has been already recorded by the learned Judicial Magistrate, First Class on 13th of June, 2005. I am remitting the case back to the Court. It is clarified that the Court concerned shall start with the retrial from the stage after framing the plea. It is further made clear that since retrial has been ordered by this Court, two witnesses, who are already examined i.e. Mr. Vinayak Jaising Valvi (Exhibit3) and Mr. Dinesh Jaising Valvi (Exhibit4) are permitted to be examined on behalf of the prosecution, if the prosecution desires to do so. However, in that contingency, liberty in favour of the present Respondent No. 2/ original accused to refer and confront the earlier evidence of Mr. Vinayak and Mr. Dinesh i.e. Exhibit3 and Exhibit4. Respondent No. 2 shall appear before the Court of learned Judicial Magistrate, First Class, Nandurbar on 19th April, 2010 at 11.00 a.m. Learned Judge shall decide the case expeditiously on or before 31st December, 2010. Registrar (Judicial) shall remit the papers within one week from today. Needless to mention that the learned Judge, after retrial, decide the case on its own merits.

18. Rule is made absolute, in above terms, with no orders as to costs.