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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.217 OF 2015.**

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|-----------------------------------|---|-------------------|
| 1. Narayan @ Dada Shankar Hande |] | |
| Age : 51 years, occn. Agriculture |] | |
| residing at: Hande Galli, Barshi. |] | |
| |] | |
| 2. Shahaji Shankar Salunkhe, |] | |
| age: 22 years, Occn. Business, |] | <u>Appellants</u> |
| residing at Patil Plot, Barshi. |] | Ori. accused Nos |
| |] | 1 to 4. |
| 3. Gopal Narayan Hande, |] | |
| age: 23 years, Occn. rickshaw |] | |
| driver, r/o Hande Galli, Barshi |] | |
| |] | |
| 4. Ganesh Kisan Hande, |] | |
| age; 22 years, Occn. education |] | |
| r/o Hande Galli Barshi, |] | |
| |] | |
| At present all lodged in Kolhapur |] | |
| Central Prison, Kolhapur. |] | |

Versus

The State of Maharashtra	..	]	Respondent.
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Mr. Harshad Nimbalkar i/by Mr. Priyal Gopaldas Sarda, for the Appellants.

Smt. V.R. Bhosale, A.P.P. for the State.

CORAM : P.V. HARDAS AND

DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATED : 28th April, 2015

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. The appellants, who are convicted by the Additional Sessions Judge, Barshi, District : Solapur, by judgment dated 23rd

January, 2015 in Special Case No.34 of 2014, for the offence punishable under Section 302 read with section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- each in default to suffer further rigorous imprisonment for three months, by this appeal, challenge their conviction and sentence.

2. Facts, as are necessary, for the decision of this appeal may briefly be stated thus :-

On 8.6.2011, at about 8.00 p.m. Akash, son of P.W.5 Ashabai Salunkhe, left the house for going to gymnasium. At 9.00 p.m. Shankar Yadav, nephew of P.W.5 Ashabai, informed her that Akash was lying in injured condition on the heap of stones at Patil Plot. P.W.5 Ashabai went there and took the injured to Jagdale Mama Hospital at Barshi; where he was declared dead before admission.

3. P.W.5 Ashabai then, alongwith her husband Navnath went to police station. Her husband Navnath lodged complaint against the accused at about 10.00 p.m. and on his complaint C.R.No.133 of 2011 came to be registered against accused for the offence punishable under Section 302 read with 34 of the Indian penal Code. The investigation of the said crime was taken over by P.W.19 Dy. S.P. Mansawale. Immediately after registration of the offence, he visited the spot of incident. From the spot, he collected

one blood stained pant of the deceased, blood mixed mud and ordinary mud under panchnama (Exh.37).

4. On 9.7.2011, P.W.19 Dy. S.P. Mansawale, arrested accused No.1 Narayan and accused No.2 Shahaji under arrest panchnamas Exh Nos 44 and 45 respectively, and seized blood stained clothes on their person. On the same day, Head Constable Vonkaldas produced blood stained clothes of the deceased Akash which came to be seized under panchnama Exh.38.

5. During police custody on 9.7.2011, accused No.2 Shahaji expressed his willingness to show the spot of incident. His statement was reduced in writing under memorandum exh.16. Accused No.2 Shahaji took the police and panchas to the spot of incident, which was open space in front of tin shed. From there, he produced some sticks, one handle of pick-axe and the footwear of the deceased. P.W.19 Dy.S. P. Mansawale seized those article Nos 7 to 11 under panchnama Exh.61.

6. On 10.7.2011, accused No.3 Gopal and accused No.4 Ganesh came to be arrested and blood stained clothes on their person came to be seized under panchnama Exh.63 and 72. During police custody, accused No.3 Gopal gave disclosure statement expressing his willingness to show the auto-rickshaw in which the dead body of Akash was carried. The memorandum panchnama at

Exh.69

was prepared accordingly. Thereafter accused No.3 Gopal guided the police and panchas to the spot behind Barbole Shopping Centre and showed one rickshaw bearing No.MH-12/DT-1664 which came to be seized under panchnama Exh.70.

7. On 13.7.2011, P.W.19, Dy.S.P. Mansawale referred all the four accused to Barshi Hospital and obtained their blood samples. On 14.7.2011, he collected postmortem report (Exh.75) and recorded the statement of some more witnesses. On 15.7.2011, he has sent all the seized articles to Chemical Analyzer vide requisition Exh.95 and 96. On 16.7.2011, on the application of first informant Navnath, he added Section 3(2) (v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and submitted a report Exh.98 accordingly to his superior officer. Further investigation of the case was handed over to P.W.2 Dy. S.P. Rohidas Pawar.

8. On being entrusted with the investigation, P.W.20 Dy.S.P. Pawar, has recorded further statements of the witnesses and after carrying out necessary investigation, submitted chargesheet in the Court against the accused on 30.9.2011.

9. On the case being committed to the Sessions Court, the trial Court has framed charge against accused vide Exh.27. Accused

abjured the guilt and claimed trial.

10. In support of its case, the prosecution has examined in all 27 witnesses and on appreciation of their evidence, the trial Court held the guilt of the appellants to be proved beyond reasonable doubt, for the offence punishable under Section 302 read with section 34 of the Indian Penal Code; and convicted and sentenced them as aforesaid, while acquitting them for the offence punishable under Section 3(2)(v) of Scheduled Caste and Scheduled Tribes(Prevention of Atrocities) Act, 1989.

11. In this appeal, we have heard learned counsel for appellant Shri. Harshad Nimbalkar and learned APP for the State Smt. V.R.Bhosale. In order to effectively deal with the rival submissions advanced by them, in our considered opinion, it would be useful to refer to the evidence on record.

12. To prove homicidal death of deceased Akash, prosecution has examined P.W.13 Dr. Ravindra Mali, who has conducted postmortem on his dead body on 9.7.2011. On external examination, he found as many as 19 injuries which were in the nature of Contusions, Abrasions and three Incise Wounds. He has noted those injuries in the column No.17 of the postmortem report Exh.75. He also noticed corresponding internal injury on dissection of brain. The cause of death according to him was neurological

shock due to head injury with simple injuries as mentioned in column No.17 and 19 of postmortem report Exh.75. There is nothing in his cross examination to disbelieve the cause of death of deceased as homicidal in nature. The learned counsel for the appellant has also fairly conceded this fact.

13. To prove the complicity of the appellants in homicidal death of deceased, prosecution has relied on four circumstances viz i) *motive*, ii) *deceased last seen in the company of accused Nos 3 and 4*, iii) *recovery of weapon of assault at the instance of accused No.2 Shahaji* and iv) *recovery of blood stained clothes of the accused*.

14. As regards first circumstance, *the motive*, the prosecution has placed reliance on the evidence of P.W.5 Ashabai, the mother of the deceased. She has deposed that Akash used to go to Hande Lane for flying pigeons. Accused No.3 Gopal was residing there and he was telling Akash not to come in Hande Lane as he was suspecting that Akash was having illicit relations with his sister. As per evidence of P.W.5 Ashabai, her son Akash has disclosed this fact to her. The prosecution has also examined P.W.14 Akshay, the brother of the deceased on the same point.

15. To prove the second circumstance of, *last seen together*, the prosecution has placed reliance on the evidence of P.W.9

Siddheshwar Pawar. According to his evidence, on the date of incident, while he proceeding on his bicycle at about 6.30 p.m., he saw the deceased standing in Hande lane, one auto-rickshaw came there. Accused No.3 Gopal and accused No.4 Ganesh got down from the rickshaw and they took the deceased in the said rickshaw alongwith them. In his evidence, he has further stated that in the night when he returned from the duty, he came to know that Akash was murdered.

16. Thus as per his evidence, he has seen Akash being taken in rickshaw by accused Nos 3 and 4 at about 6.30 p.m. However, he has not disclosed said fact to anyone till next day at 4.30 p.m. As per his evidence, he went to police station on the next day. This conduct of the witness of not disclosing about the material fact, to which he was a witness, creates doubt about the credibility of his evidence that he has seen accused Nos 3 and 4 taking the deceased Akash at 6.30 p.m. Moreover as per his evidence, he has seen accused Nos.3 and 4 taking deceased at 6.30 p.m. whereas P.W.5 Ashabai was informed about injured Akash at 9.00 p.m.

17. To establish the third and fourth circumstances, the prosecution has relied upon the evidence of panchas and Investigating officer P.W.19 Dy. S.P. Mansawale to prove the seizure of blood stained clothes of accused and also the recovery of blood stained weapon of assault like sticks and pick-axe. However, C.A. report Exh.52 reveals that blood group of the blood stains found thereon could not be ascertained. Therefore, necessary link is not

established to prove that these weapons were used in the offence or blood stains found on the clothes of accused were that of the deceased.

18. Thus, the prosecution in this case has, at the most to some extent has succeeded in establishing only two circumstances viz i) *motive* and ii) *last seen*. However, none of the circumstance is conclusively established and is not of a clinching nature to prove the guilt of the appellants beyond reasonable doubt. The circumstance of *last seen together* is not in that way an incriminating circumstance perse or *motive* by itself is also not sufficient to prove the guilt of the accused. The burden is on the prosecution to establish chain of incriminating circumstances from which no conclusion except that of guilt of the accused and accused alone could be drawn. Here in the case the prosecution has failed to do so.

19. Consequently, appeal is allowed and the conviction and sentence of the appellants is hereby quashed and set aside and the appellants are acquitted of the offences with which they were charges and convicted. Fine, if paid by the appellants be refunded to them. Since the appellants are in jail, they be released forthwith, if not required in any other case.

(DR. SHALINI PHANSALKAR-JOSHI, J.)

(P.V. HARDAS, J.)