

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

CRIMINAL APPLICATION NO.1979 OF 2017

Anna s/o Mhatardeo Kolte,
Aged 55 years, Occu. Agri.,
R/o Mali Babalgaon,
Taluka Pathardi, District
Ahmednagar

..Applicant

Versus

1. The State of Maharashtra,
through Police Station Officer,
Police Station, Ambhora,
Taluka Ashti, District Beed
2. Babasaheb s/o Mahadeo Maske,
Age 48 years, Occu. Agri.,
R/o Sawargaon, Taluka Ashti,
District Beed
3. Balbhim s/o Mahadeo Maske,
Age 42 years, Occu. Agri.,
R/o as above
4. Ramesh s/o Mahadeo Maske,
Age 38 years, Occu. Agri.,
R/o as above
5. Daulat s/o Balbhim Maske,
Age 24 years, Occu. Agri.,
R/o as above
6. Bapu @ Sandip s/o Balbhim
Maske, Age 22 years,
Occu.Aгри., R/o as above

..Respondents

Mr R.P. Phatke, Advocate for applicant
Mrs P.V. Diggikar, A.P.P. for respondent no.1
Mr Dhananjay Mane, Advocate h/f Mr P.S. Pawar, Advocate for
respondent no.2
Respondents No.3, 5 and 6 served

- WITH -

CRIMINAL APPLICATION NO.3304 OF 2017

The State of Maharashtra,
through Police Station Officer,
Police Station, Ambhora,
Taluka Ashti, District Beed

..Applicant

Versus

1. Babasaheb s/o Mahadeo Maske,
Age 46 years, Occu. Agri.,
R/o Sawargaon, Taluka Ashti,
District Beed
3. Balbhim s/o Mahadeo Maske,
Age 40 years, Occu. Agri.,
R/o as above
4. Ramesh s/o Mahadeo Maske,
Age 36 years, Occu. Agri.,
R/o as above
5. Daulat s/o Balbhim Maske,
Age 22 years, Occu. Agri.,
R/o as above
6. Bapu @ Sandip s/o Balbhim
Maske, Age 40 years,
Occu.Aгри., R/o as above

..Respondents

Mrs P.V. Diggikar, A.P.P. for applicant

**CORAM : S.S. SHINDE AND
A.M. DHAVALA, JJ.**

**DATE OF RESERVING
THE JUDGMENT : 7th August 2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 21st August 2017**

JUDGMENT (Per A.M. Dhavale, J.)

1. These applications are filed under Section 378 (3) of Cr.P.C. for grant of permission to prefer appeal against the order of acquittal of respondents no.2 to 6. Criminal Application No.1979 of 2017 is filed by the informant, who is brother-in-law of the deceased, while Criminal Application No.3304 of 2007 is filed by the State. Both are assailing the judgment of acquittal passed by learned Additional Sessions Judge, Beed on 24th March 2017 in Sessions Case No.105 of 2015, whereby respondents no.2 to 6 were acquitted of the offences punishable under Sections 302, 201 read 34 and 120-B of the Indian Penal Code.

2. Heard learned Advocate Mr Phatke for the applicant, learned A.P.P. Mrs Diggikar for the applicant/State and learned Advocate Mr Mane for respondent no.2.

3. Respondents no.2 to 6 were prosecuted on the basis of crime registered at C.R.No.12/2015 at Ambhora Police Station registered on the basis of F.I.R. of the applicant from Criminal Application No.1979 of 2017.

4. Deceased Gorakh, aged about 32 years was resident of Sawargaon, Taluka Ashti, District Beed. He was brother of wife of the informant, Anna Kolte and cousin of PW-5 Rohidas and son of PW-6 Parubai. All the accused are residents of the same village Sawargaon and are distant relatives of the deceased. Informant Anna was residing at Maliba Bhadgaon, Taluka Pathardi, District Ahmednagar.

The accused were prosecuted on the basis of material of last seen together and the two incidents dated 21.1.2015 and 22.1.2015 of assault by the accused to the deceased and the alleged illicit relations of the deceased with Vimal, second wife of accused No.2 Balbhim. All the accused are *inter se* related. Accused No.1 – Babasaheb (A-1) and accused No.3 -Ramesh (A-3) are brothers of Balbhim, while accused Nos.4 and 5 are sons of Balbhim. As per F.I.R. dated 29.1.2015, PW-1 Anna Kolte was invited by deceased Gorakh for attending a '*Jatra*' held at Sawargaon on 20th and 21st January 2015. As per F.I.R. and evidence of PW-1, on 21.1.2015, he along with deceased Gorakh had gone to watch '*Tamasha*' in the *Jatra*. At that time, at about 9.30 p.m. all the accused came and sat behind him and deceased Gorakh and Gorakh told Anna that he was apprehending danger to his life and they should leave the place. Then accused No.1 (A-1) Babasaheb held Gorakh by his collar, accosted him, what sort of relations he was maintaining with Vimal, who was brother's wife of accused No.1 – Babasaheb. Thereafter Babasaheb (A-1) gave a fist blow on his face and accused No.2 Balbhim (A-2) gave a stick blow on his back, while accused Nos.3 Ramesh and Daulat gave kick and fist blows. Accused No.5 slapped PW-1 Anna. Then, some persons intervened and PW-1 Anna and the deceased Gorakh left the place. Gorakh told PW-1 Anna to go to his house. PW-1 Anna went to the house of his maternal uncle residing in the same village.

5. PW-2 Ashok and PW-3 Sominath gave statements and oral evidence that on 22.1.2015 at about 4.30 to 5.00 a.m., when they were proceeding to attend nature's call, they saw accused Nos.1 to 5

assaulting deceased Gorakh by sticks and dragging him by putting rope around his neck. They were also abusing him and this incident took place in front of hotel of accused No.2 – Balbhim. PW-2 Ashok and PW-3 Sominath got frightened and did not intervene. Thereafter deceased Gorakh went missing. On 23.1.2015, PW-5 Rohidas lodged a missing report Exh.58 at Ambhora Police Station. Thereafter, there was search of the deceased and on 28.1.2015, dead body of Gorakh was found floating on water in the well of Hausrao in the same village. Accordingly, Accidental Death report Exh.59 was lodged by PW-5 Rohidas on 28.1.2015. On the next day, PW-1 Anna lodged F.I.R.

6. The post mortem notes Exh.74 and evidence of PW- 9 Dr.Balaji show that deceased Gorakh had single contusion of 6 cm x 4 cm on high parietal area in the midline and there was internal fracture of cervical vertebra C-4 and C-5 and haematoma in the scalp. These injuries were the cause of death. The body was in decomposed state. The Medical Officer did not lead any evidence about the date and time of death.

7. The prosecution mainly relied on the evidence of PW-2 Ashok and PW-3 Sominath who deposed that on 22.1.2015 at 4.00 to 5.00 a.m., they have seen the accused nos.1 to 5 assaulting deceased Gorakh by sticks and dragging him by putting noose of the rope around his neck.

8. The learned trial Judge has rightly taken into consideration the subsequent conduct of PW-2 Ashok and PW-3 Sominath in not disclosing these facts to the Police. There is evidence that they had

disclosed this fact to other witnesses i.e. PW-1 Anna, PW-5 Rohidas and mother of the deceased immediately after the incident, but this material fact does not find place in the missing report dated 23.1.2015 Exh.58 and Accidental Death case report dated 28.1.2015 Exh.59. This fact was intimated to the Police for the first time after six days on 29.1.2015 in the F.I.R. During the intervening period PW-2 Ashok and PW-3 Sominath were searching deceased along with other witnesses and if they would have narrated this incident, there could have been F.I.R. against the accused persons much earlier. In the present case, the F.I.R. is lodged after seven days. The learned trial Judge rightly relied on **State of Orissa Vs. Brahmananda Nanda AIR 1976 SC 2488** in which silence of the material witnesses for a day and half was held to be serious infirmity. In the present case, the silence was for a period of six to seven days.

9. We also find that there are discrepancies and suspicious circumstances in the evidence of PW-2 Ashok and PW-3 Sominath. Both are chance witnesses. PW-2 Ashok stated that he was going to answer the nature's call. His cross-examination in paragraph 10 shows that he had other spots nearer to his house for going to answer the nature's call. PW-2 Ashok in cross-examination admitted that his wife while filing nomination paper had shown that there was toilet in her house but thereafter, he changed his version. According to him, he saw the incident at 5.00 to 5.30 a.m. His evidence shows that accused no.1 Babasaheb and accused no.2 Balbhim and accused no.3 Ramesh beating Gorakh with stick whereas other accused Daulat and Bapu were dragging him by putting noose of rope around his neck.

PW-2 Ashok and PW-3 Sominath did not depose about presence of each other on the spot.

10. PW-2 Ashok stated that after watching Tamasha for some time, he went to sleep. According to him, the incident took place at 4.00 to 4.15 a.m. when he was proceeding to milking buffaloes. According to him, accused no.1 Babasaheb, accused no.2 Balbhim and accused no.3 Ramesh were beating Gorakh with sticks and stick blow of Babasaheb landed on head of Gorakh whereas accused nos.4 Daulat and accused no.5 Bapu were dragging Gorakh by a rope. The role assigned to accused no.3 - Ramesh by PW-2 Ashok and PW-3 Sominath is different.

11. Pertinently, the post mortem report shows only one injury on the skull of deceased Gorakh. Besides internal haematoma and fracture of vertibras. There are no corresponding injuries to support the evidence of assault by two three persons by sticks and there is no ligature mark to support the allegation that some accused were dragging deceased Gorakh by putting noose of rope around his neck. When these contradictions are considered along with silence of PW-2 Ashok and PW-3 Sominath by not reporting the incident to Police for six days, their evidence becomes highly suspicious.

12. As far as the first incident in *Tamasha* theatre is concerned, there is evidence that there was police *bandobast* but there was no intervention by the Police when deceased Gorakh was allegedly assaulted. Besides, PW-1 Anna, PW-2 Ashok, PW-3 Somnath and PW-5 Rohidas had also attended *Tamasha*. PW-1 Anna stated about assault.

PW-2 Ashok did not state about any incident though he was present there from 9.00 p.m. to 11.00 p.m. PW-3 – Sominath formally spoke about quarrel without any reference to assault. PW-4 Raju also stated about quarrel and beating by the accused to Gorakh by sticks. PW-5 Rohidas also stated about quarrel without any specific evidence regarding assault. There was intervention by Mohan and Raju, but Mohan is not examined while Raju has not deposed about assault. Not reporting the incident to the Police present there is also suspicious.

13. The subsequent conduct of PW-1 Anna is again suspicious. Though deceased Gorakh allegedly told him about danger to his life at the hands of accused, PW-1 Anna did not accompany him to his house. Instead he went to the house of his maternal uncle. Deceased Gorakh was wife's brother of PW-1 Anna. It was expected that he should have escorted him to his house.

14. The missing report dated 23.1.2015 lodged by PW-5 Rohidas only disclosed about a quarrel (casual quarrel). P.W.5-Rohidas reported that Gorakh was lying on the ground in drunken condition but PW-5 Rohidas did not take him to his house. Chemical Analyst's report shows that deceased Gorakh had consumed liquor. The report of Accidental Death dated 28.1.2015 lodged by PW-5 Rohidas is again silent about assault by the accused in the *Tamasha* theatre and assault seen by PW-2 Ashok and PW-3 Sominath.

15. There is no definite material to show at what time Gorakh died. The body was in the process of decomposition. Therefore, there is no evidence to show that this evidence of last seen and assault was

within close proximity with the time of death.

16. Learned trial Judge held that the homicide was proved. The evidence in this regard shows that shirt, pant and mobile of deceased were found in the field. His chappal was found at a distance of 50 feet and body of the deceased was found with only baniyan and underwear. If somebody jumps into the well for committing suicide, he will have contused injury like injury no.1 with fracture of vertebra. We, therefore, find that possibility of suicide is not ruled out.

17. There is evidence about discovery of clothes of the accused but Chemical Analyst's reports do not show any blood stains on the clothes of the accused.

18. There is also discovery of rope but it was not proved to be weapon of offence. There are no corresponding injuries and blood stains.

19. The defence suggested various stands of enmity, political, commercial, land dispute, personal and character. Admissions of the witnesses disclose that the parties are of two rival groups and there was contest of election by relatives of the accused and the witnesses against each other. The evidence of PW-3 – Sominath and PW-4 Raju show that one Mangal contested election from the panel of father-in-law of PW-3 – Sominath against accused no.1 and there was a tie and in lucky draw. Mangal was elected but in Court, accused No.1 – Babasaheb was declared as elected. Wife of PW-4 Raju contested election from the panel of Babasaheb Mahadeo Maske. It was against

the accused. There is admission by PW-2 Ashok that he was in transport business and accused no.1-Babasaheb was also in transport business. There were transactions with one Harba of both of them. PW-3 Sominath admitted that one case under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was filed against him by one Hausrao Bajirao but denied that accused nos.1 and 2 were witnesses in the same.

20. After considering all the facts together and on going through the judgment of the trial Court, we find that the view taken by the learned trial Judge is a reasonable and probable view. We do not find it necessary to admit the appeals and re-appreciate the evidence. Hence, we find that these are not fit cases for granting permission to file appeal against acquittal under Section 378 (4) of the Cr.P.C.

21. Hence, both the applications Nos.1979 of 2017 and 3304 of 2017 seeking liberty to file appeals under Section 378 (4) of the Cr.P.C. are rejected.

(A.M. DHAVAL, J.)

(S.S. SHINDE, J.)

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