

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

CRIMINAL APPLICATION NO. 5434 OF 2015

The State of Maharashtra, through
Police Inspector, Karjat Police Station,
Dist. Ahmednagar

...APPLICANT
(Ori. Complainant)

versus

1. Bharat Chandrakant Ghalme, Age 23 years,
 2. Deepak Parshuram Ghalme, Age 23 years,
 3. Balu Pandurang Sabale, Age 25 years,
 4. Vinayak Namdeo Ghalme, Age 23 years,
 5. Sharad Dada Ghalme, Age 25 years,
 6. Gangaram Bapu Ghalme, Age 25 years,
 7. Chandrakant Ashru Ghalme, Age 51 years,
- All R/o. Shinde, Tq. Karjat, dist. Ahmednagar.

...RESPONDENTS
(Ori. Accused)

.....
Mr. M.M. Nerlikar, APP for the applicant/appellant.
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**CORAM : S.S. SHINDE AND
K.K. SONAWANE, JJ.**

**RESERVED ON : 11th JANUARY, 2017
PRONOUNCED ON : 23rd JANUARY, 2017.**

JUDGMENT : (Per : K.K. Sonawane, J.)

1] The petitioner i.e. State of Maharashtra moved the present application seeking leave under Section 378 of Cr.P.C. to prefer appeal against the judgment and order of acquittal dated 13.7.2015 of respondent/accused in Sessions Case No. 230 of 2012, passed by the learned Additional Sessions Judge, Ahmednagar.

2] The genesis of the application culled out in brief is as under :-

That, the ill-fated victim Vinod Ghalme, r/o. Village Shinde, Taluka Karjat, Dist. Ahmednagar was the son of PW-2 Pramila and Arun Ghalme. He was residing with parents and brother - PW-6 Yogesh etc. The accused were also resident of the same village Shinde nearby the vicinity of the house of deceased Vinod. According to prosecution the relations between the family of deceased Vinod and accused were strain on account of old vendetta. Accused had given threats to victim Vinod that they will eliminate him prior to the next fair in the village. It has been contended that on the day of incident i.e. 27.4.2012, the victim Vinod in the wee hours of evening was at his house. Accused No.3 Balu came to his house in the vehicle Bolero Jeep. He asked the victim Vinod to accompany with him. Thereafter, the accused Balu went ahead and the victim Vinod followed him on his motor cycle. But, thereafter he did not return to home. The family members of victim Vinod launched massive search of victim Vinod but all efforts found unavailing. Thereafter, his father Arun filed missing report to the Karjat Police station. Eventually on 1.5.2012, they learnt that one dead

body was found lying beneath the bridge within the vicinity of village Vangdari. The father Arun and brother PW-6 Yogesh rushed to the spot. They identified the dead body of the victim Vinod.

3] Meanwhile, the Police Patil of village Vangdari Shri Bhausahab Nimse, received the information from one Subhash Gore about the dead body lying near the bridge on Vangdari-Inamgaon Road. He immediately visited the spot to take stock of situation. He found dead body of one male in the bed of river. He took out the dead body from the water. There were injuries on the mortal remains of the deceased. He immediately rushed to the Shrigonda Police Station and filed a report of murder of deceased by unknown assailants. Pursuant to report, the police of Shrigonda Police station, registered the Crime No. 223 of 2012 under Section 302 of IPC and swung into action. Police attended the dead body and drawn inquest panchanama. It was referred for autopsy to determine the exact cause of death. The I.O. recorded statement of the witnesses acquainted with facts of the case. The accused came to be apprehended for the sake of investigation into the crime. Thereafter, investigation was transferred to Karjat Police Station for collecting evidence against accused/assailant. The clothes of the deceased were seized under panchanama. The accused made confessional statement and shown willingness to produce the weapon of the crime as well as point out the spot of the incident in presence of Panchas. The I.O. prepared the memorandum panchanama and recovered the weapon, vehicle Bolero Jeep and other incriminating articles at the behest of accused under Section 27

of the Indian Evidence Act. I.O. procured the post mortem report and other medical certificates of the injured witnesses etc. The I.O. collected photographs of the scene of occurrence and record of call detail of the accused inter-se as well as with the prosecution witnesses. After completing formalities, the I.O. preferred charge-sheet against the accused for the offence under Sections 302, 201 of IPC, r/w. 34 of IP.C. During investigation, it was transpired that the victim Vinod, while proceeding on his motor bike on the day of incident, in the evening i.e. on 27.4.2012, met with one Datta @ Pintya Ghalme and they both had been to one Pan-Kiosk of Shri Kamble and consumed liquor. Thereafter they came to Shiv-Shakti Dhaba of accused No.3 Bharat for enjoying mutton party. According to prosecution, in the hotel, accused thrown boiling oil on the deceased Vinod and assaulted him with knife and tommy. The accused with an intension to screen themselves from the offence thrown the corpus of deceased Vinod beneath the bridge of Ghodnadi within the vicinity of Vangdari village.

4] The learned Sessions Judge, after committal of the proceedings framed the charges against the accused under Section 302 and 201 of IPC. The accused denied the charges and claimed for trial. In order to bring home guilt of the accused, prosecution examined in all 24 witnesses in this case. After appreciation of evidence adduced on record, the learned trial court, arrived at the conclusion that prosecution failed to prove the charges pitted against the accused beyond all reasonable doubt. Therefore, all the accused came to be acquitted for the charges levelled against them. The

impugned judgment and order of acquittal of the accused is the subject matter of scrutiny in this application for leave to appeal u/s 378 of Cr.P.C.

5] The learned APP was heard at length before issuing notice to the respondent/accused. He vehemently submitted that the impugned judgment and order of acquittal passed by the learned trial court is erroneous, imperfect and not within the ambit of law. The learned trial court did not appreciate the evidence adduced on record in its proper perspective. The learned trial court committed error by acquitting the accused from the serious charges of murder of victim Vinod. According to learned APP, the evidence on record demonstrates that the dead body of victim Vinod was recovered from the water of the river Ghodnadi. Both the accused and family members of Vinod were on inimical terms. The medical evidence indicate that death of the victim Vinod was homicidal one. The victim Vinod had received threats from the accused prior to incident. The prosecution also proved the CDR of accused Bharat, Vinayak and Chandrakant etc. The circumstances fortify the allegations that the accused did commit murder of victim Vinod. But the learned trial court failed to appreciate the circumstances in proper manner while evaluating the evidence of prosecution witnesses. The impugned judgment and order of acquittal passed by the trial court is perverse, erroneous and deserves to be quashed and set aside. The learned trial court ought to have convicted the accused/respondent for the charges pitted against them. Therefore, prosecution moved the present application seeking leave u/s 378 of Cr.P.C.

to prefer appeal against acquittal of the accused in Sessions Case No.230 of 2012.

6] We have given anxious consideration to the arguments advanced on behalf of Learned APP. We have also gone through the entire oral and circumstantial evidence adduced on record in Sessions Case No. 230 of 2012. We do not find force in the submission propounded on behalf of prosecution/State. Admittedly, the prosecution has examined in all 24 witnesses in this case to bring home guilt of the accused. Except the family members, medical officer and police witnesses, no any other independent witness supported the prosecution case to establish the charges against the accused. The learned Prosecutor, while conducting the trial of Sessions Case no. 230 of 2012, ventured to declare most of the witnesses hostile and preferred to cross examine them to elicit the truth. But, it transpire that efforts on the part of learned Prosecutor did not evoke result, and no any incriminating circumstances are brought on record, to support the allegations nurtured on behalf of prosecution.

7] In the instant case, victim PW-1 Bhausahab Nimse was the police patil of village Wangdari. He filed the FIR (Exh. 78) after receiving information about the dead body lying in the bed of river Ghodnadi, beneath the bridge. He immediately visited to the spot of incident. He took out the dead body from the water of river and saw the injury marks on the dead body. Therefore, he rushed to Shrigonda police station and filed FIR (Exh.

78). His evidence is relevant to the extent to switch on the investigating agency to ascertain the cause of death as well as to trace out the real assailants by collecting positive evidence. PW-2 Pramila w/o. Arun is the mother and PW-6 Yogesh is the brother of victim Vinod. PW-3 Ashwini is the wife of PW-6 Yogesh. These family members/related witnesses stated about the visit of accused No.3 Bharat on 27.04.2012 in the evening to the house of victim Vinod. They deposed that accused Bharat asked victim Vinod to accompany with him and thereafter he went away in Bolero jeep. The victim Vinod later-on followed him on his motor bike. But, thereafter since 27.4.2012, victim Vinod did not return to home. It has come in the evidence of these family members that they made endeavour to trace out the whereabouts of victim Vinod but they did not succeed. The father Arun also filed missing report on 30.04.2002 in the Karjat Police Station. Eventually, on 1.5.2012 they came to know about the dead body of victim Vinod lying beneath the bridge in the river Ghodnadi. PW-6 Yogesh identified the dead body being the mortal remains of brother Vinod. PW-2 Pramila, PW-3 Ashwini and PW-6 Yogesh stated about the threats given by the accused to eliminate the victim Vinod prior to the incident.

8] Admittedly, the evidence of these family members and relatives of deceased Vinod is required to be appreciated minutely on the point of last seen together of the deceased in the company of the accused Bharat. But, it is to be noted that the victim Vinod had left the house not accompanied with accused Bharat but at his instance on 27.10.2012 and thereafter, he did

not return to home. Eventually, on 1.5.2012, his dead body was discovered in the bed of river Ghodnadi. The Honourable Apex Court, in the matter of ***Mujibur Raheman Vs. State of Assam reported in (2012) 6 SCC 715***, observed that circumstances of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In ***Arjun Marik Vs. State of Bihar (1994) Supp.2, SCC 372***, the Honourable Apex Court reiterated that the solitary circumstance of accused and victim being last seen will not complete the chain of circumstances for the Court to record the finding that it is consistent only with the hypothesis of guilt of the accused and no conviction on the basis alone can be founded.

9] Reference may also be made to ***Bodhraj Vs. State of J & K reported in (2002) 8 SCC 45***, wherein, their Lordships of Apex Court, held in para 31, as under :-

“31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14,15 and 18; in addition to the evidence of Pws 1 and 2.”

10] As referred (supra) victim Vinod was missing since evening of 27.4.2012 and at last his dead body was discovered on 1.5.2012 in the river Ghodnadi. The gap between the point of time when the accused and victim Vinod were last seen together and when deceased is found dead is so large that possibility of any other person than the accused being the author of crime could not be ruled out. In such circumstances, it would be difficult to fasten guilt on the accused for the serious charge of murder of victim Vinod. Moreover, the circumstance of last seen together of the deceased in the company of accused Bharat, is also not corroborated by independent source. In addition, it would be essential to appreciate that the deceased Vinod did not leave the house accompanying with accused Bharat. But, as per the prosecution witness accused Bharat went ahead and thereafter, victim Vinod followed him. These circumstances cause dent in the theory of last seen as alleged by prosecution.

11] There would not be any controversy in regard to cause of death of deceased as stated by medical expert PW-5 Dr. Khamkar. He expressed the opinion that victim Vinod succumbed to head injury. Obviously, the attending circumstance of injury on the vital part of head, discovery of corpus of deceased in the bed of river Ghodnadi, missing of victim Vinod since evening of 27.2.2012 etc., categorically demonstrate that the death of victim Vinod was homicidal in nature. But evidence of prosecution witnesses appear not significant to prove the complicity of the accused in this case. We would reiterate that rest of the independent as well as star witnesses of the

prosecution turned hostile. They refused to support the prosecution case in regard to overt act or participation of the accused in this crime. The panch witnesses of recovery of weapon, clothes etc. under Section 27 of Evidence Act, also made volte-face and found reluctant to favour the prosecution case. The prosecution witness i.e. waiters who were on duty and received the opportunity to watch spectacle in the hotel “Shiv Shakti Dhaba” at the scene on occurrence also retracted from their statement before police.

12] It is worth to mention that the prosecution witness Shri Dattatray @ Pintya, who was accompanied with the deceased since beginning till occurrence of incident of assault in the hotel “Shivshakti Dhaba” of accused No.3 Bharat, did not step into the witness box, nor prosecution took efforts to examine the star witness Dattatraya @ Pintya in this case to depose against the accused. The witness Dattatraya was also one of the injured and he received the burn injury after hurling of oil in the alleged incident. The PW-18, I.O. Shri Dnyaneshwar Dhokle, stated about the portion marked ABCDE in the statement of Dattatraya and learned trial Judge ventured to mark portion ABCDE, as Exhibit Nos. 124 to 128. We are at our wit's end , as to how the learned trial Judge, marked portion A to E as Exh. 124 to 128 without any oral testimony of witness Dattatray Jaysing Ghalme, in the court. The circumstances demonstrate that the learned trial Judge, unwittingly glossed over the procedure prescribed for bringing omission or contradiction in the statement u/sec. 161 of Cr.P.C. of the witnesses on record under the Evidence Act. The approach of the learned

trial Judge, to deal with the statement of Dattatraya u/s 161 of Cr.P.C. appears erroneous, imperfect and not within the purview of law.

13] It has been harped that the witnesses were turned hostile during the course of their oral evidence before the learned trial court, but their entire evidence cannot be thrown away entirely on board. There is no doubt that evidence of hostile witnesses to some extent favourable to prosecution can also be appreciated to establish the charges against the accused. In the instant case, no incriminating circumstances are brought on record in the evidence of hostile witnesses which would facilitate prosecution to establish the allegations nurtured against the accused. The evidence of hostile witnesses found not favourable to the prosecution. It would also be fallacious to appreciate the evidence of CDR, produced on record. The CDR would not itself adequate to draw adverse inference against the accused. Therefore, in case we allow the prosecution agency to prefer an appeal against the judgment and order of the learned trial court, it would be nothing but a futile effort and would not sub-serve the purpose. In contrast, it would dissipate the precious time of this Court. It would be an attempt to fishing in the sand There is no doubt that ultimately result in the appeal would be in the form of negative one. Hence, we are not prepared to accept the contention propounded on behalf of learned Prosecutor to grant leave u/s 378 of Cr.P.C. to file appeal against the judgment and order of acquittal of the accused. It would be an abuse of process of law. Hence, we do not find any merit in the application. No interference is warranted in

the impugned judgment and order of acquittal passed by the trial court. The application deserves to be dismissed. In sequel, we proceed to pass order of dismissal of the application. Hence Application stands rejected. There shall be no orders as to costs.

[K.K.SONAWANE]
JUDGE

[S.S. SHINDE]
JUDGE

grt/-