

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Criminal Application (APPA) No.535 of 2017

(Smt. Nirmala wd/o. Chirkut Moje and Ors. vs. Firoz Tajmohammad Sk. S/o. Taj Mohd. Shaikh)

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Mr.E.W.Nawab, Advocate for the applicants.
Mr.A.C.Jaltare, Advocate for respondent nos. 1 and 2.
Mrs.Ketki Joshi, A.P.P. for respondent no.3/State.

CORAM : P. N. DESHMUKH &
MRS. SWAPNA JOSHI, JJ.

DATE : 23.8.2018.

1. This application is for grant of leave filed by the applicants/wife and daughters of deceased Chirkut Moje for filing appeal against the Judgment dt.27.4.2017 passed in Sessions Trial No.432 of 2015 by learned Additional Sessions Judge-4, Nagpur thereby acquitting respondent nos. 1 and 2 of the offences punishable under Section 302 r/w. 34 of the Indian Penal Code.

2. Learned Counsel for the applicants had relied upon evidence of PW-3 Bhushan Dashmukhe and PW-4 Tukaram Raut claiming to be eye witnesses to the incident and had submitted from the evidence of both these witnesses that involvement of both respondents is clearly established as assailants of deceased by knife; whose evidence is further stated to be corroborated by medical evidence as injuries sustained by deceased are corroborated by the evidence of Medical Officer and Post Mortem notes. It is further contended that said evidence is further

substantiated from the C.A. reports; however, learned trial Court disbelieved both eye witnesses finding them to be not truthful and had also contended that evidence with regards to C.A. reports is not accepted holding that the seized property forwarded to Forensic Lab was not found in sealed condition. It is, therefore, contended that since the findings of learned trial Court are perverse, application be allowed thereby granting leave to file appeal as there is direct evidence which, according to the learned Counsel for applicant, is unshaken and can be fully relied upon.

3. Learned Counsel for respondent nos. 1 and 2, on the other hand, has pointed out material discrepancies in the evidence of both eye witnesses and also, by referring to the evidence of Investigating Officer PI Shailesh Sapkal (PW-11) and evidence of PW-2 Nikhil, had contended that when evidence of all these witnesses is considered together, evidence of PW-3 Bhushan and PW-4 Tukaram appear to be full of doubts. It is also contended that, from the evidence of Investigating Officer PI Shailesh Sapkal (PW-11), it has come on record that none of the eye witnesses are actual witnesses to the incident as from the evidence on record it has come on record that both the eye witnesses PW-3 Bhaurao and PW-4 Tukaram had stated that assault is committed on the deceased by two unknown persons. It is, therefore, contended that no case is made out for granting leave.

4. In the background of submissions advanced as aforesaid, it appears from the case of prosecution that, on

8.5.2014, at around 7.00 p.m., when deceased Chirkut was present on his construction site, he was assaulted by both the respondents who arrived there on two wheeler. Respondent no.1 Firoz is alleged to have committed assault by knife in presence of respondent no.2 and both are said to have fled away from the spot. It is the case of prosecution that PW-3 Bhaurao and PW-4 Tukaram/workers working on the construction site of deceased were present naturally on the spot and had witnessed the incident. In the background of the case of prosecution as aforesaid, evidence of PW-3 Bhushan and PW-4 Tukaram appear to be similar to what they have stated that at the time of incident they were present at the construction site and had noticed both the respondents coming on the spot on two wheeler and after having some conversation with the deceased, heard shouts as “Bachao Bachao” when PW-3 Bhushan was watering the construction wall. On hearing such voice, he gave call to PW-4 Tukaram and rushed to the spot. Tukaram also reached the spot and both of them found that Chirkut was lying behind one stationery truck. He further deposed that respondent no.1 Firoz assaulted deceased by knife on his face and chest while respondent no.2 Dilip was standing on the spot. PW-4 Tukaram thereafter made a phone call to one Narayan and others who arrived on the spot.

5. Evidence of both these witnesses substantially corroborate the medical evidence as the injuries found sustained on the person of deceased are in the form of incise wound and chopped wound. However, we have

scrutinized the evidence of PW-3 Bhushan and PW-4 Tukaram to find if at all it can be relied upon to hold them to be eye witnesses to the incident. On considering the cross-examination of PW-3 Bhushan, it has come on record that he has informed PW-2 Nikhil that two unknown persons attacked Chirkut. In that event, it is difficult to hold PW-3 Bhushan as an eye witness of the incident as had he witnessed the incident, there was no reason for him to inform Nikhil as above. We find that the trial Court on this count did not find it proper to believe evidence of PW-3 Bhushan as an eye witness. Admittedly, there is no overt act attributed to respondent no.2 and in the cross-examination, PW-4 Tukaram appears to have not stated to police about the incident as he claims that he was afraid. We find that said aspect has been rightly dealt with by learned trial Court observing that though according to case of prosecution, statement of PW-4 Tukaram is also recorded u/s.164 of Code of Criminal Procedure by the Magistrate, there was no reason for the said witness to not to disclose said fact as there was nothing for him to get afraid while making statement at least at the time of recording of statement u/s.164 of the Code of Criminal Procedure. In view of such evidence, trial Court appears to have rightly discarded the evidence and found evidence of PW-4 Tukaram having material omissions on the point of assault by applicants on the deceased to be not worthy to be acted upon.

6. We further find from the evidence of PW-4

Tukaram - alleged eye witness that, after incident he made a phone call to Narayan who is admittedly not examined and has informed him of the incident. No explanation is put forth by prosecution for non-examination of this witness as had this witness been examined, there would have been evidence on record with regards to information supplied by PW-2 Tukaram. However, in absence of evidence of Narayan, case of prosecution cannot proceed further in view of fact that evidence of PW-4 Tukaram as stated above is full of doubts. Similar is the observation of learned trial Court with regards to non-examination of Narayan holding that since he is not examined by prosecution, there is no direct evidence as to what is narrated by PW-Tukaram to Narayan. In the above background, learned Counsel for respondents/accused has referred to the evidence of Investigating Officer who, in para 21 of his cross-examination, had in clear terms admitted that, on his making inquiry from Narayan with regards to names of assailants, he told that somebody assaulted deceased Chirkut and further claims to have recorded statement of Narayan as aforesaid. Evidence of Investigating Officer as such makes it clear why prosecution did not find it necessary to examine Narayan.

7. Considering the evidence as aforesaid, we need not go into other evidence of C.A. reports as well as injuries having been corroborated as stated in the Post Mortem report as homicidal death of deceased is not disputed. In the circumstances, the view taken by the learned trial Court appears to be possible view to be taken. There is no

perversity in the impugned Judgment. Hence, we find no substance in the application. Same is thus dismissed.

JUDGE

JUDGE

**jaiswal*