

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

917 CRIMINAL APPEAL NO.128 OF 2021

Vaijnath S/o Dattarao Barsale

..APPELLANT

-VERSUS-

Karbhari S/o Babrao Khose
and others.

..RESPONDENTS

...

Mr.Mahesh P. Kale, Advocate for the appellant
Mr.S.J. Salgare, APP for respondent no.13-
State.

...

WITH

917 APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.15 OF 2021

The State of Maharashtra

..APPELLANT

-VERSUS-

Karbhari S/o Babarao Khose
and others.

..RESPONDENTS

...

Mr.S.J. Salgare, APP for appellant-State.

...

CORAM : RAVINDRA V.GHUGE
AND
B.U.DEBADWAR, JJ.

RESERVED ON : 19th March, 2021
PRONOUNCED ON : 31st March, 2021

ORDER (Per B.U. Debadwar, J.):

1. The appellant-first informant has filed Criminal Appeal No.128 of 2021 under section 372 of the Code of Criminal Procedure, 1973 (In short, "the Cr.P.C."), against the judgment and order dated 07.12.2020 passed by the learned Additional Sessions Judge-4, Parbhani, in Sessions Case No.188/2019, whereby the respondents-accused have been acquitted for the offences punishable under sections 143, 147, 148, 341, 302, 325, 504, 506 r/w 149 and 120-B of the Indian Penal Code (In short, "the I.P.C.") and sections 37(1)(3)/135 of the Bombay Police Act, vide Section 235(1) of the Cr.P.C.

2. The State of Maharashtra, through the Incharge of Police Station, Sailu, Dist.Parbhani, has also filed Application for Leave to Appeal No.15 of 2021 under section 378(1)(b) of the Cr.P.C., seeking leave to appeal against the aforesaid impugned judgment and order.

3. The case unfolds from the record that the appellant/first informant and the

respondent nos.1 to 12/accused are resident of village Brahmangaon, Tq. Sailu, Dist. Parbhani. The appellant lodged the first information report, *inter alia*, contending that drainage/gutter in front of his house was not properly constructed by the Gram Panchayat of village Brahmangaon. Consequently, the waste water running from the said gutter was stagnated and accumulated in front of his house. On 13.06.2019, when the appellant and his family members were discussing about the faulty construction of drainage/gutter, and consequential effect of the same being faced by them, respondent no.1 heard the said discussion. On 14.06.2019, at about 6 p.m., while appellant and his family members were present in their house, respondent no.1 – Karbhari and respondent no.6 – Udhav along with some relatives rushed to the house of the appellant and in loud voice said to the appellant and his brother Satish, that the drainage manhole and its cover would remain as it is, they would not either repair the the drainage or change the cover of the manhole of the drainage, and asked him to do whatever he could do. Immediately, after saying so, respondent no.1-Karbhari and respondent no.6 – Udhav and

their companions not only abused, but also assaulted the appellant and his brother Satish. Meanwhile, Satish picked up the stone and threw the same towards Karbhari and Udhav, so as to prevent them assaulting further. Meanwhile, one Vitthal Barsale and Sunil Barsale rushed there i.e. the house of the appellant, where quarrels were going on, intervened and pacified the quarrel.

4. On 15.06.2019, at about 9 a.m., Satish – the brother of the appellant left the house and proceeded to site, where the construction of Canal was going on with the tractor and trolley, for transporting the debris from the place of construction site to another place. On that day, at about 10 to 10.30 a.m., Mahadeo, the companion of Satish and driver of the tractor came to the house of the appellant and told the appellant that while returning from the construction site with debris loaded in a trolley, suddenly respondent nos.1 to 12 came in front of the tractor and prevented the same from proceeding further. Meanwhile, respondent no.2 – Digamber rushed forward, pulled Satish from the tractor and taken him towards the land belonging to Mr.Arun Korde. Then all the

accused mercilessly assaulted and beat Satish and then set him ablaze by pouring diesel on his person from diesel Can.

5. Upon knowing the same, the appellant rushed towards the land belonging to Mr.Arun Korde. On reaching there saw Satish burning and all the 12 respondents standing around Satish. They did not allow the appellant to go forward and extinguish the fire. Respondent no.6 – Udhav and respondent no.2-Digamber were constantly threatening him, saying that they would do the same, which they did with Satish, if he rushed forward to rescue Satish. Meanwhile, many villagers of village Brahmangaon reached there.

6. In pursuance of the information received from one of the villager, Policeman also reached the spot. Looking to the horrible incident, the appellant underwent a shock. After coming out from the shock, he rushed to the Police Station and lodged the F.I.R., which ultimately resulted in prosecution faced by respondent nos.1 to 12.

7. The learned Additional Sessions Judge, Parbhani by the impugned judgment and

order acquitted respondent nos. 1 to 12 holding that though the prosecution succeeded in establishing that Satish died of homicidal death, but failed to prove that respondent nos.1 to 12 hatched conspiracy to commit the murder of Satish and for that purpose, they formed unlawful assembly and with common object committed the murder of Satish by assaulting him mercilessly and setting him on a fire. Therefore, respondent nos. 1 to 12 deserve to be acquitted for all the charges framed against them.

8. We have heard Mr.M. P. Kale, the learned Advocate for the appellant and Mr.S.J. Salgare, the learned Additional Public Prosecutor for the State in Application for the Leave to Appeal. They both strenuously argued that though some of the witnesses have turned hostile, the totality of the evidence is quite sufficient to connect homicidal death of Satish. The learned Additional Sessions Judge, Parbhani has failed to appreciate the evidence on record in proper perspective and arrived at a wrong conclusion. The appellant and the State have good case and they have every hope of success in appeal.

9. In the light of aforesaid submissions made by Mr.M.P. Kale, Mr.Salgare and the learned Additional Public Prosecutor, we have carefully gone through the paper book consisting of ocular evidence of 14 witnesses examined by the prosecution and also the impugned judgment.

10. The F.I.R.(Exh.33) lodged by the appellant clearly demonstrates that initially on 14.06.2019, at about 6.00 p.m., at the house of appellant quarrel between appellant and his brother Satish on one part, and respondent nos. 1 and 12 and some more persons accompanied with them, on other part, over the issue of stagnation of dirty water infront of house of appellant coming from drainage and its manhole. That quarrel was pacified by Vitthal Barsale and Sunil Barsale-neighbourers. On next day i.e. on 15.06.2019, the aforesaid incident of brutal murder of Satish took place near the field of Arun Korde.

11. There is, *prima facie*, evidence to establish nexus between aforesaid both the incidents. It is, *prima facie*, clear that the

earlier incident i.e. incident took place on 14.06.2019, was the motive behind subsequent incident, which took place on 15.06.2019.

12. It is true that most of the material witnesses examined by the prosecution turned hostile, but that alone would not be a criteria to acquit all the respondents-accused, when evidence as to the nature of death of Satish i.e. homicidal death and motive behind the incident, is on the face of record. On close scrutiny of ocular evidence of all 14 witnesses examined by the prosecution, at this juncture, it cannot be said that respondent nos.1 to 12 - accused have no concern with the homicidal death of Satish.

13. The evidence of P.W. 1- Santosh Mujmule, who is panch witness of spot panchnama (Exh. 23), *prima facie*, proves existing situation of the spot, where the incident of murder of Satish took place and also proves seizure of articles lying on the spot, viz:- pieces of clothes of Satish, burnt pieces of plastic diesel Can, footwear i.e. Chappal, handkerchief, burnt pieces of Baniyan, Shirt, underwear of deceased Satish,

beside the seizure of lighter, plain earth, earth below the dead body of Satish and tractor.

14. P.W. 2- Mahadeo Khose, being an eye witness, his testimony assumes importance. Though, he has turned hostile, however, in his testimony, he deposed about the incident that took place on 14.06.2019, involvement of respondent nos. 1 and 2 and their relatives in the said incident and also about incident took place on next day i.e. on 15.06.2019, to the extent of his proceeding to the site of Canal along with Satish with a Tractor and plastic Can containing five liters diesel and their returning back towards village loaded with debris in a trolley. However, he has denied the further incident about assaulting and setting Satish on a fire by respondent nos. 1 to 12.

15. It is pertinent to note that P.W. 1- Mahadeo went to the extent of denying his statement under Section 164 of the Cr.P.C. recorded by the Magistrate. That statement of Mahadeo at Exh.103 proved in the evidence of P.W. 14-Bhanudas Shelke, a Judicial Magistrate First Class, Sailu, abundantly

makes it clear that P.W. 2- Mahadeo was won over by the respondents-accused.

16. P.W.3-Vaijanath Barsane (real elder brother of Satish) clearly deposed about the earlier and later incidents. His evidence, *prima facie*, establishes the presence and conduct of the respondents- accused at the spot. Though, he has not seen the accused actually assaulting Satish, but the evidence of Vaijnath to the extent of his seeing the accused at the spot encircling with Satish when he was burning and preventing him from rescuing Satish and threatening him for that purpose, *prima facie*, rules out the possibility of killing Satish by person/persons other than the respondents-accused.

17. The testimony of P.W. 8 - Dr.Sanjay Lohiya, Autopsy Surgeon, makes it clear that death of Satish took place due to spinal cord injury due to dislocation of fracture and dislocation of vertebra, which was ante-mortem in nature and burnt injuries were *post-mortem* in nature. Thus, the evidence of medical expert (Autopsy Surgeon), *prima facie*, demonstrates that Satish was initially

killed by inflicting severe blow on the neck and thereafter setting his dead body on a fire. This speaks about the brutality.

18. Evidence of P.W.11-Vitthal Kawache, Auto rickshaw driver, *prima facie*, inspires confidence on the evidence of P.W. No.3-Vaijnath and also proves presence of the accused at spot, where Satish was found burning.

19. The testimony of P.W. 12-Sandipan Shelke-Investigating Officer, *prima facie*, demonstrates as to how the respondents-accused are responsible for homicidal death of Satish.

20. Thus, having regard to the totality of the evidence discussed above, we have no hesitation to hold that there is a *prima facie* case against respondent Nos. 1 to 12. Therefore, the appeal preferred by the first informant deserves to be admitted and the leave to appeal sought by the State needs to be granted.

21. As such, Criminal Appeal no. 128 of 2021 is ADMITTED. Issue notice to the

respondents. The learned Prosecutor waives service of notice on admission on behalf of respondent no.13.

22. We direct the compliance of section 390 of the Cr.P.C against all the 12 accused i.e. respondent nos. 1 to 12.

23. We request the Court of the Additional Sessions Judge-4, Parbhani to prepare the appeal paper book in Sessions Case No.188/2019, as expeditiously as possible, and preferably on or before 30th September, 2021. Thereafter, the appeal paper book and the original R. & P. with muddemal property, if any, be transmitted to this Court on or before 30.11.2021.

24. Considering our order admitting the appeal, we find that leave to the State for preferring an appeal deserves to be granted and as such, the application for seeking leave to prefer appeal is allowed.

25. Keeping in view the judgment delivered by this Court vide order dated 10th February, 2009, in the matter of **Satesh H. Chandiramani V/s Sadashiv Namdeo Kharabi &**

Anr. in Criminal Application No.1201/2007 and Criminal Application No.1200/2007, the State need not file a separate appeal and this application is treated as an appeal.

26. Consequently, the appeal is **ADMITTED**. Issue notice to all the accused i.e. respondent nos.1 to 12.

(B.U.DEBADWAR,J.)

(RAVINDRA V. GHUGE,J.)

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