

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

**CRIMINAL APPEAL NO.500 OF 2022 WITH
CRIMINAL APPLICATION NO.2205 OF 2022**

Bharat s/o Bansi Barwal
Age 30 years, Occu. Agri.,
R/o Palasgaon, Tq. Khultabad,
District Aurangabad

... APPELLANT

VERSUS

The State of Maharashtra
To be served through :
P.P. Office, High Court,
Aurangabad

... RESPONDENT

.....
Shri S.G. Ladda, Advocate for appellant
Shri R.V. Dasalkar, A.P.P. for respondent – State
.....

**CORAM : R. G. AVACHAT, AND
R. M. JOSHI, JJ.**

DATED : 15th NOVEMBER, 2022.

JUDGMENT (PER R.G. AVACHAT, J.) :

This appeal is taken up for final hearing with the consent of learned counsel for the appellant and learned A.P.P., since the Criminal Application for suspension of execution of substantive sentence of imprisonment was about to be heard, the learned counsel for the appellant submitted that, he would require not more than 20 minutes to work out

the appeal on merits. It was further submitted that, the appellant is in jail for little over five years.

2. The challenge in this appeal is to order dated 9/6/2022, passed by learned Additional Sessions Judge, Court No.11, Aurangabad in Sessions Case No.212/2017 convicting the appellant for the offences punishable under Sections 302 and 201 of the Indian Penal Code and, therefore, sentencing him to undergo imprisonment for life and rigorous imprisonment for two years respectively with fine and default stipulation.

3. Facts giving rise to the present appeal are as follows :-

Kacharusing (deceased) was father of Premsing (informant). Maternal grandfather of the informant namely Bansising has two wives, namely Zumbarabai and Naginabai. He had contracted second marriage with Naginabai with a view to have a male child since Zumbarabai has five daughters. Bansising and Naginabai are blessed with two sons and a daughter. Appellant is a son of Bansising and Naginabai.

4. Mother of the informant and her two sisters filed a suit against their father and step-siblings for partition and separate possession of their share in the family property. Three of the sisters of the informant's mother settled the matter on accepting money. The appellant along with his brother and father had been to the house of the informant a year before April 2017 to ask the informant's mother to settle the matter for Rs.4,00,000/-. Kacharusing (deceased) was opposed to the proposal. The matter, therefore, could not be settled. The appellant and his brother had, therefore, threatened the informant and his family members. This is said to be the motive for the offence.

5. It is further case of the prosecution that, on 20/4/2017, the deceased along with his son-in-law, P.W.10 Raju Pardeshi was on his way to village Malodyachi Wadi on a motorcycle. They were returning after attending marriage of a cousin (son of maternal aunt) of the informant. The motorcycle, all of a sudden came to a halt. It could not be started. It was realised that, petrol pipe of the motorcycle had a cut. Three persons happened to pass by on one motorcycle the duo. After going a short distance ahead, one

of the three persons came back to the deceased and his son-in-law. His face was covered with a handkerchief. He told P.W.10 Raju Pardeshi and the deceased that his residence was in the nearby. He asked them to accompany him to take a petrol pipe from his residence. The deceased joined him on his motorcycle, asking P.W.10 Raju to remain at the place. Kacharusing, however, did not return. Phone calls made to him went unanswered. A dead body of Kacharusing was found in an agricultural field. He had sustained multiple injuries. The informant, therefore, lodged a First Information Report (F.I.R.) (Exh.22) at Wadod Bazar Police Station against the appellant and his brother Ganesh. Scene of offence panchanama was drawn. The dead body was subjected to autopsy.

6. The appellant came to be arrested during investigation of the crime. Involvement of his two friends in the commission of the offence along with the appellant came to light during investigation. Both of them also came to be arrested. All the three accused made disclosure statements. Pursuant to a disclosure statement made by the appellant, blood stained clothes on his person at the time of commission of offence came to be seized, besides a knife used in

murdering the deceased. A shop, wherefrom rope was purchased, was shown during interrogation. During interrogation and consequential disclosure statement, cell phones used by the appellant and co-accused to stay in contact with each other during the relevant time came to be seized. Call Data Record (CDR) was obtained from cellular companies. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of investigation, the appellant and his two associates came to be proceeded against by filing charge sheet.

7. The trial Court framed the Charge (Exh.5). To establish the same, the prosecution examined 13 witnesses and produced in evidence certain documents. The trial Court, on appreciation of the evidence in the case, convicted the appellant and sentenced as stated above. Co-accused have, however, been acquitted. State has not preferred appeal against their acquittal.

8. Heard. Learned counsel for the appellant would submit that, the case is based on circumstantial evidence. None of the circumstances relied on are conclusive in nature. On arrest of the appellant, he was not subjected to test

identification parade. CDR does not further the prosecution. The appellant hails from village Palasgaon. The scene of offence was in the nearby of this village. It was, therefore, but natural that the tower location of the appellant's cell phone would suggest he was within the range of 6 kms. from the scene of offence. According to learned counsel, the prosecution evidence was short to establish the charge beyond reasonable doubt. He, therefore, urged for allowing the appeal.

9. The learned A.P.P. would, on the other hand, submit that, the appellant had strong motive to commit the offence. Motive has duly been proved. On arrest of the appellant, a knife used in commission of the crime came to be recovered. C.A. report indicates, the knife had human blood stains. The son and son-in-law of the deceased had rightly pointed out an accusing finger towards the appellant. According to learned A.P.P., there is no reason for this Court to interfere with the impugned order. He, therefore, urged for dismissal of the appeal.

10. Considered the submissions advanced. Perused the evidence relied on.

Although 13 witnesses have been examined by the prosecution, relevant evidence for deciding the present appeal would be that of not more than 4 witnesses.

Admittedly, the dead body of Kacharusing was found in a field of Dhondu Dheple at village Liha-Jahangir, Taluka Fulambri, District Aurangabad on the morning of 21st April 2017. He had suffered multiple injuries. Dr. Smita Chavan (P.W.4) conducted autopsy on the dead body of Kacharusing. She noticed multiple external injuries on Kacharusing's person. In her opinion, the cause of death was haemorrhagic shock due to multiple stab injuries on the body (post mortem report Exh.52). Although the viscera was preserved, the C.A. reports thereof (Exh.55) indicate no poison was found therein.

11. P.W.1 Laxman Bankar is a panch witness. In his presence the scene of offence panchanama (Exh.19) was drawn. Blood stained soil, nylon rope came to be seized from the scene of offence. In our view, evidence of this witness does only prove the factum of finding of a dead body in an agricultural field and seizure of rope. It is not the case of the

prosecution that the deceased died of strangulation, nor is there any evidence to suggest a nylon rope was used in commission of the crime.

12. P.W.2 Premsing is son of the deceased. He lodged the F.I.R. (Exh.22). Admittedly, he was not in the company of the deceased when the appellant allegedly took the deceased with him on the fateful night. The F.I.R. has been lodged on the basis of hear-say. The evidence of P.W.2 Premsing establishes motive. It is in his evidence that, his mother had 4 real sisters. She had also 2 step brothers and a sister as well. Her mother and her 2 sisters had filed a suit against their step siblings and father as well for partition of their share in family property. 2 of the 4 sisters compromised the matter for monetary consideration. His father was opposed to the proposal of settlement of the matter. The appellant, his brother and their father had, therefore, threatened the informant's father. A copy of the memo of Civil Suit filed by the informant's mother is part of evidence (Exh.167). We do not find any reason to disbelieve the informant's evidence in this regard. As such, the prosecution could be said to have made out a motive for the appellant to commit the crime.

13. P.W.3 Pandit Kadam was a Circle Officer, Wadod Bazar. In his presence the appellant and co-accused allegedly made disclosure statements. The evidence of this witness would suggest that, the appellant made a disclosure statement on 28/4/2017, pursuant whereof a knife came to be recovered from under a dry leaves from an isolated place in a field. Blood stained clothes allegedly on his person while committing the crime also came to be seized pursuant thereto. The disclosure statement and seizure panchanama of those articles have been admitted in evidence vide Exhibit 33.

14. P.W.3 Pandit Kadam was a public servant. From his cross-examination, we have no reason to observe the disclosure statement and consequential recovery panchanama to have been prepared at the police station, as had been suggested. Our attention was also drawn to the seizure panchanama to indicate there is no mention of applying the seal on wrappers of those articles. To reinforce the evidence of P.W.3 Pandit Kadam, we have evidence of P.W.13 Sainath Ramod (investigating officer).

15. The appellant was made to put on the blood stained shirt in open Court. It was found to have not been

fit-in on his person so as to attribute the shirt to be of him. Moreover, the C.A. reports (Exhs.158, 159, 161) pertaining to the clothes and the knife are inconclusive so far as regards determination of group of blood stains noticed thereon. As such, this piece of evidence does not further the prosecution case. We are conscious of the fact that the circumstances relied on by the prosecution may cumulatively lead us to infer appellant's involvement in the crime in question.

16. P.W.5 Bhausahab Vidhate was a witness to the panchanama, whereunder two cell phones came to be seized from the appellant herein. P.W.6 Shahanoor Shaikh was a witness examined in connection with role of acquitted accused Dipak. His evidence is, therefore, not referred. The evidence of the said witness indicates that, he had engaged Dipak to work for his hotel. On 28/4/2017, police had come along with Dipak and panch witness to his hotel. There is nothing more in his evidence to shed light on the offence in question.

17. P.W.7 Sk. Amir was a fruit vendor. It is his case that, on a day in April 2017, one person had come to him and made a phone call to someone from his cell phone. This witness did not stand by the prosecution. Nothing could be

elicited from his examination to bring the appellant closer to the offence. Same is the case about the evidence of P.W.8 Mirza Mujaffar Baig, a shopkeeper. It is in his evidence that, on 20/4/2017, two boys had purchased a nylon rope from his shop. The prosecution wanted to connect his evidence with a fact that a nylon rope found by the side of the dead body at the scene of offence was one purchased from this witness. Admittedly, the deceased did not die of strangulation. There is nothing to suggest a nylon rope was used in committing murder of the deceased.

18. P.W.9 Barku Meher was examined in proof of a fact that there was a marriage of his son on 20/4/2019 at Liha-Jahangir. The deceased had attended the said marriage. After the marriage, the deceased along with his son-in-law (P.W.10 – Raju Pardeshi) left on a motorcycle for village Malodyachi Wadi.

19. The prosecution is mainly relying on the evidence of P.W.10 Raju Pardeshi, son-in-law of the deceased. It is in his evidence that, after attending the marriage at village Leha-Jahangir, he along with his father-in-law (deceased) started on a motorcycle for village Malodyachi Wadi. The

motorcycle all of a sudden came to a halt. It was found that, its petrol pipe had developed a cut. It was about little past 10.00 p.m., the motorcycle-borne three persons passed by them (P.W.10 Raju Pardeshi and the deceased). One of the three on the motorcycle came back to them. He told that, his residence was in the nearby and he would provide them a petrol pipe. The deceased, therefore, joined him to fetch a petrol pipe. P.W.10 Raju Pardeshi remained at the motorcycle. The deceased thereafter did not return. His dead body was found in a field on the following morning.

20. P.W.10 Raju Pardeshi testified that, all those three persons had their faces covered with handkerchiefs. Although before the Court he gave description of the person who took the deceased with him, his police statement is conspicuously silent to give description of that person. According to the prosecution, that person was none other than the appellant. Admittedly, the appellant was a relative of the deceased and P.W.10 Raju Pardeshi as well. It is very surprising as to how this witness could fail to identify him from his voice when he had interaction with him and the deceased. Furthermore, on arrest of the appellant, he was not subjected to a test identification parade. This witness had met the police on the

very next day i.e. on 21/4/2017 when the dead body was found. It is not known as to why his statement came to be recorded two days thereafter i.e. on 23/4/2017. As such, the evidence of this witness also falls short to connect the appellant with the charge in question.

21. P.W.11 Francis Parera and P.W.12 Lucas Magar were the officials of Cellular Companies. Both of them tendered in evidence CDR of cell phones allegedly used by the appellant and co-accused. The prosecution wanted to suggest that the appellant and the acquitted accused were in constant contact with each other at the relevant time. Admittedly, on acquittal of the co-accused, State has not preferred any appeal against their acquittal. The CDR thus does not help the prosecution further.

22. Then there is evidence of P.W.13 Sainath Ramod, investigating officer. As per his evidence, he had arrested the appellant and the acquitted accused. The trio had given disclosure statements. Pursuant to the statement given by the appellant, a knife and clothes on his person at the relevant time came to be seized. Those articles had blood stains. The C.A. reports, however, are inconclusive so far as

regards blood group of the blood stains found on those articles. It has already been observed about, that the shirt that was seized pursuant to the disclosure statement made by the appellant was found to have not fit-in on the person of the appellant. Even if we consider the entire evidence of the prosecution in cumulative, it could at the most be termed that the appellant had a motive to commit the crime. Rest of the evidence of the prosecution, however, is insufficient to bring home the charge. Based on such evidence, the trial Court ought not to have convicted the appellant. We are not at one with the findings recorded by the trial Court.

23. In the result, the appeal succeeds. Hence the order :-

ORDER

(i) The Criminal Appeal is allowed.

(ii) The impugned order of conviction and sentence dated 9/6/2022, passed by learned Additional Sessions Judge, Court No.11, Aurangabad in Sessions Case No.212/2017 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 302 and 201 of the Indian Penal

Code. The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

(iii) Consequently, Criminal Application No.2205/2022 stands disposed of.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

fmp/-