

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

914 CRIMINAL APPLICATION NO.3317 OF 2019
IN
CRIMINAL APPEAL NO.1063 OF 2019

AWADHUT @ RAHUL BALU GIRI (C/11161)
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. Gaikwad Sanjay N.
(Appointed Through Legal Aid)
APP for Respondent : Mr. M M Nerlikar

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CORAM: SARANG V. KOTWAL & BHARAT P. DESHPANDE, JJ.
Dated : July 21, 2022

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PER COURT :-

1. This is an application for bail. The applicant is convicted for commission of the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer RI for life and to pay fine of Rs.500/-, in default to suffer SI for one month. The impugned judgment was passed by the Additional Sessions Judge, Kandhar on 17.3.2017 in Sessions Case No.30 of 2015. The applicant was arrested in connection with this case on 5.3.2015 and since then he is in custody.

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2. The prosecution case is that, the deceased Gulab Yesdani was resident of Nanded. He was working in a shop of one Shaikh Khajamiya at Loha since last eight years before the incident. On 4.1.2014 the brother of Gulam Yesdani received a telephonic call that somebody had committed murder of Gulam Yesdani in the shop of Khajamiya. This offence was registered vide CR No.2 of 2014 at the instance of brother of deceased i.e. Mohammad Mobin. The applicant was arrested after more than a year on 5.3.2015. Prosecution case is that, PW-4 Shaikh Mainoddin Azamsab had seen the deceased in the company of the applicant prior to the incident. He identified the Applicant and identification parade that was held on 21.3.2015. On the basis of this evidence, trial was conducted. During trial, the prosecution examined 13 witnesses. Important witness is of course PW-1 first informant, PW-4 who had seen the applicant in the company of the deceased and PW-5 shop owner in whose shop, murder was committed.

3. Learned counsel for the applicant submits that there is no material against the present applicant. The only evidence of last seen together theory is not properly established by the prosecution.

4. Learned APP opposed this application. He submitted that, there is no reason to disbelieve the evidence of PW 4.

5. PW 1 has stated that deceased used to stay in the shop of PW-5 Khajamiya. Shop of PW-5 was near the deceased's own shop. PW 5 has stated that when he came to his shop in the morning on 4.1.2014, he saw the dead body of the deceased. He informed this to police. Police came at the spot. FIR was registered.

Case is based purely on circumstantial evidence. There are no eye witnesses. Spot panchnama shows Tommy which was a murder weapon, was found at the spot itself. There are absolutely no other incriminating circumstances against the applicant in the form of recovery or discovery or anything else. Spot was already known to the police because dead body was found at the

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spot. Mere pointing out of that spot subsequently by the Applicant was of no consequence.

6. Only evidence worth consideration was of PW 4. We have perused the Record and Proceeding and in particular we have perused the deposition of PW 4. He has given a very vague deposition. He has stated that he had seen the deceased while giving water to the accused at the time of the incident. Deceased was resident of Nanded. He had met the deceased on the very day when the deceased was giving water to the applicant. He had asked the deceased whether the applicant was his relative. He had replied in the negative. The applicant had told this witness that he was resident of Palam. Thereafter, this witness had left the place. On the next day, he received news of murder. Subsequently, this witness was called for identification of the Applicant. Applicant was identified by PW 4.

7. Prosecution had examined the Special Judicial Magistrate PW 10. PW 10 conducted Identification parade and in that parade PW 4 identified the

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Applicant. This is the only evidence against the applicant.

8. The learned Judge was not right in relying on inadmissible portion of the Memorandum statement of the applicant when he had shown the spot. As far as evidence of PW 4 is concerned, he has not mentioned the time when he had seen the deceased in the company of the deceased. Prosecution has not ruled out the hypothesis that nobody else could have committed the murder or that nobody else could have met the deceased prior to his murder. Evidence of PW 4 is vague. Not mentioning of the time is very significant. Therefore, it is difficult to believe this witness.

9. Apart from that, the applicant was arrested on 5.3.2015 and thereafter identification parade was conducted on 21.3.2015 which was more than one year and two months from the incident. Therefore, the evidence is extremely weak. The applicant deserves to be released on bail. Hence, the following order.

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ORDER

- i. During pendency and final disposal of Criminal Appeal No.1063 of 2019, the applicant is directed to be released on bail on his executing PR bond in the sum of Rs.10,000/- (Rs. Ten Thousand) with one or two sureties in the like amount.
- ii. The application is disposed off.
- iii. Since Mr Sanjay N Gaikwad, learned counsel is appointed to represent the cause of Applicant, the High Court Legal Services Sub-Committee, Aurangabad to quantify and pay his legal fees and expenses as per the rules.

(BHARAT P. DESHPANDE, J.) (SARANG V. KOTWAL, J.)

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