

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 27 OF 2018

THE STATE OF MAHARASHTRA
VERSUS
1. AKASH KALAKRAM @ RAMBHAU PARTEK
2. SAGAR MOHAN UIKE

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Advocate for Appellant/State : Mr. A.V. Deshmukh
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**CORAM : SMT. VIBHA KANKANWADI &
Y.G. KHOBRAGADE, JJ.**
RESERVED ON : 27.03.2023
PRONOUNCED ON : 19.04.2023

ORDER :- (Per: Y.G. Khobragade, J.)

1. The prosecution has filed present application under Section 378(i)(b) of the Cr.P.C. seeking leave to file appeal against the order of acquittal of the respondents-accused passed by the Additional Sessions Judge-7, Aurangabad on 06.10.2017 in Sessions Case No.266/2015 [arising out of in Crime No.392/2015 registered on 13.09.2015 with MIDC Waluj Police Station, Aurangabad], thereby acquitting the respondent-accused nos.1 and 2 for the offence punishable under Section 302, 201 read with Section 34 of the I.P.C.

2. With able assistance of the learned APP, we have gone through the record.

3. The prosecution story in short is that, informant-Vijay Ashok Bankar lodged a FIR with MIDC Waluj Police Station on 13.09.2015 alleging that, there was Pola festival on 12.09.2015. He visited Vitthal Rukmini Mandir at about 8.00 p.m. and noticed that his brother Deepak was with his friends Dashrath, Asif, Arjun, Akash, Sagar and they were snapping photographs. He asked his brother to come home, but his brother told him that he would come later on. Thereafter, he left for his house and slept after having dinner at about 9.30 p.m. However, when he was sitting on road in front of his house at about 7.00 a.m. on 13.09.2015, one Bihari person informed him about dead body lying behind Pass Garage, therefore, informant went there and found his brother lying in pool of blood. Some police persons were also present at the spot. The informant further alleged that, he had lastly seen his brother-Deepak with accused no.1-Akash and accused no.2-Sagar at about 8.00 p.m. on 12.09.2015. His brother had not return to their house in the night time. Both the accused were absconding. He therefore says that the accused persons have committed the murder of his brother. On the basis of said report a Crime No. 0392/2015 was registered against the respondent nos.1 and 2 for the offence punishable under Section 302 read with Section 34 of the I.P.C.

4. The Investigating Officer-PW9 Shri Mahesh Tak has drawn inquest panchanama and sent the dead body of Deepak for post mortem. He has then prepared spot panchanama. The Investigating Officer also collected

simple and blood mixed soil from the spot of incident, as well as, stone containing blood stains, pieces of rexine with blood stains under seizure-cum-spot panchanama. So also, the clothes and blue colour mobile of Intex company without SIM belonging to deceased was seized. He has recorded statements of witnesses. The Investigating Officer has arrested the accused no.1-Akash Kalakram @ Rambhau Partek and accused no.2-Sagar Mohan Uike on 14.09.2015, under separate arrest memo. The Investigating Officer has interrogated the respondents-accused and seized their clothes which were on their person at the time of incident and collected their blood samples and sent them for chemical analysis under request letter dated 01.10.2015. Investigating Officer has collected post mortem and CA reports. On conclusion of investigation, charge-sheet was filed against the accused persons before the learned J.M.F.C. On compliance of Section 207 of the Cr.P.C. the learned trial Court passed an order under Section 209 of the Cr.P.C. and committed the trial to the Court of Sessions, as the offence is triable by the Court of Sessions.

5. In order to bring home the guilt of the accused-respondent nos.1 and 2, the prosecution examined PW1-Vijay Bankar at Exh.16, PW2-Dipali Bankar at Exh.18, PW3-Bhimraj Bankar at Exh.19, PW4-Bhairavnath Wagh at Exh.22, PW5-Mahesh Agam at Exh.23, PW6-Mahadeo Kinchik Lakhe at Exh.28, PW7-Rama Chopde at Exh.32, PW8- Dr.Manoj Patekar at Exh.37 and

PW9-Mahesh Tak the Investigating Officer. Besides oral testimony the prosecution proved documentary evidence FIR (Exh.17), spot-cum-seizure panchanama (Exh.30), seizure panchanama of clothes of the deceased (Exh.31), memorandum statement (Exh.33), seizure panchanama (Exh.34) in respect of clothes of the accused and mobile of the deceased, questionnaire form (Exh.38), post mortem report (Exh.39), inquest panchanama (Exh.46), a request letter dated 14.09.2015 (Exh.47), a request letter dated 01.10.2015 under which blood samples of accused were referred for examination, muddemal receipt (Exh.48 & 50), reminder letter dated 30.11.2015 (Exh.51) and request letter for calling CDR of mobile of deceased, CA report dated 28.10.2015 (Exh.52).

6. It can be seen that the case of the prosecution is totally based on circumstantial evidence. In other words, there is no eye witness for the homicidal death of deceased-Deepak. The PW2-Dipali Bankar has deposed that, there was Pola festival on 12.09.2015 and the accused no.1-Akash and accused no.2-Sagar, who are the friends of deceased visited her house around 2.30 p.m., but prior to that her brother-in-law / deceased had received a phone call. Thereafter, her brother-in-law/deceased asked her to boil the water for his bath and went away. But after five minutes her brother-in-law/deceased returned however, he left the house once again. Both the accused Akash and Sagar once again came to her house with her

brother-in-law/Deepak around 3.00 p.m. They went again out of the house and deceased had returned at about 11.00 p.m. for dinner. However, while deceased was taking dinner, both the accused again came to her house. Thereafter both the accused took her brother-in-law/Deepak with them. Deepak did not return home for whole night and on next day she came to know about the murder of her brother-in-law. Thus, prosecution has examined her on the point of 'last seen together'.

7. On perusal of evidence of PW1-Vijay Bankar, PW3-Bhimraj Bankar and PW4-Bhairavnath Wagh, it appears that they are hearsay witnesses and came to know about the murder of deceased-Deepak through others.

8. As per the testimony of PW5-Mahesh Agam, on the day of the Pola festival on 12.09.2015 he was watching the procession of bulls. Deepak had participated in the procession with his bulls and at that time both the accused-Akash and Sagar were with Deepak. At that time Deepak was told him there was exchange of hot words between Akash and Deepak as Akash felt that while participating in the procession, Deepak had pushed him. Accused no.1-Akash threatened Deepak since it was second push to him, if Deepak would again push him, he will kill him. Accused no.2-Sagar also told that acts of pushing by Deepak are sufficient and he should be taught lesson.

After the said narration all of them went, however, on next day, Mahesh came to know about murder of the Deepak.

9. Medical Officer-PW8 – Dr. Manoj Patekar who conducted postmortem on dead body of Deepak had found 22 external injuries. There were corresponding internal injuries to the injuries described in column no. 17 of post mortem report (Exh.39). There was fracture 8x7 cm on left temporal bone with one fracture line transversely crossing over the occipital bone and second fracture base and lower part of skull was fractured into pieces with multiple fracture lines passing across the bilateral temporro-parieto-occipital part of skull and 3 injuries to the brain and all the injures are 12 hours prior to commencement of post mortem. The Medical Officer opined about possibility of injuries described in post mortem report (Exh.39) due to assault by heavy stone. In cross-examination PW8 has stated that, injuries described in post mortem report (Exh.39) is unlikely to be caused because of road accident. Therefore, it is concluded that death of Deepak was homicidal in nature.

10. As per the spot panchanama (Exh.30), the prosecution proved about seizure of one stone weighing 1 & ½ kg and another stone weighing 5 to 6 kgs from the spot of incident and blood stains were found on piece of rexine and at the spot of the incident. Though, the respondents-accused

conducted cross-examination of the panch witness-PW6-Mahadeo Lakhe but nothing was solicited to discard the testimony of the panch witness in respect of seizure of sticks, rexine pieces, clothes of deceased (Articles 1 to 10).

11. PW2-Dipali has deposed that, the deceased left her house along with both the respondents-accused after meal at about 11.00 p.m., on 12.09.2015, however, spot of incident is not an isolated place. When Deepak allegedly went with both the accused from his house till the spot of incident, some villager might have noticed them together. However, evidence of the prosecution witness is lacking to prove 'last seen' theory of the deceased with both the accused. Therefore, though the PW5-Mahesh Agam deposed that, Deepak had told him about the threats given by accused, it cannot be considered as there was no proximity. The said disclosure by Deepak to PW 5 does not come within the purview of 'oral dying declaration' under Section 32 of Evidence Act, as Deepak was not under the fear of death or circumstance causing death. Testimony of PW Dipali also cannot be considered on the point of 'last seen' together, due to the time gap between lastly seen together and time of murder.

12. Further, as per the testimony of PW7-Rama Chopde the cloths of the accused and the Intex company mobile of deceased, were seized under seizure panchanama (Exh.34), at the instance of both the accused, from a

broken/ damaged steel cup-board lying under the tamarind tree. The said cupboard was in open space. Therefore, it is highly improbable that such place would have been chosen. The Investigating Officer-PW9 deposed about seizure of clothes of both the accused containing red colour stains under seizure panchanama Exh.34 and referred said clothes for chemical examination but the prosecution failed to produce chemical analysis report, to prove that clothes of both the accused containing blood stains of the deceased's blood group.

13. Since the case of the prosecution is solely based upon circumstantial evidence, therefore, the prosecution required to bring a complete chain of events and those pieces of evidence should have proved that the accused must have committed murder of the deceased. The recovery of clothes of accused under Section 27 of the Evidence Act, even if held to be proved, will not connect the accused to the crime without any corroborative piece of evidence. It would be worthwhile to mention here that, though, the Investigating Officer has seized mobile of the deceased under Section 27 of the Evidence Act, i.e. upon the discovery by accused; however, the prosecution failed to collect CDR of the said mobile. There was no sim card in the mobile recovered. Mere suspicion is not sufficient to connect the accused-persons with the crime.

14. Therefore, we conclude that the prosecution miserably failed to prove accusation of both the accused for murder of deceased-Deepak. Learned trial Court passed the impugned judgment and order and acquitted both the accused for the offence punishable under Section 302, 201 read with Section 34 of the I.P.C., on 06.10.2017. The said judgment is not perverse or bad in law. No substantial grounds are set out to grant leave for filing appeal against the order of acquittal.

16. In view of above discussion, we are not inclined to allow the present application and hence the present application stands rejected.

[Y.G. KHOBRAGADE, J.]

[SMT. VIBHA KANKANWADI, J.]

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