

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.38 OF 2019

The State of Maharashtra,
Through Basmathnagar (City)
Police Station, Tq. Basmathnagar,
Dist. Hingoli.

.. Applicant

Versus

1. Sayyed Jalil s/o Sayyad Jafar
Age: 26 years, Occu.: Labour,
R/o. Mushafarshah Mohalla,
Basmathnagar, Tq. Basmathnagar,
Dist. Hingoli.
2. Siddharth s/o Ganeshrao Kapse,
Age: 24 years, Occu.: Labour,
R/o. Panchshilnagar, Basmathnagar,
Tq. Basmathnagar, Dist. Hingoli.

.. Respondents

...
Mrs. V. S. Choudhari, APP for the applicant – State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 21st April, 2023.

ORDER :- (Per Smt. Vibha Kankanwadi, J.)

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal against the judgment and order dated 19.09.2018 passed by the learned Additional Sessions Judge, Basmathnagar, Dist. Hingoli in

Sessions Trial No.27 of 2015, thereby acquitting both the respondents/original accused persons from the offence punishable under Sections 302, 392 read with Section 34 of Indian Penal Code.

2. Heard learned APP Mrs. V. S. Choudhari for the applicant - State. With the able assistance of learned APP, we have gone through the entire material which was before the learned Trial Judge by way of evidence.

3. The prosecution story is that one Godavari Maroti Pote lodged first information report with Basmathnagar City Police Station, Dist. Hingoli informing that her husband Maroti was serving as teacher. They have two daughters by name Shruti and Shreya. They were the owners of plot behind Reliance Petrol Pump, Basmathnagar. Maroti had undertaken construction of house on the said plot since May 2015. Maroti used to sleep at night at the construction site, as he had not engaged any watchman there. Maroti was gone to the construction site when he was returning from school on 14.07.2015. After coming to house, he again went around 7.30 p.m. by taking tiffin to the construction site for sleeping. He did not return in the morning of 15.07.2015, therefore, she as well as her daughter Shruti and her sister-in-law Vandana went to the construction site. They found Maroti lying in supine position and he was dead. After

inspecting his body, they found strangulation mark and also beating marks. His motorcycle and mobile was missing from the site. On the basis of first information report, offence vide Crime No.56 of 2015 came to be registered for the offences punishable under Sections 302, 392 read with Section 34 of Indian Penal Code against unknown accused.

4. During the course of the investigation, panchanama of the spot as well as inquest panchanama was carried out and the dead body was sent for postmortem. Statements of certain witnesses were recorded and thereafter both the accused came to be arrested. The seized articles were sent for chemical analysis. The investigating officer had found an electric bulb at the site. Finger prints from the said bulb were extracted by the finger print expert and thereupon it is stated that the connection of the accused were found. After collecting necessary reports, charge-sheet came to be filed with learned Judicial Magistrate First Class, Basmathnagar.

5. After the committal of trial, the learned Additional Sessions Judge, Basmathnagar framed charge against both the accused. Accused have pleaded not guilty. Trial has been conducted. It appears that the prosecution has examined in all seventeen witnesses to bring home the guilt of the accused. After considering the evidence

on record and statements of accused persons under Section 313 of the Code of Criminal Procedure as well as hearing both sides, the learned Additional Sessions Judge has acquitted both the accused persons of all the charges. Hence, the present application.

6. The main submissions on behalf of the prosecution are that the learned Trial Judge has not considered the circumstances which were against the accused in proper perspective. There were at least five circumstances which were against the prosecution. No doubt, the case of the prosecution was based on circumstantial evidence, but the chain of circumstances was completed and it was pointing out towards the accused persons as the author of the crime. As the appreciation of evidence is not properly done, a perverse finding has been arrived, which deserves to be set aside.

7. At the outset, we would like to say that from the evidence that has been produced as well as the impugned judgment, it is clear that death of Maroti was homicidal in nature. Following injuries were noted by the medical officer P.W.1 Dr. Narwade, who conducted the autopsy :-

- i) Abrasion over neck below the chin on left side 2 x ½ cm deep in width ½ cm.
- ii) Abrasion over neck adjacent below abrasion No.1 dimension by 1 cm 2 x ½ cm.

- iii) Abrasion 3 x ½ cm, depth ½ cm.
- iv) Contusion over neck over thyroid region 3 x 2 cm reddish in colour age within 24 hours.
- v) Contusion enlarged laterally dimension 4 x 2 cm. Reddish in colour trachea region and thyroid region.
- vi) Laceration over the neck on right side 5 cm x 2.5 cm, skin is pilled up depth is 0.5 cm.
- vii) Laceration below the chin 2 x 1 cm depth 0.5 cm.

On dissection of neck injuries mentioned in Column No.17, following things were revealed :-

- i) All abrasions reveals subcutaneous haemorrhage at places.
- ii) All contusions shows the collection of blood and fluid at superficial and inter muscular spaces.
- iii) All lacerations shows pilling up the skin and further laceration in the inter muscular spaces.
- iv) All the above said injuries are ante mortem, age within 34 hours due to reddish colour of contusion.

Internal examination of thorax in larynx area shows sub cutaneous haemorrhages and collection of blood and fluid nasopharynx due to suffocation trachea is compressed. There is fracture of greater cornu of the hyoid bone on both sides. Left and right, trachea shows pressure sign of like congestion of blood clots in wind pipe, left lung congested. Left ventricles empty and right ventricles full of blood. Bacal cavity contains fluid and blood. Stomach contains semi digested food articles which indicates death occurred 12 hours before last meal. Liver pale on cut section. Organs of generation – testies were injured and the same was ante-mortem. The viscera was preserved in three bottles.

8. No doubt, in the cross-examination of the medical officer certain things have been tried to be brought on record, which were not in respect of his finding about homicidal death, but to challenge the circumstance. For example, it was asked that the clothes of the deceased were not torned, the abrasions at the place of neck were due to nails and such injuries are not possible by sharp aged weapon. However, the answers to these questions does not give any contrary finding as regards the cause of death that has been given by him i.e. “cardio respiratory failure secondary to throttling and thereby stoppage of respiration.” Thus, the contents of postmortem report Exhibit-33 are proved. Now, it is required to be seen as to whether the said homicidal death was caused by the respondents and whether

that much evidence was adduced by the prosecution beyond reasonable doubt.

9. Before we take up the discussion, of course which would be *prima facie* in a sense to see whether there was material before the learned Trial Court to support the prosecution case and then whether leave can be granted to file the appeal, unless there is perversity, the Court cannot go into the aspect of appeal. Merely because two views are possible, an Appellate Court cannot take the second view i.e. a different view than the view taken by the learned Trial Judge. We find that the impugned judgment contains elaborate reasoning. The learned Judge has touched each and every point, scanned every piece of evidence and then concluded that the evidence is not sufficient to hold that the accused are the authors of the crime. The evidence of P.W.2 Godawari – widow of deceased would show that she is not an eye witness, nor she was knowing the accused persons prior to that. The prosecution has coupled the offence of murder with robbery and the robbery is in the form of motorcycle as well as amount of Rs.4,00/-, which the deceased was carrying. Now, from the evidence of the prosecution it has come on record that the motorcycle was found in the nearby area and it is said that amount of Rs.400/- has been recovered from the accused No.1 Jalil. The FIR is in fact silent on the point that deceased Maroti was carrying any amount with him

when he left the house. But thereafter P.W.4 Shruti - daughter of deceased Maroti, has stated that her father was carrying the said amount. Now, the learned trial Judge has taken the note of the contradiction between the testimony of P.W.2 Godavari and P.W.4 Shruti in respect of the said amount. Even if for the sake of arguments it is accepted that the said discovery panchanama has been proved, yet the ownership of the said amount was not proved and the said circumstance alone cannot prove the guilt of accused No.1. Further it can be said that unless it is proved that death was also caused by both the accused, further part about stealing of money as well as motorcycle will not arise. The fact has also been tried to be brought on record that the accused persons are the offenders on record. Merely because they are offenders to record, it cannot be said that they have committed this offence also. Under such circumstance, the chain of circumstance should be strong. The another aspect that is tried to be brought on record is the finger print of accused No.2 on the electric bulb, which was found from the spot. P.W.13 Sunder is the finger print expert and he has given the details as to how he developed the finger prints from the electric bulb. According to this witness, he had received telephonic message from Basmathnagar City Police Station providing services of finger print expert to examine scene of crime at Basmathnagar. He has stated in

the cross-examination that he visited Basmathnagar Police Station at about 13.30 hours on 15.07.2015 with photographer. The spot panchanama was already prepared by the investigating officer and message was given to him that the articles are preserved at the spot. Except bulb, no other article was preserved by the investigating officer and thereupon he has taken the said article and developed the finger print. They exercised the match to the said finger prints with the record of accused persons and then it was matched with the finger prints of accused No.2. The first and the foremost fact that is to be noted is that his testimony is silent as to where the bulb was. Whether it was in the hanging position or it was on the ground. Why the need would have arose for accused No.2 to handle the said electric bulb, is a question. The testimony of Investigating Officer P.W.17 Ashok Mairal is silent on this point. In the cross-examination, he has admitted that it had transpired during the investigation that the wire supplying electricity to the said bulb was cut. He also admitted that if the wire was cut, then the bulb would not have glowed and there would be darkness. Therefore, it is simple that if the wire itself was cut, there was no question for handling the said bulb. The said piece of evidence is absolutely not convincing.

10. The prosecution is relying on the injury marks found on the person of accused No.1. P.W.16 Dr. Rajurkar is the medical officer

who had examined accused No.1 on 16.07.2015. Multiple abrasions on neck right side blackish colour and abrasion of backside of middle blackish as well as abrasion on right forearm were noticed and the age of those abrasions was more than 24 hours, but up to 72 hours. Here, it is to be noted that the incident has taken place in the intervening night of 14.07.2015 and 15.07.2015. P.W.17 in his examination-in-chief has stated that as per the information received by Deputy Superintendent of Police - Jagtap and Police Head Constable - Rahim, they had brought accused Jalil as well as Kapse to the police station. At what time they were brought to police station has not been disclosed by him. P.W.15 Shaikh Rahim is the Police Head Constable. He has stated that he knows one Wajid Shardullahkha Pathan. Said Wajid disclosed to him at about 8.00 p.m. on 14.07.2015 that both the accused persons were near his house and their mobile was lying in front of his house. Therefore, they had taken it and in lieu of that they were asking Wajid to pay them amount of Rs.1500/-, otherwise they would kill him. In his examination-in-chief, he has not stated that he had arrested any of the accused at the relevant time. Said Deputy Superintendent of Police - Jagtap has not been examined by the prosecution for the reasons best known to it. When the time of arrest of the accused is not coming forward, then injuries allegedly noted on his person

cannot be connected to the incident in question. But it is to be noted that the name clippings of deceased Maroti were sent to chemical analysis. The report is not positive to the injury marks and the tissues to match with either Maroti or accused Jalil.

11. The surrounding circumstance of the spot has been brought on record. The said construction site was almost in the isolation. There were no houses around the said house. Nobody has seen the accused persons near the spot either before the incident or after the incident in reasonable time. Whether both the accused were seen in the CCTV installed in the petrol pump so that the time can be matched has also not been brought on record.

12. Therefore, taking into consideration the detailed reasons those have been given by the learned Trial Judge, we do not find any perversity. No case is made out for grant of permission. The application stands dismissed.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm