

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 52 OF 2018

The State of Maharashtra, ... **Appellant**
Through Police Station, MIDC, CIDCO,
Aurangabad

VERSUS

Ganesh @ Pandurang Yadavrao Khambhat, ... **Respondent**
Age 23 years, Occu: Cleaner, R/o Umravati
Tq. Phulambri, Dist. Aurangabad

Mr. A. V. Deshmukh, APP for the appellant-State

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

RESERVED ON : 05.04.2023

PRONOUNCED ON : 26.04.2023

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

1. The present application has been filed by the prosecution under section 378(1) (b) of the Criminal Procedure Code, seeking leave to file appeal challenging the judgment and order dated 24.11.2017 passed by the learned Additional Sessions Judge, Aurangabad in Sessions Case No.116 of 2014; thereby acquitting the respondent/accused from the offence punishable under section 302, 201 of the Indian Penal Code in Crime No. I-192/2013, registered with Police Station MIDC, CIDCO, Aurangabad.

2. Heard Mr. A. V. Deshmukh, learned APP for the State and with his able assistance, we have gone through the documents on record which were before the learned trial judge for the limited purpose of considering whether leave can be granted to file appeal against the order of acquittal.

3. It is the case of prosecution that respondent/accused-Ganesh and deceased Anis Khan are resident of village Umravati, Tq. Phulambri Dist. Aurangabad. Deceased Anis Khan was having a truck bearing MH-20-CT-412. He used to ply the said truck himself and accused was working as Cleaner with him. Accused and deceased were friends and therefore used to be in the company of each other. The accused had sold his land with the mediation of deceased Anis Khan and out of consideration amount, he had purchased Omni van and started doing business. Deceased had taken Rs.12,000/- for getting driving licence for accused, but driving licence was not issued. The relations between the accused and deceased were spoiled on account of price of land, which was sold by accused. The accused and deceased had left in the truck on 18.12.2013, after loading gunny bags filled with maize towards Bhusawal from Sillod. After unloading it, cotton bales were loaded at Bodhwad for transporting it to Nava Sheva, Mumbai. Thereafter, wife of the deceased tried to contact her husband but she could not succeed for about two days. She and her relatives tried to search the deceased but he was not traceable. She came to know from her relative on 23.12.2013 that the accused has returned to village. As her husband had not returned, enquiry was made about deceased with the accused. Accused told that, he and deceased had parked the vehicle after reaching Deolai Chowk, Aurangabad. He had sustained injury to his figure, hence, he came back to his house and the deceased left for Mumbai. Thereafter, relatives of deceased started searching for deceased. One Firoz Syed Dada Patel informed the brother of deceased about the news item published in newspaper about dead body of unknown person found by the police.

4. PSI Shri Anil Lotan Wagh attached to MIDC CIDCO police station had visited the spot of incident, near Cambridge School on Harsool to Sawangi By pass, where partly burnt dead body was found and he had drawn the inquest panchnama. He had referred the dead body for postmortem. In the meanwhile, relatives of deceased visited Ghati Hospital, Aurangabad and identified the dead body of the deceased. Since the medical officer opined about death of deceased was due to multiple stab injuries and burn injuries, which is homicidal death, PSI Anil Wagh had lodged First Information Report on behalf of the State. Accordingly, an offence bearing C.R. No. I-192 of 2013 came to be registered under section 302, 201 of IPC and further investigation was entrusted to PI Balaji Sontakke.

5. During the course of investigation, investigating officer has arrested the accused and noticed injuries on his person. Therefore, accused was referred for medical examination while he was in custody. The investigating officer interrogated the accused and valet containing ATM and PAN card of deceased as well as knife which was used while committing the offence was recovered under seizure Panchanama. Then finger prints of the accused were collected through expert and truck was seized from the Weigh bridge on Beed Bypass, Aurangabad. After inspection of cabin of truck, some blood stains were, so also tommy, spanner and handkerchief containing blood stains were found there and cash of Rs.5500/- was seized at the instance of the accused. Statement of witnesses came to be recorded and seized articles were sent for chemical examination. Statement of witnesses under section 164 of Cr.PC. were recorded through the learned Magistrate. The bite mark injury found on the person of accused was compared with arrangement of teeth of deceased through medical officer and blood

samples of deceased and his relatives were collected for conducting DNA test. During the course of investigation, the investigating officer collected finger print expert's report, CA report and on completion of investigation, charge sheet came to be filed against the accused before the learned Judicial Magistrate First Class, Aurangabad.

6. On compliance of section 207 of Cr. P.C., the learned Magistrate passed order under section 209 of Cr.P.C. and committed the trial to the Court of Sessions. Thereafter, the learned trial court framed charge at Exh. 8 against the accused for the offence punishable under section 302 of IPC and recorded the plea of the accused. The accused pleaded not guilty and claimed for trial. Defence of the accused is total denial and false implication in the crime.

7. In order to bring home guilt of the accused, the prosecution has examined total 21 witnesses. Besides oral evidence, the prosecution has proved documentary evidence viz. inquest Panchanama Exh. 18, spot Panchanama Exh 19, A.D. Report Exh. 22, FIR Exh. 26, seizure Panchanama of valet of deceased containing his PAN and ATM Cards Exh. 28 with photographs were snapped at the relevant time, memorandum panchanama of knife Exh. 30 and seizure panchanama of knife Exh. 31 with photographs, memorandum panchanama of truck Exh.33 and seizure panchanama of truck Exh. 34, seizure panchanama of cash amount Exh. 37 with photographs, Panchanama of injury suffered by accused Exh.40, provisional postmortem-cum-death certificate Exh. 42, Postmortem report Exh.43, office copies of receipt of Raj Pay and Park Exh.50 to Exh. 53, statement under section 164 of Cr.P.C. Exh. 57, lorry receipt of Nav Bharat Logistic Exh.60 and tax invoice of ginning and pressing factory Exh. 61, C.A. reports Exh.118 to 123.

8. After conclusion of the prosecution evidence, statement of the accused under section 313 of Cr.P.C. was recorded and incriminatory evidence was put to the accused. The defence of the accused is that he has been falsely implicated in the crime. After hearing, the learned trial judge passed the judgment and order on 24.11.2017 and acquitted the accused for the offence punishable under section 302 of IPC. Being dissatisfied with the findings recorded by the learned trial court, the prosecution has filed the present application seeking leave to file appeal.

9. The learned APP submits that the learned trial court failed to appreciate voluminous evidence produced on record and it is in the nature of proof to support accusation against the respondent. Seizure Panchanama of valet of deceased containing his PAN and ATM Cards Exh. 28, memorandum panchanama of knife Exh. 30, seizure panchanama of knife Exh. 31, seizure panchanama of truck Exh. 34, postmortem-cum-death certificate Exh. 42, Postmortem report Exh.43, receipts of Pay and Park Exh.50 to Exh. 53, statement under section 164 of Cr.P.C. Exh. 57, lorry receipt Exh.60 and tax invoices Exh. 61, C.A. reports Exh.118 to 123 have not been considered by the learned trial judge. Perverse findings are giving and therefore, the prosecution has made out substantial ground for re-appreciation of evidence at the hands of this Court. Hence, prayed for leave to file appeal.

10. It is on record that a partly burned dead body of deceased Anis Khan was found at Gat No. 292 adjacent to Harsool-Savangi Bypass Road, Chikalthana. It is evident from inquest panchanama Exh. 18. PW-8 Dr. Nitin Subhashrao Ninal, who conducted autopsy had found six external injuries described in postmortem report Exh. 43. As

per opinion of the medical officer, injuries described in the postmortem report Exh. 43 were possible due to sharp and pointed object like knife and death of deceased was caused 3/4 days prior to postmortem, which was homicidal in nature.

11. From the evidence of prosecution witnesses, it reveals that deceased was doing transportation business by plying his own truck bearing No. MH-20 CT 412. The accused was working with the deceased as cleaner. The accused has not denied about his work being cleaner with the deceased. It is undisputed that on 18.12.2013, the deceased and accused left with truck by loading maize towards Bhusawal from Sillod and after unloading it, cotton bales were loaded in the truck at Bodhwad for transporting it to Nava Sheva, Mumbai. However, after 20.12.2013, PW-10 Shabana, wife of the deceased, found the mobile phone of the deceased switched off. Though search for the deceased was taken but he was not traceable. After the accused returned to his village, enquiry was made with him about the deceased but the accused had disclosed that after reaching Deolai Chowk, Aurangabad, they had parked the truck and he came back to his house due to injuries sustained by him and the deceased left for Mumbai. Thereafter one Mr. Firoj Patel, relative of deceased came to know from news item on 23.12.2013 about dead body of an unknown person being found by the police. PW-10 Shabana wife of deceased, with her relatives, visited Ghati Hospital and identified dead body of the deceased and pieces of clothes were preserved by the police.

12. No doubt, case of the prosecution is based on last seen theory, as the deceased and the accused left with truck on 18.12.2013 and the accused alone returned to his house after parking truck at Beed

Bypass Road. It is not in dispute that, the dead body of deceased was found at Harsul Sawangi Road on 23.12.2013 and truck was found loaded with cotton bales near Hotel Gurusaya, Savangi Bypass Road on 26.12.2013. On inspection of truck, some blood stains were found in the cabin of the truck. Tommy, spanner of wheel and one handkerchief containing blood stains were seized from the said truck. The finger prints appearing on the cabin of the truck as well as finger print of the accused were collected. The investigating officer seized the knife under section 27 of the Evidence Act under Seizure Panchanama Exh. 31 as well as cash of Rs.5500/- was seized under seizure Panchanama Exh.37. Further, the respondent accused was referred for treatment due to sustaining injuries to him. Therefore, all these circumstances were tried to be proved to support the theory of "last seen". Some blood stains of the accused were found inside the cabin as well as on tommy and spanner. However, the learned trial court held that, the prosecution failed to lead clinching, corroborative and trustworthy evidence to prove that the accused committed murder of deceased and tried to destroy the evidence by setting on fire the dead body of the deceased.

13. It would be worthwhile to mention here that after arrest of accused, the investigating officer noticed about sustaining injury to the accused and on interrogation, the investigating officer revealed that, during the course of scuffle, the deceased allegedly took bite of left forearm of the accused, but due to lapse of time between the incident and arrest of the accused, said bite injury might have healed up due to formation of trust and bite marks were not clear. As per testimony of PW-20 Dr. Jyoti Bhavthankar, who examined the accused, injury was having trust and bite marks were not clear but PW-20 did not depose

about not finding bite mark injury on left forearm of the accused. Therefore, the evidence of PW 20 cannot be discarded at the threshold.

14. There is evidence in respect of seizure of articles of the deceased at the behest of accused under section 27 of the Evidence Act. How those articles belonging to deceased were known to him and the location thereof is the important aspect. Though there appears to be the time gap, but whether we can altogether throw the theory of “last seen together” is a question. Therefore, to our conscious view, the prosecution has set out substantial arguable points and re-appreciation and scrutiny of evidence is required. Therefore, it would be just and proper to grant leave to the State/prosecution to file appeal against acquittal of the respondent/ accused.

15. In view of above discussion, we proceed to pass following order:

O R D E R

- (i) Application for leave to Appeal stand allowed. Leave is granted to file appeal and the registry to register the appeal.
- (ii) The Appeal is **admitted**.
- (iii) Issue notice to the respondents, returnable on 13th June, 2023.
- (iv) Action under section 390 of the Code of Criminal Procedure be taken against the accused to the satisfaction of the trial court.
- (v) Call record and proceedings with paper book.

(Y. G. KHOBRADE, J.)

(SMT. VIBHA KANKANWADI, J.)

JPChavan