

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE NO.70 OF 2018**

The State of Maharashtra  
Through Anita Mahipati Surwase  
Age: 40 years, Occu.: Labour,  
R/o. Manewadi, Tq. Tuljapur,  
Dist. Osmanabad

**.. Applicant**

***Versus***

1. Milind Suresh Gove  
Age: 25 years, Occu.: Agri.,  
R/o. Andoor, Tq. Tuljapur,  
Dist. Osmanabad.
2. Babasaheb Suresh Gove  
Age: 23 years, Occu.: Agri.,  
R/o. Andoor, Tq. Tuljapur,  
Dist. Osmanabad.

**.. Respondents**

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Mr. A. M. Phule, APP for the applicant – State.

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

**DATE : 24<sup>th</sup> March, 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 criminal appeal challenging the judgment and order dated 05.01.2018 passed by learned Sessions Judge, Osmanabad in Sessions Case No.59 of 2016

thereby acquitting the respondents/original accused persons from the offences punishable under Sections 302, 504, 506 read with Section 34 of Indian Penal Code.

2. Heard learned APP Mr. A. M. Phule for the applicant - State for the purpose of admission. With the able assistance of the learned APP, we have gone through the material, which was before the learned Trial Judge.

3. At the outset, we would like to say that deceased is one Balappa Mahipati Surwase, who was aged 11 years on the date of incident i.e. 04.05.2016. Informant Anita is his mother and she has lodged the first information report Exhibit-45 on 05.05.2016. At that time Balappa was alive and, therefore, the offence was registered under Section 307, 504 and 506 read with Section 34 of Indian Penal Code. The FIR was lodged with Naldurg Police Station, Dist. Osmanabad. Balappa was admitted to Civil Hospital, Solapur after he was shifted from Andoor Hospital. His dying declaration (Exhibit-74) was initially recorded at 2.30 p.m. on 05.05.2016 and second dying declaration (Exhibit-72) came to be recorded on the same date at 11.30 p.m. by API Naldurg Police Station by visiting Civil Hospital, Solapur. Thereafter, Balappa expired on 18.05.2016 while undergoing treatment and, therefore, after drawing inquest panchanama, the

dead body was referred for postmortem. The postmortem was conducted and the probable cause of death is said to be “septicemia due to burn injury, however, viscera was preserved for chemical analysis”. It can be seen from the entire evidence adduced on behalf of the prosecution and the documents that the accused persons have not seriously challenged the fact that Balappa had received burn injuries and was so admitted to Civil Hospital, Solapur and then he succumbed to those injuries. Under such circumstance, three possibilities would arise, one accidental, second suicidal and third homicidal death. It is nobody’s case that Balappa, who was then 11 years old, had committed suicide. No such suggestion has been given on behalf of the accused persons to the prosecution witnesses. Under the said circumstance, when the prosecution has come with the case that it was homicidal death; then prosecution should rule out the possibility of accidental burn injuries and then death. Even as per the prosecution case, the incident of Balappa receiving burn injuries had taken place after 9.00 p.m., that too in the house which was in their field.

4. The learned APP has tried to canvass that the learned Trial Judge has not appreciated the evidence properly. When the postmortem report had clearly indicated that there are burn injuries on the person of deceased and he died due to those injuries and there

are eye witnesses, who were examined on behalf of the prosecution, then it ought to have been held that the said death was homicidal in nature. The prosecution has examined the mother, father and brother of the deceased. Their testimony has been wrongly discarded on the ground that they are the interested witnesses. When there is need to re-appreciate the evidence, leave should be granted to file the appeal to challenge the perverse finding.

5. If we consider the testimony of P.W.2 Anita, P.W.3 Mahipati and P.W.4 Mahalappa, it can be seen that they were corroborating the fact that Mahipati had done some construction work about cattle shed in the cattle shed of accused No.1 and amount of Rs.2,000/- was outstanding. Mahalappa and Ballappa had gone to demand the money to accused No.1, but at that time accused No.1 had abused the children and threatened them that if they come again for demanding the money, they would be put to fire. This incident had taken place in the afternoon and then it is stated by these witnesses that after taking dinner, P.W.2 Anita P.W.4 Mahalappa and deceased Ballappa went to sleep. They were sleeping in the courtyard. Ballappa was on the cot, whereas Anita, Mahalappa and another son Dhulappa were sleeping on the mattress laid on the ground near the cot. That means P.W.2 Anita and P.W.4 Mahalappa have not stated about the presence of P.W.3 Mahipati at the relevant time. P.W.2 Anita and P.W.4

Mahalappa have stated that after they went to sleep, after sometime, they woke up because of the sound and found that Ballappa had caught fire. Both of them have stated that they had seen both the accused persons running from the spot, however, one says that they ran on motorcycle and another person does not support this fact, but only supports that both the accused persons ran away. It is then stated by P.W.3 Mahipati that after taking meals, he saw burning near his cattle shed and, therefore, he rushed towards the same. He found someone running and someone on motorcycle. He says that when he reached the spot, he saw Anita and Mahalappa were throwing Ballappa in water tank and thereafter, the fire was extinguished. Mahipati had not stated as to where exactly he was when Ballappa caught fire. He was not sure in saying that he had seen both the accused running from the spot. P.W.2 Anita says that when she saw Mahalappa catching fire and both the accused running on their motorcycles, she raise shouts. After hearing shouts, Mahipati, Tanu Gove, Vilas, Tipu Kabade, Pappu Gove came to the spot. By that time, she had taken her son Balu in the tank constructed in concrete. She then says that Mahipati and others took her son out of the tank and took him to hospital at Andoor, whereas P.W.4 Mahalappa says that when he saw both the accused running, Ballappa was running towards the water tank. He says that with the help of his mother, he

had put Ballappa in the water tank and then the fire was extinguished. Before we consider the further niceties, it has been specifically asked to these witnesses that whether Anita and Mahalappa had received burn injuries. All of them had stated in the negative. Question then arises when they have used the words that they had put Balu in the water tank, it could not have been without the help of their hands. How they had not received burn injuries, is a question. Therefore, the said story itself is made dis-believable on this count. **At this stage, we would consider the dying declarations also (as they are presuming for a sake of moment that they have been properly proved).** It has been stated in the second dying declaration Exhibit-72 that after he caught fire, he went running and jumped in the water tank. No such statement was made in the first dying declaration Exhibit-75.

6. All the three witnesses as well as both the dying declarations say that amount of Rs.2,000/- was outstanding from accused No.1 to P.W.3 Mahipati. In order to demand the said amount, Mahalappa and Ballappa had gone to meet accused No.1 around 4.00 p.m. on 04.05.2016. None of them have given the details as to when the said construction work was done by Mahipati. As to what was the exact contract and since when the amount of Rs.2,000/- is outstanding. Another aspect to be noted is that deceased was only 11 years old boy

so also his elder brother P.W.4 Mahalappa was 13 years old boy, when his deposition was recorded. It is hard to believe that the minor sons would have been sent to ask for remaining amount from the accused No.1. Why Mahipati himself had not gone to demand the amount has not been explained by him. Therefore, the alleged motive is also not appealing.

7. Coming back to the point as regards the extinguishment of fire in the water tank is concerned, P.W.2 Anita in her cross-examination has stated that when she woke up due to the shouts of Balu, Balu was at a distance of about 5 feet from her. Then Balu had ran about 5 to 6 feet and then she had tried to extinguish the fire and she then stated that the tank was situated at a distance about 50 feet from her house. She is also made the statement that there is no water tank in front of her house. If we consider the spot panchanama Exhibit-41, there is absolutely no mention of any concrete water tank in or around the field of the informant. Then the question arises whether exactly that water tank was situated. If it was far away, then whether it would have been possible for Anita and Mahalappa to take Ballappa to water tank and put him in the water of the water tank without receiving burn injuries to their hands. She has also admitted that there are 2-3 dogs in her house. Though she has denied that dog do not allow any unknown person to come in their house, the question

remains is that till the accused persons had come up to the cot on which deceased was sleeping and then pouring kerosene on his person and igniting the fire, how it was no reaction on the part of those 2-3 dogs. It also appears from the dying declarations as well as the testimony of these relatives that till Balu was put to fire, nobody had woke up including Balu. When the kerosene was poured, in that process also, he had not woke up.

8. P.W.6 Jaideep Dalvi, who is the medical officer on duty in burn ward on 05.05.2016 and he has given endorsements on dying declarations Exhibit-62 and 63. He has stated that Ballappa had sustained 80% of the burn injuries. He has not produced the bed head tickets i.e. IPD papers to show that no sedative was given to Ballappa before both the dying declarations were recorded. We must consider that the boy was very much young and for 80% burn injuries would have given him severe pains. Under such circumstance, it was necessary for the prosecution to get produce the indoor patient papers from the hospital. Best piece of evidence is thus withheld.

9. P.W.7 Dr. Maturesh Ramkundkar was the Resident Medical Officer, who was on night duty on 05.05.2016 and he had given endorsement on dying declaration Exhibit-65 regarding the

consciousness of Ballappa. It is to be noted that he has stated only about consciousness and not about the fit state of mind to give statement. He has claimed ignorance as to whether entry regarding the recording of dying declaration was taken in IPD papers or not.

10. Under such circumstance, both the dying declarations are not trustworthy. The testimony of the alleged eye witnesses is doubtful. Further, when the other independent witnesses had also come to the spot and rather P.W.2 Anita has stated that P.W.3 Mahipati and other persons, who had come, had taken Ballappa out of the water tank (this fact was not supported by P.W.3 Mahipati). Those independent witnesses ought to have been examined by the prosecution. From the evidence that was adduced, the learned Trial Judge was justified in arriving at a conclusion that the offence has not been proved beyond reasonable doubt. No grounds are made to grant leave to file appeal, as the findings of the learned Trial Judge are not perverse. Application therefore stands rejected.

**[ Y. G. KHOBRAGADE ]**  
**JUDGE**

**[ SMT. VIBHA KANKANWADI ]**  
**JUDGE**

scm