

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 54 OF 2020

The State of Maharashtra,
Through Police Inspector,
Rahuri Police Station,
Tq. Rahuri, Dist. Ahmednagar

... Applicant
(Orig. Prosecution)

Versus

1. Raju Gangaram Bachkar,
Age : 47 years, Occu. : Shephard,
R/o. Jambhali, Tq. Rahuri,
Dist. Ahmednagar.
2. Housabai Kondiba Karhe,
Age : 40 years, Occu. : Agri.,
R/o. Jambhali, Tq. Rahuri,
Dist. Ahmednagar.

... Respondents
(Orig. Accused)

...
Mr. A. M. Phule, APP for Applicant - State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 07th JUNE, 2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. By way of instant application, the State is seeking leave to assail the judgment and order dated 22.01.2020 passed by the learned Additional Sessions Judge, Ahmednagar, Dist. Ahmednagar in Sessions Case No. 186 of 2018, by which both accused respondents were acquitted from charges under sections 302, 201 read with section 34 of Indian Penal Code (IPC).

Facts giving rise to the sessions case are as under

2. Rahuri police station charge-sheeted both accused on accusation that there were illicit relations between accused Raju and accused Housabai. On 31.05.2018, deceased Khandu happened to enter the house of accused no.2 and noticed both accused having coitus at around 11.00 p.m. He got enraged and slapped accused Housabai. According to prosecution, both accused persons covered deceased Khandu with a quilt and beat him to death. Son of Khandu namely, Nanasaheb went to the field in search of his father. On the way, he went to the house of accused Housabai for taking mobile charger. That time, he found Housabai in bewildered condition. After taking charger, while he was going towards the field from the back side of house of accused Housabai, he found his father lying in supine condition. He was shifted to Civil Hospital, Ahmednagar, but there doctor examined and declared him dead. Therefore, he lodged complaint at Exh.23. Investigation was undertaken and after its completion, both accused were charge-sheeted.

3. In support of its case, prosecution relied on the testimonies of six witnesses and also relied on documentary evidence. After hearing both sides and on appreciating the evidence on record, learned trial Judge reached to a conclusion

that prosecution had failed to prove the case against accused beyond reasonable doubt and thereby acquitted both accused from all the charges.

It is the above judgment and order of acquittal, which is proposed to be questioned by filing appeal and for the same, State has pressed into service instant application.

4. Learned APP would point out that trial was conducted with full proof case. Both accused persons were caught in compromising position by deceased Khandu and therefore, out of fear of illicit relations getting exposed, they both beat Khandu and thereafter threw his dead body behind the house. Learned APP submitted that accused no.2 himself had given extra judicial confession to none other than complainant and his other family members. Therefore, complaint was promptly lodged. Investigation revealed that deceased was found behind the house of accused no.2 Housabai. Medical evidence has confirmed that death due to beating. Prosecution witnesses have deposed about illicit relations of both accused. Their evidence has not been impeached by defence, however learned trial court has failed to appreciate available evidence on record and has arrived to erroneous conclusion. It was clearly established by prosecution that accused

are the solely responsible for death of Khandu and therefore, they were rightly arrested and charge-sheeted. There was strong incriminating circumstances, but the same were not properly appreciated by the learned trial Judge and therefore, it is submitted that the State intends to take up appeal against such erroneous judgment and so he prays for grant of leave to do so.

5. We have carefully gone through the oral and documentary evidence with which accused faced trial. Admittedly, there being no eye witness, case is rested on circumstantial evidence. From the papers, it is gathered that in trial court prosecution pressed into service, **firstly** circumstance of motive, i.e. illicit relations between both accused persons. **Secondly**, threats issued by accused Raju to Khandu. **Thirdly**, dead body found near the house of accused Housabai.

6. According to prosecution, there were illicit relations between both accused. On 31.05.2018, deceased caught both accused indulging in sex and therefore, out of fear of getting defamed, deceased was done to death and this is precisely the motive. It is emerging from the evidence that accused Housabai is the second wife of Kondiba, who is brother of deceased Khandu. Let us see whether prosecution has proved their case. PW-1

Nanasaheb and PW-2 Bhausahab seem to be the witnesses in support of such accusation.

7. Therefore, we have carefully visited their evidence. **PW-1** Nanasaheb is the informant and son of deceased Khandu. It has come in his evidence that, his uncle's second wife resided near their house. One week prior to the incident, he claims to have learnt from his father Khandu about alleged relations between both accused persons and about understanding being given to them. After funeral of his father he claims that, in the evening, he himself and his relatives, namely, Limbaji and Baban inquired with accused no.2 Housabai about death of Khandu and that time she disclosed that on 31.05.2018, at about 11.00 p.m., deceased Khandu entered into her house and saw herself and accused Raju having sexual intercourse. That, Khandu slapped her, thereafter both accused used quilt to cover Khandu and thereafter beat him and in that assault, he died. He further stated that both accused lifted deceased Khandu and kept his dead body outside the house.

8. While facing cross, he admitted that he did not disclose his uncle Kondiba about illicit relationship of accused Housabai with accused Raju. He stated that his father was sleeping near him on the night of 31.05.2018. He answered that his father did not

wake him while going towards the house of Housabai. He answered that his mobile charger was with accused Housabai. He answered that when he went to police station on 03.06.2018, he lodged complaint, the same was not entertained, and therefore they returned back to village. He admitted that no written complaint was made to the Dy.S.P. He further answered that while lodging complaint, he had not stated before the police that on 31.05.2018 his father gone to Sutarwadi for making payment.

In the cross at the hands of accused no.2, he has answered that when they took Housabai to the police, at that time, after inquiry police told that Housabai is not informing anything. He admitted that, whatever was disclosed by Housabai to him was not disclosed by him to anybody except police. He answered that, near the house of Housabai there are no residential house. He answered that, he did not inquire with the doctor about the cause of death of his father.

9. **PW-2** Bhausaheb stated that, prior to one day, when Khandu was found dead, he, accused Raju, deceased Khandu went to Sutarwadi on motorcycle, while returning they consumed liquor and thereafter, there were heated exchange of words between Raju and Khandu. Witness stated that accused Raju told deceased that he is going to house of Housabai and dared him to catch him. Then

he was pacified them. He claims that they came back to village and accused Raju went away on the motorcycle and in the next morning Khandu was found dead.

In cross he admitted that, having drunk and consumed ganja, there were no talks between him and accused as well as deceased. He answered that, after exchange of hot words at Dhaba, they came back to the village Jambhali and thereafter, they dispersed to their houses.

10. Above is the only evidence on the point of illicit relationship between both accused persons. No doubt, rarely there is evidence about illicit relationship. However, what transpires from the evidence of PW-1 Nanasaheb and PW-2 Bhausahab is that they have hearsay information about illicit relationship. Informant himself appears to have learnt from his deceased father, but there is no other material to accept the case of prosecution about illicit relationship between both accused persons. Khandu, who allegedly spotted both accused persons in compromising position is infact no more. Informant himself admits about not informing Kondiba, his uncle about hearing from his father that there were illicit relations between both accused persons. Therefore, there is little or no evidence on the point of illicit relationship between both accused persons. There is no other

independent witness from the locality on the point of alleged illicit relations.

11. Now let us turn to second circumstance. It seems the case of prosecution is that deceased Khandu was spotted lying outside the house of Housabai and thereafter shifted to the hospital. Doctor has examined him and declared dead. However, cause of death is said to be heart rupture, but autopsy doctor appears to have been admitted in cross that postmortem examination findings are indicative of rupture of heart due to **natural cause**. Therefore, the very aspect of death of Khandu to be homicidal one comes under cloud.

12. According to prosecution, dead body of Khandu was behind the house of Housabai. This is posed as circumstance by prosecution. However, in our opinion, mere finding dead body near the house of accused no.2 and merely presence of accused Raju near the house of Housabai itself is not sufficient to connect accused persons with the same and merely presence of accused Raju itself cannot be said to be an incriminating circumstances.

13. Though PW-2 Bhausahab spoke about he, accused and deceased going to Sutarwadi, it has come in the evidence of

informant that, deceased Khandu was in the field throughout the day, i.e. on 31.05.2018. Therefore such material falsifies the testimony of Bhausaheb. Consequently, testimonies of PW-1 Nanasaheb and PW-2 Bhausaheb are not worthy of credence.

14. So called extra judicial confession even to informant is also doubtful. According to informant, after the funeral of Khandu when accused no.2 was questioned, she gave confession about she and accused Raju beating Khandu to death for seeing both of them having sexual intercourse. However, apparently complaint is lodged on 06.06.2018. If there was disclosure on 31.05.2018 itself, then as to why it took a week or so for complainant to approach has not been explained. The said inordinate delay in lodging FIR has not been satisfactorily explained by the prosecution. Further, according to informant accused Hausabai confessed about the crime in presence of two persons namely, Limbaji and Baban, but they are not examined to lend support to the testimony of informant. Even otherwise extra judicial confession is a weak type of evidence.

15. The last circumstance of alleged recovery and seizure of clothes of both accused are also rendered doubtful as they are recovered from some bush. Mere recovery of clothes cannot be

said to be a strong circumstance unless it is shown that the said clothes were on the persons of accused and deceased at the time of incident.

16. Therefore, in the light of above discussed material, which is emerging on close scrutiny of prosecution evidence, in our opinion, here prosecution has failed to bring home the charges by proving or establishing any circumstance relied by it. We agree with the conclusion drawn by the learned trial court and no other opinion than that has been given, would emerge on evaluation of the prosecution evidence. Therefore, in our opinion, the case has no merits and it is not a fit case to grant leave. Hence it is rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)