

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

907 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.83 OF 2018

The State of Maharashtra,
Through Police Inspector,
Police Station, Taluka Jalna,
Tq. Jalna, Dist. Jalna.

... Applicant

... **Versus** ...

John @ Nanya Suresh Nirmal,
Age 28 yrs., Occ.
R/o Powerlum, Old MIDC, Jalna.

... Respondent

...

Mr. S.D. Ghayal, APP for the applicant

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

DATE : 06th OCTOBER, 2023

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed by the prosecution seeking leave under Section 378 (1)(b) of the Code of Criminal Procedure, 1973 to file appeal challenging the Judgment of acquittal dated 28.12.2017 passed by

learned Additional Sessions Judge, Jalna in Sessions Case No.86/2016, thereby acquitting respondent – original accused from the offence punishable under Section 302 of the Indian Penal Code, 1860.

2 Heard learned APP Mr. S.D. Ghayal for the prosecution and perused the material which was before the learned trial Judge.

3 The prosecution story, in short, is that – informant Shaikh Raziya Shaikh Pasha lodged a report with Police Station, Jalna taluka, Dist. Jalna on 22.03.2016 against the present respondent and other two persons alleging that they have committed murder of her husband Shaikh Pasha Shaikh Rasul. She has stated that her husband was working in a juice centre at Mantha owned by one Pancham Thapa. Said Pancham Thapa had gone to her house around 7.00 to 7.30 a.m. on 21.03.2016 and asked her husband to come to juice centre as early as possible. Therefore, her husband went to juice centre after some time. Later in the evening i.e. around 9.00 to 9.30 p.m. said Pancham Thapa came to her house and informed that someone beaten her husband and her husband is lying in front of the juice centre. The informant and her sister-in-law (husband's sister) went to Mantha Chafuli where the juice centre was located. They found that one Bidiwala Mama had caught hold of Shaikh Pasha and Pancham was standing behind them. Then an auto

rickshaw was called and Shaikh Pasha was taken to Government Hospital, Jalna. In the auto rickshaw she asked her husband as to how the incident has happened, then Shaikh Pasha replied that accused Nanya Nirmal, Sonya and Pitya Nirmal had assaulted him with kicks and fist blows. Later on the Medical Officer after examining Shaikh Pasha declared him dead. On the next day morning she lodged report with Police Station.

4 On the basis of her First Information Report offence vide Crime No.124/2016 came to be registered and investigation was undertaken.

5 Inquest panchnama was prepared and then the dead body was referred for postmortem, after the postmortem was done the clothes on the person of the dead body were seized under panchnama, panchnama of the spot was carried out, accused and two other persons came to be arrested, statements of witnesses were recorded, however, during the further investigation Sonya Nirmal and Pitya Nirmal came to be discharged under Section 169 of the Code of Criminal Procedure. After the completion of the investigation charge sheet was filed against only one accused.

6 After the committal of the case the trial was conducted. Prosecution has examined in all 11 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides the

learned trial Judge has acquitted the accused. Hence, present application seeking leave to appeal.

7 It can be seen from the entire evidence that prosecution had come with a case that PW 9 Madhukar is the eye witness and deceased had given oral dying declaration to PW 4 Raziya – informant, PW 5 Shaheen – sister of the deceased and PW 7 Pancham Thapa – proprietor of the juice centre and employer of deceased. It has been stated that the incident has taken place around 9.00 p.m. on 21.03.2016, that too in a chowk, still only one witness has been examined, who is stated to be the eye witness. If we consider the testimony of PW 9 Madhukar, then it can be seen that he had gone to the juice centre around 8.00 a.m. When he was cleaning the juice centre (raswanti gruh) at 8.30 p.m., accused Nanya went there and demanded amount of Rs.600/- from Shaikh Pasha. Shaikh Pasha told that since he has just come out of illness and was in hospital, he is not having money, but then fighting started between Nanya and deceased. Nanya was giving fist blows and kicks on face, stomach and back of Shaikh Pasha. Then it is stated that accused stabbed a tocha (big needle used for cutting ice) in the chest of deceased and then Shaikh Pasha fell down. After about 10 to 15 minutes PW 7 Pancham Thapa came and asked Shaikh Pasha as to what has happened, then Shaikh Pasha told that Nanya has beaten him. Thus, it is to

be noted that his examination-in-chief appears to be against the First Information Report, wherein it has been stated that in oral dying declaration deceased had told to informant that he was assaulted by in all three persons. The informant PW 4 Raziya has not stated that deceased told her that accused had stabbed/pierced tocha in his chest. Another thing is that though this witness says that he was present at the said place and was witnessing the incident, he has not taken part in saving the deceased. Even PW 7 Pancham Thapa is stated to have arrived at the place 10-15 minutes after the deceased i.e. after deceased fell down on the ground. Why PW 9 Madhukar allowed the accused to go or there was no attempt on his part to shout for help to the public at large is not coming forward. Why even after deceased fell down he did not take further steps to shift injured Shaikh Pasha to any hospital has not been explained by him. Surprisingly, if we consider the testimony of PW 7 Pancham Thapa along with evidence of PW 9 Madhukar, then we can get that he went to the house of informant first which appears to be at Jalna (the distance between juice centre and the house of the deceased has not come on record) and after informant came, then the step of shifting him to hospital is stated to be taken, when the conduct should have been to shift the deceased to the hospital first. In the cross-examination PW 9 Madhukar has admitted that there are about 100 shops around the juice centre and still he says that nobody gathered on the spot. Therefore, the testimony of this witness is held

by the learned trial Judge, rightly to be so, not believable.

8 As regards the testimony of witness Nos.4, 5 and 7, though they are stating that deceased has given oral dying declaration to them; yet, that oral dying declaration was in respect of three persons i.e. present accused – respondent and two more i.e. Sonya and Pitya. The Investigating Officer himself had discharged Sonya and Pitya under Section 169 of the Code of Criminal Procedure. Recently, a Three Judge Bench of the Hon'ble Supreme Court in **Phulel Singh vs. State of Haryana** in **Criminal Appeal No.396 of 2010** decided on 27.09.2023 held that same dying declaration cannot be used/believed to convict one person while disbelieving it for the other accused or other person. Of course, it was in respect of a written dying declaration, but the same principle would apply in respect of oral dying declaration also. If the oral dying declaration allegedly given to PW 4, 5 and 7 is to be used against the present accused holding it to be admissible in law, then the alleged involvement/disclosure of names of Sonya and Pitya cannot be segregated. Under the said circumstance, when they have been discharged under Section 169 of the Code of Criminal Procedure, the same oral dying declaration cannot be held to be admissible as against the present respondent.

9 As aforesaid, PW 4, PW 5 are not eye witnesses and also PW 7 Pancham Thapa who reached to the spot before PW 4 and PW 5, still he had not seen any of the accused persons at the spot. Though the testimony of PW 6 Dr. Vaijanth Rathod is indicating that death of Shaikh Pasha was homicidal in nature; yet, the said death is not attributable to the accused. At the cost of repetition, we would also like to say that there was no hurdle for the prosecution to examine more eye witnesses, who were admittedly present at the spot. Therefore, we do not find any illegality or perversity in the judgment and order passed by the learned trial Judge. Application, therefore, stands rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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