

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
APPLICATION FOR LEAVE TO APPEAL
BY STATE NO.78 OF 2019**

The State of Maharashtra, Through
Officer in-charge of Police Station Manwat,
Tq. Manwat, Dist. Parbhani.

..Applicant
(Orig. Complainant)

Versus

1. Ganpat s/o Kundalik Kajale,
Age 35 years, Occu. Agri.
2. Hari s/o Ganpat Kajale,
Age 23 years, Occu. Agri.
3. Ashalata w/o Ganpat Kajale,
Age 50 years, Occu. Agri.

..Respondents
(Orig. Accused)

...

Mr. A. M. Phule, APP the Applicant.

...
**CORAM : SMT. VIBHA KANKANWADI &
S. G. CHAPALGAONKAR, JJ.**

DATE : 27th JUNE, 2023.

ORDER (Per: S. G. Chapalgaonkar, J.):

1. By this application filed under Section 378 (1) (b) of the Code of Criminal Procedure, the State of Maharashtra seeks leave to file appeal to impugn the judgment and order passed by the learned Additional Sessions Judge-3, Parbhani dated 20.12.2018 in Sessions Trial No.52/2015, thereby acquitting the respondents/accused, who were charged for the offences punishable under Section 302, 323, 506 r/w 34 of the Indian Penal Code.

2. The case of the prosecution is that at about 12.00 noon on 15.11.2014 one Mauli Kajale telephoned to the Police Station that one Rameshwar Kajale is murdered and lying in the field at village Tad -

Borgaon. His wife Nandabai was accompanied him. Pursuant to the information ASI Nitin Chincholkar with Bit police officers reached to spot. Nandabai shown the place of incident. The spot panchanama was drawn. The articles were seized. Inquest panchanama was recorded and dead body was sent to Primary Health Centre at Kolha for postmortem.

3. It is further the case of the prosecution that Prabhakar Kajale gave First Information Report to the Police Station with narration that his son Rameshwar had been to the field early morning. His wife Nandabai and one Ushabai Khade went to the field at about 9.30 am. At that time, accused Ganpat, Haribhau and Ashalata quarreled with Rameshwar for taking water out of common well. Accused Ganpat noosed Rameshwar by rope and accused Ashalalata hit stone on the his private part. Nandabai and Ushabai separated the quarrel. At that time, accused Ganpat slapped Ushabai and threatened her of dire consequences. Thereafter, Nandabai rushed to home and informed Prabhakar about the incident. Prabhakar immediately rushed towards the field on motorcycle with one Akbar Kha Saab where he noticed that his son Rameshwar was being dragged towards Mango tree. Accused Ganpat had pressed his leg on Rameshwars right ear and noosed rope around his neck. At the same time, accused Haribhau (Nephew) gave fist blow to the informant on his stomach causing invisible injury. On the basis of the information, Crime No.152/2014 was registered with Police Station Manwat for the offences punishable under Section 302 r/w. 34 of the Indian Penal Code. During the course of the investigation, the accused persons were arrested. The statements of witnesses were recorded. On the basis of the disclosure statement of the accused persons, incriminating articles like handkerchief, stone and clothes of accused were recovered. After completion of the investigation,

the charge-sheet against the accused was filed before the Judicial Magistrate First Class at Manwat for the offences punishable under Section 302 r/w. 34 of the Indian Penal Code.

4. On committal of the case to the Sessions Court, the charge was framed against the accused. They pleaded not guilty and claimed for trial. On 01.02.2017, the charge was re-framed below Exhibit-30 to incorporate Section 323 of the Indian Penal Code. The prosecution in its endeavour to bring home guilt of the accused relied upon oral evidence of ten witnesses. The informant Prabhakar i.e. father of the deceased claimed to be an eye witness. His evidence is recorded at Exhibit-40. Nandabai Kajale (PW-2) i.e. wife of the deceased recorded her evidence at Exhibit-45. Usha Raju Khade (PW-3) i.e. sister-in-law of deceased recorded her evidence at Exhibit-49. Durga Dnyaneshwar Kajale (PW-4) recorded her evidence at Exhibit-51. All these four witnesses were examined as eye witnesses of that incident. Dr. Vidya Natkar (PW-6) recorded her evidence at Exhibit-70. Nitin Chincholkar (PW-7) and Namdeo Waghmare (PW-8) were examined as witnesses on the discovery panchama. Mr. Shivanand Patil and Mr. Pradeep Jondhale recorded their evidence as PW-9 and PW-10. The statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure. The accused maintained their defence of total denial and false implication. The Sessions Court after considering the evidence on record and submissions of the learned Advocate appearing for respective parties, acquitted the accused for the offences punishable under Section 302, 323 and 506 r/w. Section 34 of the Indian Penal Code vide Section 235(1) of the Code of Criminal Procedure.

5. Mr. Phule, learned APP for the applicant took us through FIR at Exhibit-41 recorded on the basis of the report given by PW-1

Prabhakar. He took us through the evidence of alleged eye witnesses of the incident. He invites attention of this Court to the postmortem report at Exhibit-74 and submits that the prosecution has proved homicidal death of the deceased Rameshwar. He would submit that PW-1 Prabhakar and PW-4 Durga have supported the prosecution case and detailed narration of the incident. He would submit that the discovery of incriminating articles has been proved through the evidence of PW-7 Nitin Chincholkar and PW-8 Namdeo Waghmare. He would further submit that, although PW-2 Nandabai and PW-3 Usha failed to support the prosecution case, their statements were recorded under Section 164 of the Code of Criminal Procedure by PW-9 i.e. Judicial Magistrate First Class, Manwat and those statements are proved by leading his evidence. He would, therefore, submit that the prosecution has proved the charged offences against accused. He would submit that the Sessions Court has not given due consideration to the evidence of eye witnesses supported by the discovery panchanama as well as medical evidence, which establish homicidal death of the Rameshwar.

6. We have considered the submission advanced by the learned APP and also perused the evidence tendered into service by prosecution.

7. What we noticed from the evidence of prosecution is that, the narration of the incident as given by PW-1 Prabhakar posing himself to be an eye witness of the incident itself is unbelievable. Secondly, the wife of the deceased namely Nandabai (PW-2), who has been examined as eye witness of the incident did not support the case of the prosecution. Another eye witness Usha (PW-3) has been declared as hostile, although as per the case of the prosecution she was actively present at the time of incident and slapped by the accused Ganpat during the course of the incident. Another eye witness of the incident on

whom prosecution relies is PW-4 Durga, who is sister-in-law of the deceased Rameshwar, the Sessions Court discarded her evidence for the reason that, FIR do not make reference regarding her presence. PW-1 Prabhakar in his deposition nowhere states about the presence of Durga in the field at the time of incident. Pertinently, she admits during the course of examination that when police visited the spot neither PW-1 nor she informed about incident to the police, although Prabhakar states that he reached to the field after getting information from Nandabai alongwith Akbar. Although, spot panchanama was drawn in presence of Parmeshwar and Keshav Deshmukh, Durga PW-4 is oblivious about their presence in the field. It is, therefore, difficult to believe that Durga had witnessed incident. Her presence in the field at the time of incident cannot be believed because of aforesaid crucial circumstances. It appears that, she is a got-up witness of the incident, probably, under apprehension that Nandabai (PW-2) and Usha (PW-3) would not support the case of the prosecution. The Sessions Court has recorded adequate reasons to which we record concurrence.

8. Although, it has been contended by the learned APP that the statements of PW-2 and PW-3 were recorded by PW-9 Judicial Magistrate First Class, Manwat under Section 164 of the Code of Criminal Procedure and such statements are proved, we afraid to accept it as evidence when both these witnesses failed to support the prosecution case during trial. The statement recorded under Section 164 of the Code of Criminal Procedure has limited significance. It cannot substitute of substantive evidence. It can be used as corroborative piece of evidence when the prosecution establish its case through other evidence on record. The Sessions Court has rightly appreciated the nature and scope of the statements recorded by PW-9 under Section 164 of the Code of Criminal Procedure.

9. The learned APP submits that there is recovery of incriminating articles under memorandum of panchanama at the instance of accused and it has been proved through evidence of PW-7 and PW-8. We have considered the contents of the memorandum. It is difficult to accept that such memorandum would constitute valid within parameters of Section 27 of the Evidence Act. The memorandum simply records that the accused is willing to produce incriminating objects but further particulars are not specified in the memorandum. It is difficult to accept such statement, as the statement leading to discovery of incriminating articles. Pertinently, the statement of accused Ashalata was recorded in the police station. So far as the statements of the Haribhau and Ganpat are concerned, those were recorded during the journey. Another aspect that tends us to reject this evidence is that the recovery of the articles is from the place, which is open to sky. Anyone can have access to the site. The recovery is not from any hidden place that can be attributed to exclusive knowledge of the accused. Further it has come on record that PW-8 Namdeo is maternal uncle of the deceased, who lives in place which is 110 kilometers away from the village Tad Borgaon. The said witness has given material admissions during the cross-examination, which established that he is interested witness and cannot be relied. The Sessions Court has rightly recorded that the C.A. report do not show presence of blood on the stone and other articles. In that view of the matter, the evidence on the point of discovery is not useful to built prosecution case. Although it is alleged that rope was used for strangulation of deceased, the recovery of handkerchief is shown, which may not be incriminating article that was used in commission of offence.

10. The Supreme Court in case of ***Shivaji Sahabrao Bobade and Anr. Vs. State of Maharashtra*** reported in ***(1973) 2 SCC 793***

laid down certain principles to be adhered by the Appellate Court while dealing with the appeal against the acquittal. The relevant part of Paragraph No.5 of the judgment reads thus:

“In law there are no fetters on the plenary power of the appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration.”

11. It is trite that once the Sessions Court acquitted the accused persons on appreciation of evidence, in Appeal against Acquittal, the Appellate Court would accept the case of prosecution only when it is shown that there is perversity in the judgment or the Sessions Court missed to consider the important piece of evidence that would have made difference in the conclusion. However, no case is made out before us to demonstrate any such perversity or failure on the part of the Sessions Court.

12. Resultantly, Application is rejected.

(S. G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE