

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.104 OF 2018**

The State of Maharashtra,
Through Police Station Officer,
Police Station, CIDCO, Aurangabad.

**...APPLICANT
(Ori. Complainant)**

VERSUS

- 1) Pratik s/o Dagadu Kedar,
Age-19 years, Occu:Education,
R/o-Gumasta Colony, Latur,
- 2) Rahul S/o Atmaram Rathod,
Age-19 years, Occu:Education,
R/o-Vidya Colony, Parli-Vaijinath,
Dist-Beed,
- 3) Pankaj S/o Shamsundar Parikh,
Age-19 years, Occu:Education,
R/o-Adarsh Colony, Pashupathinath,
Latur, Dist-Latur,
- 4) Akshay S/o Sunil Chandole,
Age-19 years, Occu:Education,
R/o-Bodhe Nagar, Latur.

**...RESPONDENTS
(Ori. Accused)**

...
Mrs. V.S. Choudhari A.P.P for Applicant – State.
...

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

DATE : 3rd APRIL, 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 to file Appeal challenging the Judgment and order dated 22nd December 2017 passed by the learned Additional Sessions Judge-3, Latur in Sessions Case No. 85 of 2015 thereby acquitting the respondents – original accused Nos.1 to 4 from the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

2. Heard learned APP Mrs. Choudhari appearing for the applicant – State. With the able assistance of learned APP, we have gone through the material which was before the learned trial Judge. We have heard the matter for the purpose of admission i.e. whether to grant leave to Appeal or not.

3. The prosecution has come with the case that deceased Rahul Gambhire had come to Latur from his village Sikandarpur in the morning of 5th June 2015. Thereafter, his brother PW-13 Amol Gambhire had also come to Latur. PW-13 Amol was in Basweshwar Chowk, Latur around 2.30 p.m., when he heard

shouts from Muskan Chinese Center, located in the square. Amol reached there and noticed that his brother Rahul was lying in the pool of blood. Rahul has sustained severe injuries. PW-13 Amol also noticed accused Nos. 1 to 4 leaving the place with weapons. Accused No.1 Pratik was holding large sickle, accused No.2 Rahul Rathod was holding knife. Informant Amol then asked his brother Rahul as to what had happened. Rahul told him that he had informed accused No.1 Pratik that he is going to depose against Pratik and his father, who were the accused persons in a criminal case in which deceased Rahul has been unnecessarily implicated. Accused No.1 Pratik got annoyed and by giving threats to kill, he as well as accused No.2 Rahul Rathod inflicted the blows of large sickle and knife on the person of deceased Rahul. Accused No.4 Akshay also assaulted deceased and gave threat to kill. After the said narration, informant's brother called to their common friend Datta Shinde and along with him deceased Rahul was shifted to Government Hospital for treatment. It is stated that one P.S.I. Padwal had also assisted them in shifting Rahul to the hospital. After the preliminary treatment was given, Rahul was shifted to Ashwini Hospital, Latur. In the meantime, informant lodged report on 6th June 2015. At that time it was under Section 307 read with Section 34 of the Indian Penal Code, however, during

treatment Rahule Gambhire expired and therefore, Section 302 of the Indian Penal Code came to be added.

4. After the investigation was completed, charge-sheet was filed and after the committal of the case, the trial was conducted. Prosecution examined in all fifteen witnesses to bring home the guilt of the accused and also proved certain documents. After considering oral and documentary evidence and hearing both the sides, the learned trial Court has acquitted all the accused persons, hence this Application.

5. Learned APP tried to submit that the learned trial Judge has not appreciated the evidence properly. Voluminous evidence was produced and it is in the nature of proof of various panchnamas including the discovery panchnama under Section 27 of the Indian Evidence Act. PW-2 Nilkanth was the witness for the test identification parade and he has supported the prosecution. PW-6 Vikas is the witness on the point of memorandum seizure panchnama under Section 27 of the Indian Evidence Act and the seizure of clothes of the accused persons. PW-13 Amol – informant and PW-14 Datta Shinde, common friend and the person who had seen the accused persons at the

spot in the beginning, have conclusively proved that the accused persons were at the spot along with the weapons. Therefore, there was sufficient evidence to hold the accused persons guilty of committing offence. As there is no proper appreciation of evidence by the learned trial Judge, the Application deserves to be allowed by granting leave to file Appeal.

6. At the outset, we would like to say that though the prosecution has proved so many panchnamas, the basic nature of those panchnamas was corroborative in nature and therefore, it is necessary to consider the other evidence. It has been rightly observed by the learned Additional Sessions Judge that though fifteen witnesses have been examined by the prosecution, none of them is eye witness. The case of the prosecution rests on circumstantial evidence. Under such circumstance, it was necessary for the prosecution to prove that each segment of the chain of the circumstance unerringly point out towards the accused persons as the authors of the crime. From the testimony of PW-13 Amol, we could not gather that how it would have been possible for him to reach the spot soon after the incident. He has admitted in the cross-examination that he do not know where the shop of his brother is situated. Amol has further admitted in

cross-examination that Rahul had not told him for what purpose he went to Latur. He has further admitted that on the day of incident he was not knowing where Rahul was waiting. He further stated in the cross-examination that he do not know within how much time he reached at spot. This witness, therefore, is either chance witness or got up witness. He as well as deceased were resident of Sikandarpur whereas the incident has taken place in Latur.

7. The motive has been tried to be brought on record from the mouth of this witness PW-13 Amol. He states that there was a criminal case in which deceased, accused No.1 Pratik and father of accused No.1 were the accused persons. Deceased Rahul stated to accused No.1 and his father that he would disclose favourable facts to the police regarding the criminal case. Deceased Rahul was under impression that since he was unnecessarily implicated in the case, he should get his name cleared. From the testimony of PW-13 Amol it can be further seen that he is not an eye witness, but then he says that after he heard the noise, he immediately went to the said place. All the accused persons were present holding knife and other weapon like Katti. Another fact is that PW-13 Amol does not give

the relationship between the accused persons inter-se. Even if for the sake of arguments it is accepted that there was some motive for accused No.1 to commit murder of deceased Rahul, why accused Nos.2 to 4 should help him, is a question. In his cross-examination, PW-13 Amol has admitted that when the offence was registered against deceased, accused No.1 and his father, at that time accused No.1 was minor. Under which provisions of law Rahul could have deposed, is a question. The prosecution has not come with the case that deceased had given proposal for pardon and agreed to become approver. If it is to be accepted that accused No.1 was minor at the relevant time, then the case would have been proceeded against the father of accused No.1 and the deceased only. Under such circumstance, unless the procedure is adopted it was not possible for Rahul to depose in a Court of law against the father of accused No.1 as well as accused No.1. When that earlier case was filed, what was its status, that means whether charge-sheet was filed or not, and when first time deceased Rahul had expressed his intention that he would depose against the co-accused, are the questions which are not answered by the prosecution. The said decision of deposition could not have been taken by the deceased alone. Prosecution has not taken pains to bring on record any

application filed by Rahul to allow him to be an approver. Therefore, the prosecution in this case failed to bring on record that there was motive for the accused persons to commit the crime. As the case is based on circumstantial evidence, proof of motive was mandatory.

8. PW-13 Amol and PW-14 Datta are not the eye witnesses. PW-13 Amol appears to be the first person who reached the spot prior to Datta. PW-14 Datta says that when he saw deceased standing in front of Pan shop, he went there, talked with the deceased and asked him to come along with him. Deceased refused and it is stated by PW-14 Datta that deceased asked him that he should see inside the shop of Pan center. Accordingly, PW-14 Datta peeped in and he saw the accused persons sitting there and they had the weapons in their bag. It is hard to believe that openly such weapons could have been shown to other people. His evidence further shows that after once again asking deceased to come along with him; upon his refusal, Datta went away from the spot. PW-14 Datta does not say that deceased Rahul had expressed his willingness to give statement against the co-accused persons in earlier criminal case. According to both of them i.e. PW-13 and PW-14, the incident

has taken place around 2.00 to 2.30 p.m. on 5th June 2015, that too near the square, which creates possibility that the incident could have been witnessed by some independent witnesses. Those witnesses have not been examined at all, especially the owner of the Pan shop. Another important fact to be noted is that even as per the testimony of PW-13 Amol, PW-14 Datta and one P.S.I. Padwal had helped the informant to put the injured in auto rickshaw, however the said Police Officer has not been examined. Under such circumstance, the testimony of these two witnesses is untrustworthy.

9. As regards the various panchnamas are concerned, some of them are proved and others are not. From the spot panchnama, we could gather that the spot is in the crowded place. PW-6 Vikas mere speaks about the seizure of the clothes. Under such circumstance, even the discovery under Section 27 of the Indian Evidence Act or seizure of clothes, are not believable.

10. It is not seriously challenged that death of Rahul was homicidal in nature, but the weak evidence adduced by the prosecution does not prove the guilt of the accused beyond

reasonable doubt. A detailed and well reasoned order has been passed by the learned trial Judge while acquitting all the accused persons, which we do not find to be perverse and illegal. We do not find that grounds are made for grant of leave to Appeal and the application deserves to be rejected.

11. Accordingly the Application stands rejected.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/APR23