

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 APPLICATION FOR LEAVE TO APPEAL BY STATE NO.146 OF 2018

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

... Applicant

... **Versus** ...

- 1 Nansahaeb @ Balasaheb Genu Kakade,
Age 26 yrs., (**absconding**)
- 2 Bhausaheb Genu Kakade,
Age 35 yrs.,
- 3 Sangita Nansahaheb Kakade,
Age 30 yrs.,
- 4 Mangal Bhausaheb Kakade,
Age 22 yrs.,
- 5 Indubai Genu Kakade,
Age 62 yrs.,

All are r/o Sheri-Chikhalthan,
Tq. Rahuri, Dist. Ahmednagar.

... Respondents

...

Mr. S.D. Ghayal, APP for applicant

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

DATE : 12th JULY, 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 22.03.2018 passed by learned Additional Sessions Judge, Ahmednagar in Sessions Case No.323/2014, thereby acquitting respondent Nos.2 to 5 – original accused Nos.2 to 5 from the offence punishable under Section 143, 147, 148, 302, 504, 506 read with Section 149 of the Indian Penal Code, 1860 and under Section 37(1)(3) punishable under Section 135 of the Bombay Police Act, 1951.

2 Heard learned APP Mr. S.D. Ghayal for the applicant and with his able assistance we have gone through the record which was available before the learned Trial Judge.

3 The prosecution story, in short, is that – informant Alkabai Genu Kakade is the mother of deceased Nirmala. Nirmala and her son Pranav were

residing with Alkabai at Rahuri. Alkabai was married to one Genu about 40-42 years prior to the incident. At that time Genu was having wife by name Nehabai. Nehabai was having five daughters and they used to reside with their respective husbands. As Alkabai was not blessed with a child for about 6-7 years of marriage, her husband Genu married to one Indubai. But thereafter informant gave birth to Nirmala and Indubai gave birth to Nanasaheb i.e. original accused No.1 and Bhausahab i.e. original accused No.2. Genu was owner of 48 acres of land. 24 acres of land was transferred in the name of Nirmala in the year 1981 and remaining land was kept in the name of Indubai and her sons accused Nos.1 and 2. Though the land was transferred in the name of Nirmala, accused Nos.1, 2 and 5 were not allowing them to cultivate the land and, therefore, Nehabai's daughters had filed suit for partition, which was pending. There were rains in village Sheri-Chikhalthan 4-5 days prior to 13.07.2014 and Nirmala went to said village for sowing operation. She stayed with one Shantaram Sampat Kakade. Nirmala had given a phone call to informant Alkabai on 14.07.2014 from her land stating that the accused Nos.1, 2 and 5 with accused Nos.3 and 4 were not allowing to enter her into land, they were giving threats that they would cause death. Upon receiving the phone call, Alkabai went to Sheri-Chikhalthan from Rahuri. From villagers she came to know that Nirmala has been assaulted by the accused. Therefore, she hurriedly went towards the

land at about 10.30 a.m. She saw that both the accused Nos.1 and 2 were assaulting Nirmala with wooden log in their hand and accused Nos.3 to 5 were assaulting her with kicks and fist blows. She has attributed role to each one of them and states that after the accused persons saw her, they fled from the spot. The villagers had given phone call to Rahuri Police Station and then around 3.00 p.m. police came to the spot. Before their arrival Nirmala was dead. The dead body was taken by police in Ambulance to Rahuri. The dead body was sent to hospital and informant went to Police Station and lodged the report.

4 After the offence was registered, accused Nos.2 to 5 came to be arrested, however, accused No.1 was absconding till the decision of the case. That means, the trial proceeded against accused Nos.2 to 5. The prosecution has examined in all 10 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 all the accused Nos.2 to 5. Hence, the present application.

5 The gist of the submissions on behalf of the prosecution is that the learned Trial Judge has not appreciated the evidence properly. The testimony of informant PW 3 Alkabai has not been appreciated. Merely

because she is the mother of the deceased her testimony cannot be discarded. PW 2 Subhash Bansi Kakade has proved the spot panchnama and thereafter he is the panch to various panchnamas including the discovery panchnama by accused No.2. He had discovered the wooden log, which was used in committing the crime. PW 8 Gangadhar Raghunath Kakade is the panch to the arrest panchnama and seizure of clothes of accused which were blood stained. PW 9 is the Medical Officer, who conducted the autopsy. The observations by the learned Trial Judge in para No.39 are that the accused have not disputed the fact that the death is homicidal one, but then, according to the learned Trial Judge, the accused disputed that they are the author of the crime. When the death is homicidal in nature and there is eye witness, who had seen the deceased being assaulted, then her testimony ought to have been properly considered. Re-appreciation is, therefore, required.

6 At the outset, we would also like to say that there are observations by the learned Trial Judge that the prosecution has proved that the death of Nirmala was homicidal in nature. At this stage, we cannot have second opinion, however, the acquittal of the accused persons i.e. being the authors of the crime has been challenged and, therefore, that part of evidence is required to be considered, from the point of view that whether

case is made out for granting leave. PW 2 Subhash Kakade, PW 7 Santosh Kalnar and PW 8 Gangadhar Kakade are the panch witnesses to the various panchnamas and it appears that their testimony has been discarded on the ground of inconsistency. However, it is to be also noted that PW 3 Alkabai is the informant mother who had specifically stated that when she went to village Sheri-Chikhalthan around 10.30 a.m., she had seen the accused persons assaulting Nirmala. Prior to that between 9.00 to 9.30 a.m. Nirmala had given phone call to her informing that the accused persons were not allowing her to carry out the sowing operations. PW 6 Shantaram Sampat Kakade is the person in whose house Nirmala had taken shelter on 13.07.2014. He says that he went to the land which was adjacent to the land of Nirmala along with his brother Sagar and mother Mirabai around 10.30 a.m. He heard the shouts of Nirmala and, therefore, he saw towards her land. He has given as to what role was played by each of the accused. Whether reliance can be placed on the testimony of PW 6 Shantaram Kakade, is definitely requires to be appreciated and, therefore, we are of the opinion that case is made out to grant leave. Hence, following order.

ORDER

1 Application stands allowed and disposed of.

2 Leave is granted to the prosecution to file Appeal.

3 Registry to register the Appeal.

4 Appeal stands **Admitted**.

5 In Appeal, issue notice to the respondents, to be made returnable
on 23.08.2023.

6 Call Record and Proceedings.

7 Action under Section 390 of the Code of Criminal Procedure be
taken against the respondents to the satisfaction of the trial Court.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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