

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.134 OF 2019

The State of Maharashtra
Through : Police Inspector,
Nandurbar Taluka Police Station
Tq. and Dist. Nandurbar

... Applicant
(Ori. Complainant)

Versus

1. Anitabai Tikma Vasave
Age 32 years, Occu. Labour,
2. Bebibai Tikma Vasave
Age: 58 years, Occu. Labour,
Both R/o Nanderkhede,
Tq. And Dist. Nandurbar

... Respondents
(Ori. accused)

....
Mr. R. D. Sanap, APP for applicant – State

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

DATE : 19.04.2023.

ORDER (PER Y. G. KHOBRAGADE, J.) :-

By the present application under Section 378(1)(b) of the Code of Criminal Procedure, the prosecution seeks leave to file appeal, to challenge the judgment and order dated 26.02.2019 passed by the learned Additional Sessions Judge, Nandurbar, District Nandurbar in Sessions Case No.22/2018, thereby the non-

applicants/accused was acquitted from the charges under Sections 302, 34 of the Indian Penal Code.

2. In nutshell, it is the case of prosecution that One Shri Jagan Valvi- Police Patil lodged a report with Nandurbar taluka Police Station on 27.02.2018 alleging that he had received a call from one Narayan Desai at about 1.00 p.m. on 27.02.2018 informing him about dead body of his brother Shiva Desai lying near a Nala (Culvert) in peripheral of village Nanderkhede. Therefore, he visited the spot of incident and confirmed about death of his brother. He did not notice any injury on body of deceased. On the basis of said information, ADR was registered. During the course of investigation, it transpired from witness that accused persons have committed murder of deceased. Therefore, Crime No.30/2012 was registered against the respondents / accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

3. PW-8 PSI Shri Vitthal Mohkar, Investigating Officer had drawn spot panchanama, inquest panchanama and sent the dead body of deceased for postmortem. The Investigating Officer had recorded statements of witnesses including the child witness

from shepherd community and collected postmortem report. Accordingly, the respondent accused were arrested. On completion of investigation the Investigating Officer filed charge-sheet against the respondent accused persons.

4. The learned trial Court framed the charge against the accused at Exh.11. The respondents accused pleaded not guilty and claimed for trial. In order to bring home the guilt of accused, the prosecution examined in all eight (8) witnesses viz; PW-1 Suresh Shiva Desai (Exh.18) complainant and son of the deceased, PW-2 Rahul Sukdeo More (Exh.20), spot panch witness, PW-3 Ashwin Raju Thakre (Exh.25) a child eye witness, PW-4 Anil Ambar Thakre (Exh.26) another child witness, PW-5 Narayan Umbarsing Desai (Exh.29) brother of the deceased, PW-6 Jagan Jesya Valvi, PW-7 Dr. Rohan Anant Thorat (Exh.37), Medical Officer, PW-8 Vitthal Shrawan Mohakar (Exh.41) Investigating Officer.

5. Besides oral evidence, the prosecution relied on documentary evidence. i.e. Report Exh.19, spot panchanama Exh.21, ADR dated 27.02.2018 Exh.31, Inquest panchanama Exh.32, Postmortem Report Exh.38.

6. It is proved fact that, the Police Patil informant Jagan Valvi received a call from one Narayan Desai (PW-6) at about 1.00 p.m. on 27.02.2018; who informed him about dead body of his brother Shiva lying near rivulet. Thereafter, the Police Patil visited at the spot and found that dead body of deceased Shiva Desai lying in prone condition. As per oral report Exh.31, the Police Patil had not noticed any injury on dead body, which is in corroboration with Inquest panchanama Exh.69. The PW-8 Investigating Officer testified that though the dead body was checked by turning from all side, but no external injuries were found. As per the spot panchanama Exh.27, the dead body of deceased Shiva found near rivulet in periphery of village Nanderkhede.

7. As per postmortem report Exh.38, the death of deceased was “due to intracranial hemorrhage with coronary artery disease” and viscera was preserved for Chemical Analysis. The evidence of PW-7 Dr. Rohan Thorat is in corroboration with the postmortem report Exh.38. The medical expert was unable to tell the probable reason from said intracranial hemorrhage. His testimony does not conclusively prove that death was homicidal in nature.

8. As per the testimony of PW-1 Suresh, his father deceased had two wives, first Jermabai died and his father remarried with one Champabai. His deceased father was labour contractor at Taloda in sugar factory. The accused No.2 is daughter of accused No.1. His father had illicit relations with the accused No.1 since 2 – 3 years of his death. As per the testimony of PW-1, the accused No.1 was demanding one acre land out of his agricultural field and money from his father. Therefore, on that count there was quarrel between his father and accused No.1. On 27.02.2018, he received a call from his uncle Narayan (PW-5) who informed him about death of his father due to assault at the hands of respondents No.1 and 2. However, PW-1 is not eye witness of either the said quarrel or the incident of murder. When that quarrel had taken place is not explained by him. There should have been proximity between the said quarrel and incident in question. Then only it can be taken as motive. It is not his case that after the said quarrel, his father had stopped visiting accused No. 1. Thus, prosecution has failed to bring the motive on record from the mouth of this witness.

9. As per the ADR report Exh.31, when the Police Patil Jagan met the minor shepherd Ashwin Raju Thakre and PW-4 Anil

Ambar Thakre who had disclosed him that the deceased had parked his vehicle and thereafter he came running and fell down. At that time accused No.1 Anitabai Vasave and accused No.2 Bebibai Vasave were present. Even if we accept the said fact as it is, we cannot say that accused are the authors of the crime.

10. On perusal of testimony of PW-3 and PW-4, both the accused had quarreled with the deceased. Therefore, the deceased started running and fell down after stumbling to stone. Thereafter both the accused assaulted the deceased with fist and blows on chest and abdomen. These two child witnesses have been believed by the learned Trial Court to the extent of causing hurt to deceased. These two witnesses have not disclosed the reason for the quarrel and assault.

11. On perusal of evidence of prosecution witnesses as well as circumstantial evidence brought on record, it does not suggest that the accused assaulted the deceased with such an intention to cause death of the deceased. There is no evidence on record to show that accused persons had knowledge that deceased was suffering from coronary artery disease. The evidence of Medical Officer appears that the death of deceased caused due to

“intra-carnial hemorrhage with coronary artery disease”, which does not appear homicidal. Therefore, evidence of the prosecution witnesses is not trustworthy and inspire confidence to hold that accused persons have committed murder of deceased. At the cost of repetition, it can be said that the son PW-1 is accepting the fact that his father had illicit relations with accused No. 1. According to him, she was demanding portion of land. Even if we accept that such demand would have been put by her, and also the fact that deceased was not ready to give; yet whether the relations had gone so worst, that she could think of committing his murder is doubtful. If deceased would have been murdered then how the demand of land would have been fulfilled? The said story appears to have been developed later. However, considering the evidence of PW-3 and PW-4, the act of accused certainly falls under the category of assault and battery, provided under Section 322 punishable under Section 323 of the Indian Penal Code. The alleged act was certainly not with an intention to commit murder.

12. Learned Additional Sessions Judge, Nandurbar, has passed the impugned judgment on 26.02.2019 and acquitted the non-applicants / accused for the offence under Sections 302 read with Section 34 of the Indian Penal Code, however, held them

guilty for the offence punishable under Section 323 read with Section 34 of the Indian Penal Code, which itself appears justifiable. The prosecution has not made out substantial ground to interfere with the findings recorded by the trial Court. No substantial grounds are set out to grant leave to file against the order of acquittal. Accordingly, the application is dismissed.

[Y. G. KHOBRAGADE, J.] [SMT. VIBHA KANKANWADI, J.]

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