

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.166 OF 2018

The State of Maharashtra,
Through Police Station Officer,
Mhasawad.

..Applicant..
(Prosecution)

Versus

1. Abhay Yashwant Gavate,
age 33 years, R/o Dhandai Nagar,
Dhule, Taluka Dhule, Dist. Dhule

2. Pravin Jagan Gire @
Jagannath Mahadu Gite
(since dead) abated

..Respondents..
(orig. accused.)

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Mrs. V. S. Chaudhary, APP applicant-State.

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

DATED : 3rd JULY, 2023.

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

1. Prosecution, being aggrieved by the judgment and order dated 27.3.2018 passed by the learned Additional Sessions Judge, Shahada, District Nandurbar in Sessions Case No.19 of 2012, approached this Court seeking leave to file the appeal against acquittal under the provisions of Section 378 (1)(b) of the Criminal Procedure Code, 1973.

2. The case of the prosecution is that, on 31.12.2011 accused Abhay Gavate and Pravin Gite had been to the house of deceased Rupesh. They took him with them under pretext of taking party from Pune. Deceased Rupesh boarded with his baggage in the Indica Car bearing

registration no.MH-18/L-306 brought by the accused. On 1.1.2012, the informant / Parag Ahire i.e. brother of Rupesh received a telephonic call from Police Head Quarters, Dhule. Immediately, the informant rushed to the Police Head Quarters, where he came to know that a vehicle met with an accident at Toranmal and identity card of Rupesh is found on the spot. Then informant proceeded to Toranmal. The police showed identity card and the bag containing clothes of Rupesh. The body of Rupesh was found in Sitakhai valley. The informant, after inquiry, came to know that there was quarrel between the deceased Rupesh and the accused persons in the night of 31st December. They beat Rupesh and thrown him in the Sitakhai.

3. Initially, on receipt of the information regarding dead body of the deceased, Accidental Death (A.D.) No.1 of 2012 was registered with the police station Mhasawad, however, on information of Parag Ahire, Crime No.1 of 2012 was registered against the accused persons for the offences punishable under section 302 and 201 r/w 34 of the Indian Penal Code. The investigation of the crime was carried out by the PSI Ramesh Savale. During the course of the investigation, spot panchnama was drawn, dead body was removed from the Valley, inquest panchnama was drawn, postmortem was conducted, identity card and bag containing clothes of the deceased was seized. Subsequently, on recoding supplementary statements of the witnesses, it was revealed that the accused had borrowed Rs.50,000/- from deceased Rupesh. When he asked for refund of the amount, quarrel took place between the deceased and accused, who committed his murder. After completion of the investigation, charge-sheet came to be filed against accused in the Court of the Judicial Magistrate First Class, Shahada. It was then committed to the Court of Sessions. Since the accused persons pleaded not guilty, they were put on trial for offence punishable under section 394, 302, 201 r/w 34 of the Indian Penal Code.

4. The Prosecution relied on the oral evidence of 16 witnesses. During the pendency of the trial, accused no.2- Pravin died, resulting into abatement of the case against him. The trial was continued only against accused no.1. His statement was recorded under section 313 of the Criminal Procedure Code, wherein he explains that the deceased slipped into the deep valley. His death is consequential to the accidental fall. The Sessions Court, after considering the evidence on record and the submissions advanced on behalf of the respective parties, acquitted the accused Abhay Yashwant Gavate of the offences punishable under sections 394, 302, 201, r/w 34 of the IPC as per section 235 (1) of the Criminal Procedure Code vide judgment and order dated 27.3.2018.

5. Ms. V.S. Chaudhary, the learned APP appearing for the applicant/State would submit that the case of the prosecution is based on circumstantial evidence. The prosecution has proved the chain of circumstances like motive for commission of the offence, last seen together, and subsequent conduct of the accused persons, which is sufficient to hold them guilty of the charges. She would urge that the evidence of PW 7 Mahadu Bhoi, PW-5 Ramanath, PW-8 Sunil, PW 10 Nita and PW 11 Bhika clearly indicates that in the night of 31st December there was quarrel between the deceased and accused persons and they had beaten the deceased. All of them had consumed the liquor and then spend entire night together. She would further submit that accused Abhay had borrowed Rs.50,000/-from the deceased Rupesh for purchase of the plot. However, when Rupesh asked for refund, quarrel took place. Rupesh was murdered with intention to avoid such repayment. She would further submit that the postmortem report depicts multiple injuries on the dead body. Cause of death is also attributed to the such injuries. She would further submit that accused Abhay was absconding for long period after incident. This conduct is sufficient to find out the guilty mind. She would further submit that since the accused has

admitted his presence with the deceased during relevant period, facts are within his special knowledge. The burden would shift on him to explain circumstances leading to death of deceased in the light of the section 106 of the Evidence Act. However, no plausible explanation offered by the accused so also not reporting the incident to the police. She would therefore submit that re-appreciation of the entire evidence would be necessary by granting leave to file the appeal.

6. Pertinently, the case of the prosecution is based on the circumstantial evidence. Although, as per the charge-sheet, alleged eye witness was available, he could not be examined on account of his death. In this backdrop, the prosecution has recorded circumstantial evidence to bring home the guilt of the accused. We have examined this aspect. The alleged eye witness was one Jadi-buti seller. The I.O. i.e. PSI Ramesh Savale PW-16 admitted during cross examination that he had recorded the statement of said witness. He deposed that deceased was shouting and snapping the photos but never deposed that the accused have pushed him in the valley. It is therefore evident that even examination of said witness would not have supported the prosecution story. Be that as it may, it was for the prosecution to prove that death of deceased Rupesh was homicidal. However, entire evidence on record does not support the case of prosecution that the accused persons have either pushed the deceased into the valley or they had killed him prior to that.

7. First circumstance that the prosecution relies is that, identity card and bag containing clothes of the deceased was recovered at the spot, however, this inception of prosecution story is shaken because of inconsistent versions surfaced on the record. PW 2 Olsing Tiwdya Naik admitted that when he went to the spot on 1.1.2012, the bag and identity card was already there. However, the recovery of the same is shown in the spot panchnama Exh.49 dated 2.1.2012. Khabar which is recorded

on 1.2.2012 also mentions about the bag and identity card. The bag and identity card not shown to any witness during trial for identification to be belonging to the deceased.

8. Second circumstance that is sought to be relied upon by the prosecution is that, the accused persons took the deceased from his home at 11 am on 31.12.2011 on the false pretext that they are going to Pune to bring the Prison Party, however, they went to Toranmal. Pertinently, the prosecution alleges that the accused had quarrel with the deceased on account of money transaction of Rs.50,000/- and it was alleged to be motive for the murder. It can be observed that the FIR lodged by the PW 1 Parag i.e. brother of the deceased does not mention about any such transaction, however, such story has been introduced only by way of supplementary statements of the family members recorded after 8 to 10 days of incident. It is, therefore, evident that the motive for commission of the offence is sought to be introduced afterthought.

9. The next contention of the prosecution that the accused persons were absconding for more than one month. However, that cannot be the only reason by which the accused can be held guilty of the murder. The Sessions Court has rightly relied upon the judgment of the Supreme Court in the case of **Jahir Ahmad Daeed Ahemad Vs. State of Maharashtra reported in 2016 (1) BCR Cri 47** wherein it is observed that the absconding of accused may lend weight to other evidence establishing the guilt of an accused, but by itself is hardly any evidence of the guilt. The conduct of the accused making himself scarce for some period is relevant under section 8 of the Evidence Act and may be indicative to some extent of guilty mind, but it would not be conclusive evidence of his guilt. Even innocent persons may, when suspected of grave crimes, attempt to evade arrest. Such is the instinct of self-preservation in an average human being. Absconding is a weak link in

the chain of circumstances and is not conclusive either of guilt or a guilty conscience. Even assuming that the fact of absconding has been established by the prosecution, it cannot be held that the accused were the author of the crime in the absence of evidence pointing to their guilt.

10. In the present case, from the cross examination of PW-12 and PW-15, it has been brought on record that the accused Abhay had suffered great shock and mental stress. PW 15 Dr. Ravindra deposed that on 2.1.2012 at about 12.30 am the accused Abhay alongwith his parents had been to Civil Hospital, Dhule on reference by Dr. Raghuwanshi as he was unable to speak due to locked jaw. There was acute convulsion reaction making Abhay unable to speak. He admits that such a condition is possible because of psychological stress. If such is the state of affairs, then it would be difficult to give any weightage to the fact that the accused was either not available for long period after the date of incident or he had failed to report the incident to the police station. Pertinently, the case of the prosecution is that, the accused persons have thrown/pushed Rupesh into the valley, by which he suffered injuries resulting into his death. Conversely, the accused is coming with a defence that deceased Rupesh had fallen into the valley because sudden slip of his leg. In absence of direct evidence regarding the act of the accused, the defence appears probable and worthy of acceptance.

11. The Supreme Court of India in the matter of **Raghunath Vs. State of Haryana and another reported in (2003) 1 SCC 398**, observed that where two parallel stories are coming forward with the similar probability, story that favours the accused should be accepted. The similar view is reiterated in many subsequent judgments. The trial court considered the aforesaid golden rule of appreciation of evidence in the facts of the case while recording the acquittal.

12. Pertinently, the trial court considered the credibility of the informant i.e. brother of the deceased. It is brought on record that the informant Parag is facing criminal cases for serious charges. Initially, Accidental Death was reported to the police, however, on his information, the offence was registered against the accused persons. His information was based on his own inquiry. Further, motive of the incident has been subsequently introduced by supplementary statements of family members. Even otherwise, the chain of circumstances falls short to bring home the guilt of the accused. The circumstances surfaced on record are not sufficient to establish the guilt of the accused beyond reasonable doubt. Possibility of false implication at the instance of the complainant cannot be ruled out. The genesis of the prosecution case does not inspire confidence. Material link to establish triggering point immediately at the time of fall of the deceased in the valley (Sitakhai) could not be established. The defence of the accused appears probable in such circumstances. The Supreme Court in case of ***Shivaji Sahabrao Bobade and Anr. Vs. State of Maharashtra*** reported in (1973) 2 SCC 793 observed 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 scrutinize 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.”

13. Applying the aforesaid to in the facts of the case, we do not find merit in the contentions of the applicant-State. We find that no case is made out to grant leave to file an appeal as the Sessions Court recorded elaborate reasons to discard the case of the prosecution. We do not find any reason to re-appreciate the entire evidence since no

perversity in the reasoning adopted by the Sessions Court is brought to our notice. Hence, the application seeking leave to file appeal stands rejected.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

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