

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.386 OF 2021
WITH
CRIMINAL APPLICATION NO.1727 OF 2021
IN APPEAL/386/2021

Ganesh Prakash Rokde
Age: 26 Years, Occu- Agriculture,
R/o. Bhorkheda, Tal- Bhokardan,
Dist- Jalna.

..Appellant
(Original Informant)

Versus

1. The State of Maharashtra,
Through Police Station Officer,
Paradh, Tal- Bhokardhan,
Dist- Jalna.
2. Shushila Vitthal Rokde,
Age- 56 years, Occu- Agriculture,
3. Datta Vitthal Rokde,
Age- 31 years, Occu.- Agriculture,
4. Laxman Vitthal Rokde,
Age- 26 years, Occu.- Agriculture,

Respondent No. 02 to 04 are
R/o- Bhorkheda, Tal- Bhokardan,
Dist- Jalna.

5. Subhash Sarangdhar Sonwane,
Age- 29 years, Occu- Labour,
R/o- Dahegaon, Tal- Bhokardan,
Dist- Jalna.
6. Deelip Ramesh Kurhade,
Age- 29 years, Occu- Labour,
R/o- Khupta, Tal- Sillod,
Dist- Aurangabad.

.. Respondents 2 to 6
(Original accused No.1 to 5)

...
Advocate for Appellant : Mrs. Sabahat T. Kazi
APP for Respondent No.1 State : Mr. R. D. Sanap
Advocate for Respondent Nos.2 to 6 - Accused : Mr. Bharat N. Gadegaonkar
...

WITH
APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 59 OF 2021

The State of Maharashtra,
Through Police Station Incharge,
Police Station Paradh,
Tq. Bhokardan, Dist. Jalna.

..Applicant
(Ori. Prosecution)

Versus

1. Shushila Vitthal Rokde
Age: 52 years.
2. Datta Vitthal Roke
Age: 24 years,
3. Laxman Vitthal Rokde
Age; 19 years.

Accused Nos.1 to 3
R/o. Bhorkheda,
Tq. Bhokardan, Dist. Jalna.

4. Subhash Sarangdhar Sonwane,
Age: 25 years, R/o. Dahigaon,
Tq. Bhokardan, Dist. Jalna.
5. Deelip Ramesh Kurhade
Age: 25 years, R/o Khupta,
Tq. Sillod, Dist. Jalna.

..Respondents
(Ori. Accused)

...
APP for Applicant -State : Mr. R. D. Sanap
Advocate for Respondent Nos.1 to 5 - Accused : Mr. Bharat N. Gadegaonkar
...

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

DATE : 31st January, 2023

JUDGMENT (ABHAY S. WAGHWASE, J.) :

1. Original informant has filed Criminal Appeal No. 386 of 2021 after being dissatisfied by judgment and order of acquittal passed by learned Additional Sessions Judge-5, Jalna in Sessions Case No. 139 of 2017 by which respondent nos. 2 to 6 stood acquitted from charge under Sections 302, 120-B, 143, 147, 148 r/w 149 of the Indian Penal Code (IPC)

2. Learned Advocate for the appellant would submit that present appellant had set law in motion alleging that his father Prakash was falsely involved in murder of his own cousin, namely, Vitthal Rokde on account of transaction of purchase and sale of agricultural land. His father Prakash was initially convicted by learned trial court, however, in appeal before the Hon'ble High Court, he stood acquitted. It is pointed out that on account of acquittal of deceased Prakash, present accused were annoyed and they had started issuing threats to kill Prakash. That, in consequence to the threats, on 12.07.2017 when Prakash went for grazing his goats near their field, informant claims that, he saw Prakash lying on the ground and accused nos. 1 to 3 were assaulting him by weapons like stick. Out of fear, informant returned on his

motorcycle. However, on the way his motorcycle slipped and he fell down. So he went running home and narrated the incident to his mother Ushabai (PW6) and cousin brother Narayan (PW7) and therefore they all went to the land and saw in the light of torch that Prakash was lying in dead condition at Bhorkheda to Taka cart way. There were injuries to his forehead and his skull had got fractured as a result of which brain had come out. In the Jeep of one Sonwane, body of deceased Prakash was shifted to the Government Hospital, Buldhana where postmortem was conducted and after the funeral, present appellant set law in motion on the strength of which crime no. 111 of 2017 came to be registered.

3. It is pointed out that initially crime was only registered against accused nos. 1 to 3. But as the incident had occurred in dark, other accused were not named and therefore, in supplementary statement they too were named and roles of each of the accused were also defined.

4. Learned Advocate for the appellant would further submit that on the basis of report at the instance of appellant, accused persons came to be arrested and after investigation they were duly chargesheeted. Accused nos. 1 to 3 preferred regular bail application before this Court and the same was granted. However, the informant preferred application for cancellation of their bail and this Court cancelled the bail of accused nos. 2 and 3. Learned

Advocate took us through the order passed by this Court at Exhibit "A". Learned Advocate further submitted that after investigation, accused faced trial during which prosecution examined in all 13 witnesses and documentary evidence. Prosecution had taken up trial with cogent, trustworthy and reliable evidence. However, learned trial court failed to appreciate the same and acquitted the accused persons and hence the instant appeal to set aside the said judgment and order of acquittal.

5. The sum and substance of the submissions raised before us by learned Advocate for the appellant is that accused persons were annoyed on account of death of Vitthal. Therefore, they wanted to take revenge and as such they had motive and accordingly, heirs of Vitthal had hired accused to commit murder, who finding Prakash alone, committed his murder. The said episode itself was eye-witnessed by appellant-informant Ganesh (PW3). He has deposed to that extent. However, it is submission of appellant that his testimony has not been correctly appreciated by learned trial court. Even testimonies of PW5 Rameshwar and PW6 Ushabai are not given due weightage. Rather aspect of delay has been unnecessarily highlighted. There were minor discrepancies and contradictions which were not material. Therefore, while summing up it is submitted that such judgment and order is required to be set aside by allowing the appeal.

6. Along with above appeal, appellant has also preferred Criminal Application No. 1727 of 2021 praying to grant permission to produce documents Exhibits A-1, A-2 and A-3 as additional documents by exercising power under Section 391 of the Code of Criminal Procedure (Cr.P.C.), i.e. copy of FIR dated 26.05.2009, copy of FIR dated 11.03.2011 and copy of written complaint dated 11.07.2017 filed by deceased Prakash with police authorities.

7. The State, vide ALS No. 59 of 2021, is also seeking leave to file appeal against the judgment and order of acquittal passed by learned Additional Sessions Judge-5, Jalna dated 13.05.2021. Learned APP would point out that there was cogent, reliable and trustworthy evidence on behalf of prosecution apart from direct eye witness in the form of PW3 Ganesh i.e. son of deceased. However, his account has been disbelieved. Even testimony of PW5 Rameshwar and PW6 Ushabai ought to have been properly appreciated. But learned trial court failed to do so. Accused respondents were annoyed on account of acquittal of Prakash from the charge of murder of their father and as such, they had decided to take revenge and thereby had entertained motive. In that backdrop, they had executed the threat given earlier. Therefore, with such quality of evidence, learned trial court ought not to have discarded the same and ought not to have given benefit of doubt to the accused persons. That, there are several points which prosecution wants to press into service

and therefore, as prosecution has every hope of succeeding in the appeal, leave to prefer appeal has been prayed for.

ANALYSIS AND CONCLUSION

8. We have carefully considered the contentions raised in the above three proceedings. We have also gone through the record placed before us including the judgment and order of Additional Sessions Judge acquitting accused respondents. It seems that charge was framed against respondents accused for commission of offence punishable under Sections 302, 120-B, 143, 147, 148 r/w 149 of IPC. There is no dispute that initially deceased was charged and tried for commission of offence of murder of his own cousin Vitthal and though he was held guilty by learned trial court, this Court had, on re-appreciation and re-analysis of the evidence, held the findings and conclusion reached by learned trial court to be erroneous and thereby set aside the order of conviction by allowing the appeal.

9. The incident seems to have taken place on 12.07.2017. It is the case of prosecution that since acquittal of deceased Prakash from previous Sessions Case, accused persons were issuing threats. Prosecution claims that said threats were executed on 12.07.2017 i.e. by assaulting Prakash while he had been to graze his goats. Son of Prakash, namely, Ganesh (PW3) claims to have seen the assault. Thereafter, he informed his mother and cousin brother and

they all visited the scene of occurrence and they saw dead body of Prakash and thereafter, after postmortem and remaining formalities, crime was registered on the next day against accused persons. After investigation, accused persons were put to trial. During trial, prosecution seems to have examined in all 13 witnesses.

10. To establish the point of mode of death, prosecution seems to have examined PW12 Dr. Marodkar, Medical Officer who conducted autopsy and issued postmortem report. In witness box, at Exhibit 131, the medico-legal expert narrated six injuries noticed by him and opined that the injuries are possible by sharp and blunt object like axe and bamboo stick and it was opined that death was due to grievous injury to vital organs such as brain. Though doctor was cross-examined, there does not seem to be any serious challenge to the mode of death. Therefore, there is no hesitation to hold that death of Prakash is nothing but homicidal.

11. Here, prosecution seems to have come with a case of availability of direct evidence i.e. **PW3 Ganesh**. He seems to have reiterated what he informed in the FIR.

12. Apart from him, in the trial court reliance was also placed on testimony of mother of informant i.e. PW6 Ushabai and cousin brother PW7 Narayan and it was put forth that with the testimonies of these three witnesses coupled with medical evidence, case of prosecution stood proved.

13. Admittedly, only Ganesh went to see his father. He returned home and informs PW6 Ushabai and PW7 Narayan. He is said to be star and a direct eye witness. In his evidence he has stated that he saw his father being assaulted by only accused nos. 1, 2 and 3 by means of weapons like stick. However in his substantive evidence he does not refer to use of any axe which surprisingly is recovered while lying at the scene of occurrence along with stick, pair of shoes, pair of chappal etc. Such is his version in FIR . However, he seems to have given supplementary statement after two days i.e on 14.07.2017 and named accused nos. 4 and 5 also. PW6 Ushabai - mother of informant speaks about hearing from her son informant that accused nos. 1 to 5 assaulted his father. However, she speaks of being informed about assault by means of sickle, iron pipe, knife and axe. Thus, like her son, she does not speak about her husband being assaulted by stick. Rather she names different articles. Her son informant has not informed her about use of above articles. PW7 Narayan - cousin brother of informant, does not speak about use of above articles.

Therefore informant son, his mother and cousin brother are not found to be consistent or corroborating each other on the point of assault. Though it has come in the evidence that villagers also joined when they went for the second time to the spot, but none of the villagers, who could have been an independent witness, is examined by prosecution for the best reasons known to it. PW5 Rameshwar - real brother of informant, being residing at Pune at the time of occurrence, he too has mere hearsay information. Thus, the outcome of analysis of testimonies of informant, mother and brothers of informant, is that there are material inconsistencies. Versions are contrary to report Exhibit 102 where there is mere mention about accused nos. 1, 2 and 3 to be the assailants. At a belated stage in supplementary statement accused nos. 4 and 5 are implicated. Therefore, above discussion is sufficient to cast doubt about actual occurrence.

14. Another salient feature of the case in hand is that it has come in the very cross-examination of informant Ganesh (PW3) that after occurrence, he himself, his cousin brother Narayan (PW7), one Keshav Devkar and Ashok Todkar shifted deceased Prakash to the hospital at Buldhana and there information was said to be passed at police chowki. The Investigating Officer API Bhagwat (PW13) in his cross-examination seems to have acknowledged that there was no eye witness to the incident and further admitted that deceased was taken to Buldhana and there A.D. was registered vide zero

number. Said report at Exhibit 175 finds place in record which is dated 12.07.2017 showing the occurrence as accidental case. The same was registered on the strength of medico legal case (MLC). Therefore, very contrary and different version about actual occurrence has come on record raising doubt about credibility of testimony of informant about he seeing accused persons mounting assault on his father. Because of such contradictory material, prosecution has suffered a very serious blow.

15. Though prosecution claims to have recovery and discovery under Section 27 of the Evidence Act, it is admittedly from open space. Memorandum Exhibit 119 at the instance of accused no.5 is vague in nature. Exact location has not been stated and therefore exclusive knowledge cannot be attributable to accused no.5.

16. To sum up, here on taking audit of the prosecution evidence, very motive is not established. It was tried to be submitted that acquittal of deceased Prakash prompted heirs of Vitthal to take revenge. However, that incident is of 2013. Present occurrence has taken place in the year 2017. Due to lapse of huge time, it is difficult to accept the said motive behind the incident. Theory of contract killing has not been substantiated. Prosecution witnesses are inconsistent. Coupled with implication of accused nos. 4 and 5 at a belated stage, FIR is also after one day delay for which there is no

explanation. There is contrary record suggesting reporting of A.D. Therefore, prosecution case does not deserve to be accepted. Learned trial Judge also has refused to accept the case of prosecution on the strength of findings supported by sound reasons. Finding no merits in the appeal, we refuse to grant relief as prayed.

17. Though attempt has been made to bring additional documents on record, circumstances enumerated for bringing additional evidence at appellate stage are not satisfactorily shown to be existing. Therefore, we refuse to take such additional documents on record. Even State failed to make out a case for leave to file appeal. Hence, we proceed to pass the following order;

ORDER

All the three proceedings i.e. Criminal Appeal No. 386 of 2021, Criminal Application No. 1727 of 2021 and Application For Leave To Appeal By State No. 59 of 2021 are hereby dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)