

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.117 OF 2020**

The State of Maharashtra,
Through Police Station Officer,
City Chowk Police Station, Aurangabad.

...APPLICANT

VERSUS

- 1) Shaikh Sarfaraj @ Shaffu Shaikh Sandu,
Age-20 years, Occu:Labour,
R/o-Besides Afroz Kirana Shop,
Roza Baugh, Aurangabad,
- 2) Shaikh Adil @ Langada Shaikh Rafiq,
Age-21 yeas,
R/o-Behind Azad College, Near Jama
Masjid, Roza Baugh, Aurangabad.

...RESPONDENTS

...
Ms.V.S. Choudhari A.P.P for Applicant.
...

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

DATE : 11th JANUARY, 2023

ORDER :

1. Present Application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to appeal to challenge the acquittal of the respondents by the learned

Additional Sessions Judge, Aurangabad in Sessions Case No.76 of 2018 from the offence punishable under Section 302 read with Section 34 of the Indian Penal Code on 3rd March 2020.

2. With the able assistance of learned APP, we have gone through the evidence that has been recorded as well as the impugned Judgment and order. It will not be out of place to mention here that it appears that the original informant has also filed Appeal under Section 372 of the Code of Criminal Procedure (thought wrongly mentioned as "Appeal under Section 378 of the Code of Criminal Procedure), but it would be considered upon merits, later on.

3. Perusal of the evidence would show that deceased Feroz was 18 years old boy. He was the son of PW-1 Farooq Khan. It appears from the prosecution story that the informant had given an amount of Rs.200/- to Feroz for household expenses on 30th December 2017. Informant could not see the son at home at 6.45 p.m. when he returned and then made inquiry with his wife. It was told to him that around 4.15 p.m. the present respondents – original accused had came to the house of Feroz on motorcycle and took Feroz along with them. Informant had tried to contact the deceased on his mobile from 7.30 p.m.,

however it was not reachable. Thereafter, the informant searched for the son but he could not be traced out. Around 12.15 a.m. one Sayyad Rashid came to the house of the informant and told that some untoward incident has happened with Feroz and Feroz has been taken to Ghati hospital, Aurangabad. Informant went to the hospital, saw the dead body of his son and thereafter he lodged the First Information Report.

4. Prosecution examined in all 7 witnesses to bring home the guilt of the accused. The evidence of Associate Professor, Department of Forensic Medicine, Government Medical College and Hospital, Aurangabad, Dr. Ramesh Wasnik, who had conducted the autopsy, would disclose that the deceased had sustained in all 28 surface wounds and corresponding internal injuries. The probable cause of death was "head injury associated with stab injury to spleen." Further, the spot panchnama would show that from the spot the murder weapon i.e. knife has been seized. Therefore, there is sufficient evidence to arrive at a conclusion that death of Feroz was homicidal in nature.

5. It is now required to be seen, whether there was sufficient evidence to connect the respondents to the crime. It can be seen from the evidence that the case of the prosecution rests on 'last seen together' theory. PW-1 Farooq, father of the deceased was not the same person who had seen deceased and accused together. PW-2 Shaikh Ahmed is the person who had seen Feroz along with the accused. He has stated that on the day of incident in the evening at about 5.00 to 5.30 p.m. he was sitting with his grandson nearby the water tank of Rozebagh. Accused persons as well as Feroz came near that water tank together. He also states that one rickshaw was parked in front of water tank. He had seen the accused as well as deceased shaking hands with each other and talking. Then PW-2 says that thereafter all of them went by that auto rickshaw towards Satya Vishnu Hospital. Thus, it is to be noted that even his examination-in-chief shows that he has allegedly seen deceased along with accused around 5.00 to 5.30 p.m. From the testimony of PW-6 Medical Officer, it has not been extracted as to what was the approximate time of death. That was important point to show the proximity between the point when deceased was seen along with accused prior to the death. PW-4 Raziya Khan is the mother of the deceased and she has stated that when she was at home and talking to Feroz,

around 4.00 to 4.15 p.m., both the accused came to her house and called Feroz. She went outside the home. At that time accused persons told her that they have some work with Feroz and asked her to permit him to accompany them. Thereafter, Feroz went along with them. Here, it is to be noted that as per the prosecution story in the First Information Report, accused persons had taken Feroz on motorcycle and PW-1 Farooq Khan has also stated in his testimony that when he had made inquiry with the boys playing in the area when he could not find Feroz, it was disclosed by those boys that Feroz went on motorcycle with accused persons towards Satya Vishnu Hospital. However, PW-2 Shaikh Ahmed says that accused and Feroz had gone in auto rickshaw towards Satya Vishnu Hospital.

6. Another fact that is to be noted, is the testimony of PW-3 Syed Rashid, who had given information about the untoward incident to the informant. PW-3 states that he had received phone call from his friend, reporter Kayyum Khan. Kayyum Khan requested the witness to provide phone number of one Afsar Patel who was the maternal uncle of deceased Feroz. Though witness Syed Rashid tried to give phone call to said Afsar Patel, he found that it was switched off and thereafter the witness went

to the house of Afsar Patel around 10.30 p.m. and he says that at that time he came to know from Kayyum Khan that Feroz is murdered. He then says that he thereafter, went to Farooq Khan and informed that Feroz is met with an accident as Farooq is a heart patient and thereafter Farooq went to Ghati hospital. Here it is to be noted that Kayyum Khan was the person who has supplied the information about the incident to PW-3 Syed Rashid, but said Kayyum Khan has not been examined by the prosecution for establishing the link. How said Kayyum Khan came to know about the incident is therefore, missing which prosecution did not tried to solve. The other witnesses examined by the prosecution are panch to the spot panchnama and the Investigating Officer.

7. Thus, it can be seen that since the case is based on 'last seen together' and the proximity is not established, proper chain is also not coming forward and most importantly the motive behind the offence has not been uncovered, it can be seen that the trial Court was justified in acquitting the accused persons. It could not have been said on the basis of the quality of the evidence that the prosecution had proved the guilt of the

accused persons beyond reasonable doubt. Hence, no case is made out for grant of leave to appeal.

8. For the aforesaid reasons, the Application stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JAN23