

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE
NO.182 OF 2018**

The State of Maharashtra,
Through Police Station, Ghansawangi,
Tq-Ghansawangi, District-Jalna.

**...APPLICANT
(Orig. Complainant)**

VERSUS

Babasahed Keruba Toge,
Age-35 years, R/o-Mangujalgaon,
Tq-Ghansawangi, District-Jalna.

**...RESPONDENT
(Orig. Accused)**

...
Ms. V.S. Choudhari, A.P.P for Applicant - State.
...

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

DATE : 20th APRIL, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Application has been filed, seeking leave under Section 378(1)(b) of the Code of Criminal Procedure, by the prosecution to file criminal appeal challenging the Judgment and order dated 24th April 2018 passed by the learned Additional

Sessions Judge-3, Jalna in Sessions Case No.41 of 2016 thereby acquitting the respondent / original accused from the offence punishable under Section 302, 201, 364, 182 of the Indian Penal Code

2. Heard learned APP Ms. Choudhari appearing for the applicant - State and with the able assistance of learned APP, we have gone through the entire evidence which was before the learned trial Court.

3. It is the prosecution story that accused Babasaheb Keruba Toge lodged First Information Report (for short "FIR") on 4th October 2015 with Ghansawangi Police Station District-Jalna contending that he resides with wife, two daughters and a son Arun. Arun was taking education with Warkari institution, Ghansawangi since 2012, which was a boarding school. It was the institution run by one Pandurang Bapurao Kale Maharaj, under the name "Jagadguru Tukobarai Warkari Sanstha". Arun was also taking education in 10th standard at Matsyodari school at Ghansawangi. Arun used to come to the house at the time of festivals. Information was given by Pandurang Maharaj Kale on phone to the accused on 26th September 2015, that Arun has gone under the pretext to attend the festival of Mahalaxmi, to

his village and therefore, Arun should be sent back. Thereupon the accused informed that Arun has not come to the house. Then accused, his wife and brother-in-law went to Ghansawangi, made inquiry with Pandurang Maharaj, who has stated that Arun had left the institution on 22nd September 2015 stating that father has come near bus stand. There was vacation between 19th September 2015 to 25th September 2015 to Warkari institution for Mahalaxmi festival and therefore, it was presumed that Arun would have gone for attending the festival. However, Arun was not found as well as his Mobile Phone was switched off, therefore, the FIR was lodged against unknown person for kidnapping him. Arun was aged about 15 years at that time.

4. Investigation was taken up. Statements of witnesses were recorded, however, a dead body of Arun was found on 4th October 2015 in the well which is situated in the agricultural land of brother of accused. It was tied in gunny bag and also stone was put. After the dead body was taken out, inquest panchnama was drawn and the dead body was sent for postmortem. Thereafter also the supplementary statements of witnesses were recorded and accused came to be arrested as it was revealed that accused had called deceased Arun and thereafter taken him to the place, murdered and thereafter disposed of his dead body.

Offence under Section 302, 201, 364 and 182 of the Indian Penal Code came to be added. After completion of the investigation, charge-sheet was filed.

5. After the committal of the case, charge was framed. Prosecution has examined in all 16 witnesses to bring home the guilt of the accused and after considering the evidence on record and hearing both the sides, the learned trial Judge has acquitted the accused of all the charges. Hence the present Application.

6. At the outset, we would like to say that the case of the prosecution is based on circumstantial evidence and therefore, it was for the prosecution to prove a complete chain and each segment of the same should point out that the accused is the author of the crime. We could find that the prosecution also rely on the deposition of the boys who were also residing with deceased Arun in the same institution and they were told by Arun that he has received phone call of his father who had called him near the bus stand (the word used is "Hira Moti Shop" which might be the shop near the bus stand). The prosecution has examined PW-12 Dr. Vishwanath Dasare who had conducted the autopsy. He has stated that there was no external injury on the dead body, however he had noticed tight mark around neck.

According to PW-12 Dr. Dasare, dead body was mummified. The cause of death that has been given by him, "Terminal Cardio Respiratory arrest, due to asphyxia, which was due to strangulation". Though this witness has been cross-examined at length, the said opinion has not been shattered. No doubt, in his cross-examination, he has stated that he has not mentioned in the postmortem report, as to whether the injury was ante-mortem or postmortem. The neck of the deceased was not pressed with hands. The prosecution has also examined PW-7 Dnyandeo Borge, who was the panch to the inquest panchnama and there is no cross-examination to this witness. Thus, it can be said that the prosecution had proved that the death of Arun was homicidal in nature. However, in order to prove that accused was the author of the crime, we will have to consider the other evidence.

7. PW-6 Smt. Muktabai is the wife of accused and mother of deceased Arun. She has stated that their marriage has taken place on 7th May 1999 and Arun used to reside in the said Warkari institution. She has stated that accused used to say that she is not beautiful and used to dislike her and therefore, used to say that he wants to perform second marriage. It is her say that accused used to say that she should give him permission to

perform second marriage otherwise he would kill Arun. She has stated about the quarrel that had taken place between herself and accused on 14th September 2015 and 17th September 2015 but then she says that she had made phone call to Maharaj on 26th September 2015 stating that she wants to talk to Arun and therefore, he should give phone to Arun. Thereupon, Maharaj told her that accused had called Arun on phone near Hira Moti Shop on 22nd September 2015 and since then Arun has not returned.

8. Before proceeding further, here it is to be noted that the testimony of the mother appears to be unnatural. Even if the facts are taken as it is as told up till now, it is hard to believe that for seeking permission for second marriage from wife why the accused would say that he would kill Arun. If wife fails to give permission to husband, why the son should suffer. Secondly, we have considered the FIR Exhibit-44, though it has been given by the accused himself and whether the contents of the same can be considered or not might not be a question when the fact remains is that it was against an unknown person. In the said FIR, a Mobile number has been given along with IMEI number, stating that, said Mobile used to be with Arun, then the question arises how the mother was not knowing this fact and why she

would not have contacted son directly on his Mobile number. At this stage itself we would like to take note of testimony of PW-4 Mahesh Waghunde, who has stated that he was along with Arun on 22nd September 2015 and at that time Arun had received phone call. PW-4 Mahesh asked Arun as to whose phone that was and then Arun told that it was his father's phone and father had called him in front of Hira Moti Shop. This also indicates that Arun was having Mobile phone with him. There is absolutely no evidence adduced by the prosecution to support the fact that accused had called on the Mobile Phone of deceased on 22nd September 2015.

9. PW-3 Pandurang Kale is the person who runs Warkari sanstha by name, Jagat Guru Tukobarai Warkari Shikshan Sanstha at Ghansawangi. Arun was taking education in his institute. He states that some of the students had gone to their village on account of Mahalaxmi festival on 22nd September 2015, however, Balaji, Mahesh, Arun and Ajay were the students who were in the institute. But Pandurang Kale then says that he was not present in the institute at the relevant time and he had asked one Pramod Jadhav to take care of the students who were in the institute. PW-3 Pandurang further says that he asked Arun as to whether he wants to go to his village or not and then Arun

said that there was quarrel between his father and mother and therefore his mother had gone to her parental home. After return of PW-3 Pandurang, he came to know from Pramod Jadhav that Arun was called by his father at the bus stand, on phone and then Arun left the institute. That means, whatever Pandurang was saying that was on the basis of inquiry made by him with Pramod and for that purpose testimony of Pramod was necessary. Prosecution has not examined Pramod, for reasons best known to it. What were the rules for allowing a minor student to go outside the institute, have not been told by PW-3 Pandurang. Therefore, on that front also the prosecution case fails to connect the accused with the crime, as there is no concrete evidence to prove that accused had called Arun at any particular place.

10. PW-9 Ambadas is the real brother of accused. He has stated that when he was irrigating cotton crop by lifting water from well in his field on 13th October 2015, he found that one gunny bag was floating on the well. He narrated the said fact to villager Sadashiv Wadekar and then Wadekar informed the said fact to Police. PW-9 Ambadas thereafter came to know that accused had consumed poison and therefore he took accused to hospital at Ambad and came back to field. Dead body of one boy

was found in the gunny bag and then he says that he is unable to tell whether the dead body was of Arun. Thereafter witness PW-9 Ambadas was declared as hostile and the learned APP has conducted his cross-examination, but nothing contradictory has been found. No doubt in his cross-examination by learned APP, he has admitted that accused had lodged missing report about Arun and told him that he should not be given more tension otherwise he would commit suicide. Important point to be noted is that there is no separate FIR or charge even in this case against the accused for allegedly attempting to commit suicide. Offence under Section 309 of the Indian Penal Code was not added. PW-6 Muktabai, mother of Arun, has stated that even from the date Arun went missing till the dead body was found, she was residing with accused and after hearing that the gunny bag has been found in the well of PW-9 Ambadas, accused had tried to commit suicide. Therefore, whatever has been stated by PW-9 Ambadas stating that accused had consumed poison and tried to commit suicide, cannot be considered as a point against the accused referring to the guilt. The investigating officer has also not stated that accused had tried to commit suicide.

11. The other witnesses appear to be formal witnesses i.e. relatives of the deceased and PW-3 Muktabai, who came to know

about the incident from others and then there are panchas to various panchnamas. The investigating officer has made an attempt to show the panchnama under Section 27 of the Indian Evidence Act, alleging that the accused had shown the said well from where the dead body was found. When the said fact was already known to the police, it cannot be considered as discovery under Section 27 of the Indian Evidence Act.

12. Thus, considering the facts from any angle, we do not find that the impugned Judgment was perverse, illegal. There is no necessity to interfere. No case is made out to grant leave to appeal. The Application stands rejected.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE