

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 165 OF 2019

The State of Maharashtra

Through : Daithana Police Station,
District Parbhani.

... Applicant

Versus

Ganesh s/o Vasant Kakde,
Age: 28 years, Occu: Service,
R/o. Ramabai Ambedkar Nagar,
Parbhani.

... Respondent [Orig. Accused]

.....

Mr. S. D. Ghayal, APP for the Applicant-State

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

Reserved on : 21.09.2023

Pronounced on : 27.09.2023

ORDER [ABHAY S. WAGHWASE, J.] :

1. Getting dissatisfied by the judgment and order passed by learned Sessions Judge, Parbhani in Sessions Case No. 83 of 2017 dated 11.04.2019, thereby acquitting present respondent from charge under Section 302 of the Indian Penal Code [IPC], instant application has been filed praying to grant leave.

2. Learned APP appraises us about the prosecution case in the trial court. He submitted that there is direct evidence. Accused was seen by informant (PW1 Uttam) and also grand daughter of victim (PW2

Alanka), who was sleeping next to deceased. That, PW3 Prabhawati and PW7 Vitthal had also reached at the spot within minutes and they had all seen accused with a stick. Deceased had suffered head injury. Informant PW1 had attempted to catch hold of respondent, but to save life of injured, they concentrated on shifting her to hospital. That, same night deceased was declared dead. She had suffered intracranial injury and autopsy doctor is very categorical about death to be homicidal and injury to be sufficient in the ordinary course of nature to cause death. That, in spite of such overwhelming evidence, it is his submission that, learned trial court has given undue importance to minor omissions and failure of informant to lodge complaint immediately. He added that in fact, incident had taken place around 11.00 p.m. and FIR is lodged early in the morning of the next day. Therefore, there is no delay. Evidence of PW1 informant, PW2 Alanka, PW3 Prabhawati and PW7 Vitthal was consistent and therefore, it is his submission that, prosecution had established the charge beyond reasonable doubt against the accused, however, learned trial court failed to appreciate the said evidence and has thereby erred in acquitting the accused. Hence, it is pointed out that they have very good case in appeal and so, leave is prayed for.

3. In the light of above submissions, we have considered the papers placed before us. It transpires that in support of above case, prosecution has examined in all nine witnesses. PW1 Uttam seems to be the informant. In the initial evidence, he has spoken about accused to be his brother-in-law and he quarreling with his sister and consequently, about initiation of proceedings by his sister under Section 498-A of IPC. Regarding occurrence, he deposed that on the night of 19.05.2017, he slept in a shed and whereas his sister slept with her child in the house and his mother slept in the company of his nieces Alanka and Vaishnavi. According to him, around 11.00 p.m., he heard shouts of Alanka and Vaishnavi and so he woke up and saw accused giving blow of stick on the head of his mother. According to him, he prevented accused and even caught hold of him, but his sister Prabhawati, who also reached there, asked him to leave accused and to take mother to hospital and therefore, he took her to Parbhani Civil Hospital.

4. To this extent, even PW2 Alanka - a child witness and PW3 Prabhawati - sister of PW1 are examined. They are all speaking about occurrence of assault taking place around 11.00 p.m. and naming accused to have inflicted blow with stick on deceased. All these witnesses are subjected to extensive cross by defence.

5. Apart from above so-called direct evidence, prosecution has also adduced evidence of autopsy doctor i.e. PW4 Dr. Kale, who claims to have noticed intracranial hemorrhage due to head injury. After she was declared dead, FIR seems to have been lodged by PW1 Uttam. From the answers given by PW1 Uttam, it is emerging that in order to give priority to shifting the injured, he did not pass information immediately to neighbours or relatives and even not reported the authorities at the Civil Hospital regarding assault or naming accused. However, complaint is apparently lodged at 8.46 a.m. on the very next morning.

6. We have gone through the judgment which is now sought to be challenged. In our view, opinion of learned trial court is based on not informing relatives and villagers immediately and not informing hospital authorities regarding assault. In our opinion, when witness has volunteered that they focused on shifting and giving treatment to injured, it is probable that such information may not have been promptly passed to the relatives or villagers. Apparently, occurrence has taken place somewhat around midnight hours at Shinganapur, whereas, deceased was required to be shifted at Parbhani Civil Hospital. Therefore, under such circumstances, there may not have been prompt information to others. Apart from the testimony of PW1

informant, PW2 Alanka and PW3 Prabhawati, there is evidence of PW7 Vitthal also, who claims to have woke up hearing shouts while he was on terrace of the house. He has also marked presence of accused. Therefore, with such material on record, we think that it is a fit case for re-appreciation and re-analysis during appeal. Therefore, we are inclined to allow the application. Hence, the following order :

ORDER

- I. Application stands allowed.
- II. Leave is granted to the prosecution to file appeal.
- III. Registry to register the appeal.
- IV. Appeal stands **admitted**.
- V. Call record and proceedings.
- VI. Action under Section 390 of the Code of Criminal Procedure be taken against the respondent to the satisfaction of the trial court.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]