

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE  
NO.125 OF 2020**

The State of Maharashtra,  
Police Station Officer,,  
Police Station Jintoor Taluka Jintoor,  
Dist-Parbhani

**...APPLICANT  
(Ori. Complainant)**

**VERSUS**

Narayan S/o Arjun Dalve,  
Age-65 years, Occu:Agricultural,  
R/o-Jodpimpri, Tq-Aundha,  
Dist-Hingoli,  
At present R/o-Takalkhopa,  
Tq-Jintoor, Dist-Parbhani.

**...RESPONDENT  
(Ori. Accused)**

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

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

**DATE : 26<sup>th</sup> SEPTEMBER, 2023**

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

1. Present Application has been filed by the prosecution seeking leave to appeal under Section 378(1)(b) of the Code of

Criminal Procedure challenging the acquittal of the respondent by the learned Additional Sessions Judge-4, Parbhani in Sessions Case No.79 of 2019 of the offence punishable under Section 302 of the Indian Penal Code.

2. Heard learned APP Ms. Choudhari appearing for the applicant – State.

3. The prosecution story, in short, is that one Sahebrao Narayan Dalve lodged report with the Police Station on 23<sup>rd</sup> January 2019 stating that he had received phone call of his father Narayan (accused) around 6.00 a.m. on that day and it was informed by the accused that informant's uncle Datta and his two sons i.e. Pandurang and Khandu had come to their farm house (locally called as "*Akhada*") around 2.30 a.m., at village Takalkhopa. Datta, Pandurang and Khandu assaulted informant's mother Shantabai with the sickle and therefore, Narayan asked informant Sahebrao to come to the farm house. Accordingly informant went there. He found that his mother was in the injured condition. Her breathing had stopped. Upon personal inquiry with the accused, the same story was repeated and therefore, on the basis of the said information, when it was concluded that Shantabai has expired, upon the First Information

Report, offence under Section 302 of the Indian Penal Code came to be registered.

4. Investigation was carried out and during the investigation, the investigating officer has concluded that the offence is not committed by Datta and his two sons but it was the accused Narayan who has committed murder of his wife Shantabai. Accordingly, after completion of the investigation, charge-sheet was filed against the accused. By that time accused was arrested and there was discovery under Section 27 of the Indian Evidence Act by the accused.

5. The prosecution has examined in all eight witnesses to bring home the guilt of the accused and after considering the evidence on record, the learned trial Judge has acquitted the accused. Now, it is submitted on behalf of the prosecution that the trial Judge has concluded that death of Shantabai was homicidal in nature, but the recovery and discovery and the circumstantial evidence has been disbelieved by the learned trial Judge, so also the hostility of the informant and his brother has been highlighted. In fact the discovery and recovery under Section 27 of the Indian Evidence Act was properly proved by examining PW-2 Anil Makode. It is also stood corroborated by

the C.A. report and further the incident has taken place at night time and therefore, it was the bounden duty of the accused to disclose the circumstances under which his wife was found murdered in the farm house, in view of Section 106 of the Indian Evidence Act and therefore, the matter requires re-appreciation.

6. As the learned trial Judge has concluded, on the basis of the postmortem report which is proved through PW-3 Dr. Rahul, that death of Shantabai is homicidal in nature, we need not re-appreciate the said fact. It is therefore, required to be seen, as to whether the nexus between the said homicidal death and the guilt of the accused has been established by the prosecution or not.

7. Herein this case, the informant PW-1 Sahebrao and PW-8 Gajanan, who are the sons of the accused Narayan and deceased Shantabai, have turned hostile. In fact they have stuck to the version that the accused has given telephonic call to PW-1 Sahebrao and told that cousin brother of the accused, Datta and his two sons have committed murder of Shantabai. That means, rather PW-1 Sahebrao has supported his First Information Report. But it appears that thereafter his supplementary statement was taken and statement of PW-8 Gajanan was taken

under Section 161 of the Code of Criminal Procedure at Exhibit 46 and 64, respectively. They have denied to have given such statements. On any count, both of them came to know about the death of Shantabai at a later point of time. That means, whatever they were deposing was on the basis of hear-say information.

8. The case of the prosecution, therefore, rested on circumstantial evidence and therefore, it was the bounden duty of the prosecution to establish the chain of the circumstances. Those circumstances should satisfy the requirements of golden principles laid down in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** reported in ***(1984) 4 SCC 116***. It appears that the prosecution is then relying upon the discovery of axe and banyan, having blood on the same, by the accused. In order to prove the said discovery panchnama, the prosecution examined PW-2 Anil Makode. Even if we take his testimony as it is, he has not stated, from which place in the hut i.e. farm house the accused discovered the axe. The learned trial Judge has rightly observed that the hut was not locked and in fact spot panchnama was executed much prior to the discovery panchnama and at that time the investigating officer ought to have searched every possible piece of evidence within the hut

which would have provided evidence in the matter. The investigating officer is not explaining as to why he has not carried out extensive search of the hut at the time of executing spot panchnama. The spot panchnama cannot be restricted to the very same spot but it includes the entire periphery. It is in fact a hut and therefore, all the precautions ought to have been taken by the investigating officer. Neither the investigating officer nor the panchas at the time of executing discovery panchnama had entered the hut to see, from which place the accused had taken out the axe and the banyan. When the hut was open, we cannot attribute knowledge only to the accused when there was a time gap. Therefore, the said discovery panchnama does not confirm to the requirements under Section 27 of the Indian Evidence Act. Further, we would like to say that there cannot be conviction only on the basis of discovery under Section 27 of the Indian Evidence Act.

9. As regards point in respect of Section 106 of the Indian Evidence Act is concerned, it is to be noted that since beginning the accused appears to have said that his cousin brother Datta and his two sons have committed murder of his wife Shantabai. Even the First Information Report states the said fact. Accused in his statement under Section 313 of the Code of Criminal

Procedure also has said the same fact. That is in fact the explanation that was given by the accused, which can be said to be an explanation in view of Section 106 of the Indian Evidence Act. The testimony of the investigating officer is totally silent as to on what basis he came to the conclusion that the said offence is not committed by Datta and his two sons. Unless that explanation would have been given, the burden will not be again shifted on the accused to explain the circumstances so as to attract Section 106 of the Indian Evidence Act.

10. Therefore, for the reasons stated above, we are of the opinion that the impugned Judgment does not suffer from any illegality or it is not perverse. There is no merit in the Application and it deserves to be rejected.

11. The Application is rejected.

**[ABHAY S. WAGHWASE]**  
**JUDGE**

**[SMT. VIBHA KANKANWADI]**  
**JUDGE**