

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 255 OF 2018

The State of Maharashtra
Through : Yawal Police Station,
Taluka Yawal, District Jalgaon. ... Appellant

Versus

1. Bhagwat Damu Suryawanshi,
Age : 42 years,
2. Sau. Chandrabhagabai Bhagwat
Suryawanshi, Age : 30 years,
Both residents of Sakli,
Taluka Yawal, District Jalgaon. ... Respondents
[Orig. Accused Nos.1 and 2]

.....
Mr. R. D. Sanap, APP for Applicant-State

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

DATED : 12.06.2023

ORDER [ABHAY S. WAGHWASE, J.] :

1. The State of Maharashtra has pressed into service the instant application thereby seeking permission to question the judgment and order of acquittal passed by learned Additional Sessions Judge, Bhusawal in Sessions Case No. 383 of 2014 by which present respondents have been acquitted from the charge under Section 302 r/w 114 of the Indian Penal Code [IPC].

2. According to learned APP, on 13.11.2023 deceased Madhukar i.e. son of informant Laxman (PW9) had been to a mobile shop. On account of previous litigation, accused no.2 went there armed with axe at around 7.00 p.m. He assaulted deceased Madhukar on head, as a result of which, Madhukar died on the spot. Father learnt about it and rushed to the spot and lodged FIR, on the strength of which, crime was registered bearing no.132/2013. It is further submitted by learned APP that there was direct evidence. Motive has been cogently proved by the prosecution. To support its case, prosecution has examined in all 14 witnesses. All witnesses are corroborating each other about the actual occurrence of assault. Report is lodged immediately. Therefore, when there was evidence to that extent on behalf of the prosecution, he submitted that, a full proof case being made out, conviction ought to have been recorded by learned trial Judge, but it failed to do so. It is further submitted that it has been proved by the prosecution that accused no.2 had instigated the occurrence. Accused had come armed and therefore intention to kill was explicit. Various panchanamas have been duly proved by panchas, including disclosure panchanama. Scientific evidence was also lending support and corroborating the prosecution case and therefore, there being clinching and clear evidence, accused ought to have been held guilty, but on account of failure to appreciate the oral

and documentary evidence, erroneous findings and reasons have been assigned. Therefore, now State intends to prefer appeal against said judgment and order of acquittal and hence the leave.

3. We have heard learned APP and we have examined the oral and documentary evidence, including the impugned judgment.

It transpires from available evidence that there was litigation and dispute between the informant party and the accused. The alleged incident seems to have taken place on 13.11.2023 around 7.00 p.m. According to the prosecution, both accused husband and wife reached the mobile shop of PW3-Saurabh, where deceased Madhukar was sitting at such time. Deceased was allegedly assaulted by blunt side of the axe, however, deceased fell down and died on the spot itself. Father PW9-Laxman has lodged report on the same day. After inquest, formalities of autopsy and taking up investigation at the hands of PW14 API Bhusari i.e. the Investigating Officer are completed. Accused was also arrested and seizure was dispatched for analysis. It is the specific case of prosecution that there is memorandum of disclosure at the instance of accused under Section 27 of the Evidence Act. Investigating machinery seems to have video-recorded the submission of memorandum of disclosure. Various witnesses have also been examined. On the strength of evidence of

autopsy doctor and postmortem report, it is evident that death is as a result of injury to head. Record shows that PW3-Saurabh and PW4-Irfan Khan were present at the scene of occurrence at the time of alleged incident. It is therefore imperative on our part, to first visit their evidence.

4. The sum and substance of the evidence of PW3-Saurabh is that on 13.11.2013 around 7.00 p.m., he was in his mobile shop. According to him, deceased Madhukar came and sat near him for the purpose of getting his mobile recharged and to purchase a sim card. This witness claims that one person came in the shop armed with axe, gave 4 to 5 blows on the head of Madhukar. This witness states that he tried to intervene but the said person threatened to kill him. Out of fright, he went out of the shop and thereafter said person left the shop with axe. He stated that he rushed to the Sakali Police Station. A phone call was made to police to approach the spot. His statement was said to be recorded on the next day i.e. 14.11.2013. He also spoke about attending the test identification parade on 18.11.2013 conducted in the office of Tahsil, Yawal and he identified the accused amongst six persons. This witness is subjected to extensive cross-examination.

5. Next witness PW4-Irfan Khan, according to the prosecution, is also an eye witness. Unfortunately this witness has been cross-examined by prosecution itself. However, he was confronted with his statement wherein portion has been marked "A", but he denied having stated so and could not assign any reason how such contents are appearing in his statement.

6. Another important witness according to prosecution is PW6-Nilesh i.e. cousin of deceased. It is his testimony that on 13.11.2013, after finishing his labour work, he returned home at 5.00 o'clock. He stated that he went to chowk for a walk and that time, he saw his deceased brother in the mobile shop. He stated that at such time, accused Bhagwat came with axe in his hand and assaulted Madhukar on head four times. He further stated that he immediately rushed to the house to narrate the incident to his uncle. Even he is cross-examined at length and it seems that to a suggestion this witness has answered that at the time of incident, there were two persons in the shop and that he knew Irfan as well as the shop owner Sanjay, but he denied seeing Irfan and Sanjay in the said shop. He stated that he had seen the accused from a distance of two to three feet. In cross-examination, he has stated that he has seen accused coming with axe, while this witness was going back to his home.

7. Informant PW9-Laxman in his evidence at Exhibit 88 testified that he learnt from his nephew Nilesh about his son being assaulted by accused Bhagwat with axe. So he rushed there and saw his son lying in the pool of blood. According to him, when he reached there, he saw accused nos. 1 and 2 running along with axe. Even this witness has been cross-examined. However, in cross-examination he has admitted that mobile shopkeeper gave him information about the incident during that period and so he lodged report between 7.30 to 8.00 p.m.

8. Witness to test identification parade Exhibit 10 has also been examined by prosecution apart from the authority who conducted test identification parade and the autopsy doctor as well as the Investigating Officer.

9. We have carefully gone through the impugned judgment sought to be now challenged. Learned trial Judge has held that prosecution has proved death of Madhukar to be homicidal. After dealing with the substantive evidence of all 14 witnesses and also discussing the citations relied by both sides, it is observed in para 56 that PW2-Arun, PW3-Saurabh, PW6-Nilesh and PW9-Laxman are important witnesses. It has been further observed that PW2-Arun, PW4-Irfan and PW5-Sanjay had not supported the prosecution regarding the occurrence. It

is observed that informant PW9-Laxman when reached the spot, at that time both accused were not present at the spot of incident. However, the testimony of informant about seeing both accused fleeing from the spot with axe has not been taken into account. Application Exhibit 38 moved by informant for invoking Section 319 of the Code of Criminal Procedure [Cr.P.C.] appears to have been taken into account for holding that contents of the report are different and contrary. Similarly, private complaint under Section 156(3) of Cr.P.C. also seems to have been taken into account while discussing the prosecution case. It is true that no role of accused no.2 is coming on record, however, *prima facie* it is emerging that mobile shop owner PW3-Saurabh has categorically stated about deceased sitting in his shop and one person entered his shop getting armed with axe. He was the most natural witness and he was available in the shop. Therefore, though other so-called direct eye witnesses examined by prosecution have not supported, why testimony of PW3-Saurabh is unworthy of credence, has not been discussed in para 56. Observation about no blood stains on the cloths of PW3-Saurabh ought not to have been given undue importance. Distance quoted by this witness in cross is in fact by approximation. Similarly, mere delay in drawing spot panchanama is itself not a reason to doubt the occurrence of the alleged incident.

10. Therefore, in the light of such observations in the judgment, we are of the opinion that here there is no proper appreciation of crucial evidence i.e. on the part of learned trial Judge. The case in hand deserves re-analysis and re-appreciation by hearing the appeal. Therefore, as we find some substance in the submissions advanced by learned APP, in our considered view, prosecution deserves an opportunity to prefer appeal against the impugned judgment. Hence the following order:

ORDER

- I. The 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. Compliance under Section 390 of the Code of Criminal Procedure be made before learned Additional Sessions Judge, Bhusawal, District Jalgaon. Respondents be released on bail till the conclusion of present appeal upon such terms and conditions as be deemed fit by the concerned Trial Judge.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]