

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 459 OF 2023
IN
CRIMINAL APPEAL NO. 1178 OF 2022

Mohammad Ashraf Wali Mohammad
Age-33 years,
R/at Field of Husain Sheth, Mamon
Colony, Room No.6, Malegaon. ...Applicant

V/s.

1. State of Maharashtra
Through P.I. Pawarwadi Police Station,
Dist. Nashik.

2. Sana Majit Husain
Age-20, Occ : Labourer,
R/at : Depo, Malegaon,
Dist : Nashik ...Respondents

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Mr. Aniket Nikam i/b. Amit Icham for the Applicant.

Smt. M. M. Deshpande, APP for the Respondent/State.

CORAM : NITIN W. SAMBRE &
RAJESH S. PATIL, JJ.

RESERVED ON : 7th SEPTEMBER, 2023
PRONOUNCED ON 25th OCTOBER, 2023

ORDER (PER RAJESH S. PATIL):

1. This an Application under sub-Section (1) of Section

389 of the Code of Criminal Procedure, 1973 (for short 'CrPC') filed in Criminal Appeal No.1178 of 2022, by the present Applicant, who was Original Accused No.1. The Applicant is convicted by the Additional Sessions Judge, Malegaon, for the offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (for short 'IPC'), by Judgment and Order dated 18th October, 2022 passed in Sessions Case No. 176 of 2019.

2. Brief facts as contended by the prosecution is as follows :-

2.1. Deceased Majid Husain Wajid Husain @ Majja Dada (for short '*deceased*') was a habitual offender, and there were several Criminal Antecedents against him. He was even externed by an Executive Magistrate.

2.2. *The deceased* was alleged to have committed the murder of one Mohammad Sharif Wali Mohammad @ Sharif Kacchi, who was the brother of the present Applicant (original Accused No.1), and now convict. The said Mohammad Sharif Wali Mohammad @ Sharif Kacchi was also brother of the accused no.3 and 8 and uncle of the Accused No.2. Therefore, with a view to take revenge of their brother, the Original Accused nos. 1 to 7

entered into a conspiracy to kill the deceased. The Accused Nos. 4 to 7 were entrusted with the task of deceiving the deceased and bringing him at Chalisgaon fata. According to the plan, the Accused No.5 approached the house of the deceased with 2-3 other persons on 3rd April, 2019 and deceived the deceased and caused him to accompany them. Accordingly, the Accused Nos.5, 6 and 7 and the deceased hired an auto-rickshaw of one Juber Khan (P.W.1) at 05.30 p.m. on 3rd April, 2019 at 60 feet road, Malegaon.

2.3. The deceased and the Accused Nos. 5 and 6 boarded the said auto-rickshaw, however, accused no.7 did not board the auto-rickshaw and commenced its journey on the motorcycle. The auto-rickshaw started its journey towards Dhule. As the auto-rickshaw crossed Laling ghat, the accused nos. 1, 2 and 3 followed the auto-rickshaw on the motorcycle. The Accused No.2 pretended that the tyre of the auto-rickshaw was punctured, due to which the auto-rickshaw driver Juber Khan reduced its speed. At that time, the Accused No.1 and 2 boarded the auto-rickshaw, whereas the Accused Nos. 5 and 6 deboarded the auto-rickshaw. Thereafter, the Accused Nos. 1 and 2 started beating the deceased with their hands and also, intimidated the auto-rickshaw driver to drive the

auto-rickshaw, by pointing a knife on his neck. They directed the auto-rickshaw driver to take turn towards Malegaon.

2.4. While taking the turn, the auto-rickshaw became slow, the Accused Nos. 4 and 6 reached at the spot on a black coloured motorcycle. The Accused No. 4 inflicted the blow of fighter on the face of the deceased. Thereafter, the said two motorcycles started running in front of the auto-rickshaw, and the auto-rickshaw was following them. The Accused No.1 thereafter inflicted a forcible blow of his elbow on the head of the deceased, whereas the accused no.2 forcibly twisted the neck of the deceased, due to which the movements of the deceased stopped. The Accused Nos. 5 and 7 also started following the auto-rickshaw on a motorcycle. The Accused No.5 handed over a rope to the Accused No.1 as per his demand.

2.5. All the three motorcycles took a left turn and proceeded towards

a kaccha road, on the left side of the highway, the auto-rickshaw followed them. They stopped after some distance, whereafter the Accused No.1 asked the other accused persons to remove the deceased from the auto-rickshaw. The deceased was, accordingly,

removed from the auto-rickshaw. Thereafter, the Accused No.1 told to the auto-rickshaw driver Juber that the deceased had murdered his brother. He thereafter, handed over the auto-rickshaw driver fare of Rs.3,000/- and asked him not to disclose the incident to anybody. Thereafter, the auto-rickshaw driver return back to Malegaon alone by his auto-rickshaw. The Accused Nos. 1 to 7 strangulated the deceased with the rope, thereby killing him. After 2 to 3 days, the Accused Nos. 4 to 7 met Juber Khan and intimidated him that if he disclosed the incident to anyone, he would also be roped in the crime. Hence, the auto-rickshaw driver Juber kept silence on the issue.

2.3. Having regard to the history of deceased, police always used to search for him, as such he used to be hardly at his home and for days he used to not return to his home. Hence, no complaint was lodged with police station by the family of the deceased though the deceased had not return back to home for long time. As the deceased did not return back home after almost one and a half months, the brother of the deceased namely Sajid Husain (PW.3) approached Pawarwadi Police Station, Malegaon on 17th May, 2019 and lodged a missing complaint, bearing

No.6/2019.

2.4. The police head constable P.W.2 Sultan Shaikh (P.S.I) conducted enquiry into the missing complaint and through secret source received information that the deceased had proceeded in the auto-rickshaw of Juber Khan (P.W.1) along with the Accused Nos. 5 and 6. As such, P.W.2 made made enquiry with Juber Khan, the auto-rickshaw driver, who narrated entire episode to P.W.2.

2.5 On 27th May, 2019, P.W.2 called upon the Accused Nos. 1 to 7 and enquired with them, however, they did not disclose anything. Hence, P.W.2 directed the accused person to visit the police station on the next day. On 28th May, 2019, the Accused Nos. 1 to 7 visited the police station when P.W.2 made enquiries with the Accused No.1 and 2 separately, whereafter, they disclosed to him that the deceased was killed by them, by strangulating him and his body was thrown into a valley. P.W.2 hence, proceeded with them to trace out the dead-body of the deceased. However, the Accused No.1 changed his version, on their way, and informed that the dead body was cut into 15 to 20 pieces, and the pieces was thrown along a road at different places. Thereafter, an enquiry was made with the Accused Nos. 1 and 2 separately, by stopping the vehicle,

when both of them disclosed to P.W.2 that the dead body was buried on the bank of a canal at Malegaon. They also informed that the Accused No.8 helped them to carry the dead-body at Malegaon from the scene of occurrence, by his Sumo vehicle.

2.6. P.W.2 thereafter informed the police inspector Mr. Gulabrao Patil (P.W.14) about the whole incident, who made an entry in the station diary. P.W.14 thereafter called upon Naib-Tahsildar, Medical Officer, Photographer, Panchas and others and all of them proceeded to the canal namely Owadi Nala. The Accused Nos.1 and 2 were also with whole team of P.W.2. The Accused Nos. 1 and 2 disclosed that the dead body was buried under the hip of garbage at the bank of the canal. The dead was found buried, by using salt and cement. The dead body was exhumed from the ditch.

2.7. The brother of the deceased, namely Sajid Husain(P.W.3), identified the dead body to be that of his deceased brother. The dead body was partially decomposed. The Naib-Tahsildar prepared a panchanama in the presence of the Panchas, in respect of the entire operation. P.W.14 police inspector was drawn inquest panchanama, to ascertain the exact time of

incident. Dr. Yamunesh Pawar (PW.5A) sent the dead body for post-mortem examination at Civil Hospital, Dhule. Dr. Ramesh Gadri (PW.5A) conducted the post mortem examination. He found certain head injuries and certain injuries to the muscles of the neck of the deceased.

2.7. P.W.2 thereafter lodged an F.I.R with Pawarwadi Police Station, Malegaon on the same day, on the basis of which C.R. No.64/2019 was registered against the accused persons, for the offences punishable under Sections 302, 363, 201, 120B, 324, 323, 506 read with Section 34 of the IPC.

2.8. P.W.14 Police Inspector Gulabrao Patil investigated into the crime. In that connection, he arrested the accused persons. He prepared a running panchnama, thereby covering the entire crime scenes. He recovered the rope and the knife, on the basis of the Disclosure Statement of the Accused No.1. He seized the clothes of the accused persons as well as the motorcycles, which were produced by their relatives. He also seized the clothes of the deceased, which were produced by Police Constable Hitesh Bhamare. He got the blood sample of the mother taken by a medical officer at Malegaon. He sent the sternum and the femur

bones of the deceased, so also the blood sample of his mother to the Forensic Science Laboratory for D.N.A analysis. He recovered a fighter, at the instance of the Accused No.4, so also seized four wheeler sumo. He sought for C.D.R., S.D.R., tower location of the mobile phones of the accused persons. He also collected the D.N.A report and the post mortem notes and sent the Muddemal for chemical analysis. Thereafter, statements of the witnesses were recorded. The statement of the sole eye-witness Mr. Juber Khan (auto-rickshaw driver) was recorded by the Judicial Magistrate, as per Section 164 of the Code of Criminal Procedure, 1973. After completion of the investigation, eight accused persons were chargesheeted before the court of Additional Chief Judicial Magistrate, Malegaon, for the offences punishable under Sections 302, 363, 201, 120B, 324, 323 and 506 of the IPC. The learned Magistrate took the cognizance of the offences, and committed the case to the Sessions Court for trial.

3. The accused persons came to be charged for the commission of the offences punishable under Sections 302, 363, 201, 120B read with Section 34 of the IPC, by the learned Trial

Judge. The contents thereof were read over to the accused persons and as they pleaded to be not guilty, the trial commenced.

4. The statements of the accused were recorded under Section 313 of the Code of Criminal Procedure, 1973. The accused denied the entire incident so also suggestions put to the witnesses about commission of the crime. It was also further contended that the dead body was not that of the deceased.

5. To prove their case, the prosecution examined in all 16 witnesses, and relied upon certain documents, whereas the accused persons, did not lead any evidence.

6. After the evidence were recorded, arguments were submitted by the Advocates of both sides, the learned Additional Sessions Judge, Malegaon by his judgment and order dated 18th October, 2022, acquitted the Accused No.2 to 8 of the offences punishable under Sections 302, 363, 120-B and 201 read with Section 34 of the IPC.

7. However, the Accused No.1 was convicted for an offences punishable under section 302 of the IPC, was sentenced to imprisonment for life and was also sentenced to pay fine of Rs.10,000/-(Rupees Ten Thousands only) and in case of default in

the payment of fine, to undergo further rigorous imprisonment for a term of six months. The Applicant/Accused No.1 was also convicted of the offences punishable under Section 201 of the IPC and was sentenced to undergo rigorous imprisonment for a term of five years, was also sentenced to pay fine of Rs.2,000/- (Rupees Two Thousands only) and in case of default in the payment thereof, to undergo further rigorous imprisonment for a term of one month. The Accused No.1 was however, acquitted of the offence punishable under Sections 363 and 120-B read with 34 of the IPC.

8. The Applicant-Accused No.1 being aggrieved by order and judgment dated 18th October, 2022 passed by the Additional Sessions Judge, Malegaon preferred an Appeal bearing No. 1178 of 2022 against the said order. The present Interim Application is filed seeking relief of releasing the applicant on bail pending the hearing and final disposal of the appeal.

9. We have heard Counsels of both sides, the Applicant/ Original Accused No. 1 has been behind bars for four and a half years. The Appeal filed by the Applicant against conviction in the

year 2022, which is likely to take some more time for final hearing.

10. No criminal antecedents of Applicant has been brought on record. The Applicant has his family consisting of his wife and two children, who are dependent on him, so also his nephew.

11. The Applicant, along with the Accused No. 2 were charged for committing murder of the deceased. However, the Accused No. 2 is acquitted. The Applicant is also acquitted of the offence punishable under Section 363 of the IPC. However, the Applicant is convicted under Section 302 on the basis that he has made a confession which amounts to discovery under Section 27 of the Evidence Act.

12. It is not the Prosecution's case that they have filed appeal against the acquittal of Accused Nos. 2 to 8 and more particularly against the Accused No. 2.

13. It is the case of the Prosecution that P.W. 2 Juber Khan (Autorickshaw driver) was paid a fair of Rs. 3000/- (Rupees Three Thousand only) whereafter the P.W.1 Juber Khan left the site of occurrence of the crime incident and left for Malegaon. It is the

prosecution's case that thereafter, Accused Nos. 1 to 7 strangled the deceased with the help of a rope. Therefore, the P.W.1 Juber Khan cannot be called as a eye witness to the offense punishable under Section 302 and 201 of IPC. Hence, this could not be a case of direct evidence.

14. The wife of the deceased (P.W. 8) has stated in her admission that the deceased was a history sheeter and a local goon. Several criminal cases were pending against him and he had several enemies. Even the Police constable P.W.2 has deposed about the criminal history of the deceased and his animosity with several persons. Similarly, the brother of the deceased has stated in his deposition that before the deceased left his house, he was assaulted by one Salman Khan alias Sallu dada. He further stated that the deceased was into all kinds of wrong things.

15. The Panch witness P.W.13 has turned hostile and has not supported the case of the Prosecution, so also, the P.W.1 Autorickshaw driver has turned hostile. The Investigating Officer P.W.14 has admitted in his cross-examination that the knife and rope which was seized under the Japti Panchnama, were not sealed. P.W.5 Doctor who conducted the Postmortem stated in his deposition that the deceased had died two and a half months ago.

Therefore, the date of the alleged offense, i.e. 3 April 2019 does not match with the date mentioned by the Doctor.

16. When the dead body was discovered, no Memorandum Panchnama as contemplated under Section 27 of the Evidence Act was drawn. In the recent case of **Bobby Vs. State of Kerala** reported in 2023 SCCOnLine SC 50, the Supreme Court held that S.27 of the Evidence Act requires that the fact discovered embraces the place from which the object is reproduced and the knowledge of the accused as to this, and the information given must relate distinctly to the said fact. It further held that there was no statement of Accused No. 3 recorded under Section 27 of the Evidence Act and therefore the prosecution has failed to prove the circumstances that the dead body of the deceased was recovered at the instance of the Accused No. 3. The Supreme Court relied upon the judgment of the Privy Council in **Pulukuri Kottaya Vs. King Emperor** reported in 1946 SCCOnline PC 47.

17. The law laid down by the Supreme Court in the judgment of Bobby (Supra), in our view, it is squarely applicable to the present proceedings.

18. As far as the case on parity is concerned. The Applicant

was arrested on 29th May, 2019 and subsequent to arrest has faced the trial and consequently has been convicted of the said offences punishable under Sections 302 and 201 of the IPC. The Additional Session Judge has already recorded the reasons for the acquittal of the Accused No.2, who was similarly placed with that of the Accused No.1, which can also be germane to the cause for considering the prayer of the present applicant.

19. That being so, we deem it appropriate to allow the present Application. The Applicant be released on bail on furnishing P. R. bond of Rs. 25000/- (Rupees Twenty-Five Thousand only) with two sureties in the like amount.

(RAJESH S. PATIL, J.)

(NITIN W. SAMBRE, J.)