

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.552 OF 2015

IN

CRIMINAL APPEAL NO.65 OF 2013

BHUSHAN BHAGWAN BACCHAV

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Mr.Nikhil Chavan a/w. Mr.Rajendra Anubhule, Advocate for the Applicant / Appellant.

Mr.Akash Bhalchim h/f. Mr.Ganesh Gole, Advocate for the Intervenor.

Mrs.S.Gajare-Dhumal, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 4th SEPTEMBER 2015.

ORAL ORDER :

1 The applicant was one of the accused in Sessions Case No.9 of 2010 tried by the Additional Sessions Judge, Nashik. The applicant and two others (accused no.1 Maruti Phad and accused no.3 Nitin Khairnar) were convicted by the learned Additional Sessions Judge of an offence punishable under Section 307 of the Indian

Penal Code (IPC) and were sentenced to suffer Rigorous Imprisonment for a period of 7 years each and to pay a fine of Rs.3,000/- each, with a default sentence. Additionally, the accused no.1 Maruti was convicted also of an offence punishable under Section 392 of the IPC and Section 419 of the IPC. There were other three accused i.e. accused nos.4, 5 and 6, but they were acquitted.

2 The appeal filed by the applicant challenging his conviction and sentence imposed upon him, has been admitted. By this application, the applicant prays that pending the hearing and final disposal of the appeal, the substantive sentence imposed upon him be suspended, and that, be he released on bail.

3 It is not in dispute that the applicant was in custody for a period of about four months after his arrest. He was, thereafter, released on bail, and during trial he remained on bail. After conviction, he has been taken into custody to undergo the sentence, and as such, is thereafter in custody since 12th December

2012. Thus, the applicant has already undergone a sentence of about three years and two months.

4 It is in this background, that it is submitted in support of the prayer for suspension of sentence, that the applicant is not the actual assailant. It is submitted that as per the prosecution case, there were three persons who came to assault the victim Mushir Sayyad. It is pointed out that as per the prosecution case, these three persons had come on a motorcycle. It is also pointed out that as per the prosecution case, two of these persons went near Mushir Sayyad. They had arms with them, which had been concealed by them on their person. The prosecution case is that these two persons assaulted Mushir Sayyad and ran away. The third one, who was on the motorcycle, was attempting to run away by starting the motorcycle, but he fell down and was apprehended on the spot. That person was handed over to the police and his name was mentioned in the First Information Report. It is because, it seems to be

an admitted position that the person who was caught on the spot was not the actual assailant. He was the one, who had accompanied the other two, who were the actual assailants.

5 The First Information Report (FIR) gives the name of the applicant :- i.e. - Bhushan Bacchav. The FIR categorically states that he was the one, who was on the motorcycle and was caught while attempting to run away. The FIR and the evidence adduced during the trial also indicates that the person who was apprehended gave his name as Bhushan Bacchav, which is the name of the applicant.

6 In the course of arguments, an application was made on behalf of the intervenor – the victim, who was permitted to make submissions through his counsel opposing the application for suspension of sentence of the applicant. According to him, the applicant also assaulted the victim. It was submitted that the victim had so stated in his evidence and the identifying witnesses had identified the applicant as one of the actual assailants.

7 With the assistance of Mr.Nikhil Chavan, the learned counsel for the applicant, Smt.S.Gajare-Dhumal, the learned APP for the State, and Mr.Akash Bhalchim, the learned counsel for the intervenor, I have carefully gone through the entire evidence with the object of finding out the correct position, if possible, in the light of this discrepancy, which is apparent in the case of the prosecution. I have also carefully gone through the impugned judgment to see what is the finding in that regard of the learned Judge.

8 I find that the learned Judge has, in view of the conflicting evidence, not attempted to ascertain who were the two actual assailants, and who was the one who had merely accompanied them on the motorcycle.

9 It is true that the witnesses during the trial identified the applicant as the actual assailant. This, however, is inconsistent with the case of the prosecution. At the cost of repetition, it must be observed that, it is the case of the prosecution that the one who

was apprehended on the spot was not the person who actually assaulted the victim. I have examined the evidence of the witnesses to see whether the witnesses have pointed out any of the accused persons specifically as the one, who was caught on the spot. I find that it has not been done so. In other words, while pointing out the applicant as one of the actual assailants, the witnesses have conveniently not stated as to, in that case, who was the third one, who did not assault.

10 The Investigating Officer does not state that the person who was apprehended on the spot and was handed over to the police, gave his name falsely as Bhushan Bacchav. The record of the police itself shows that Bhushan Bacchav was the one, who was apprehended on the spot and who was handed over to the police. If that is so, he is not the actual assailant as per the prosecution case.

11 No weapon was recovered from or at the instance of the applicant.

12 The impugned judgment shows that the accused no.1 Maruti had suffered some previous conviction, but there is no mention of any previous criminal background with respect to the present applicant.

13 Considering that the applicant appears to be the person who did not actually assault the victim, his case for the purposes of suspension of sentence would be needed to be treated differently from that of those, who are said to be the actual assailants. Moreover, as already observed, the applicant is in custody for a period of more than three years. In the ordinary course, the appeal is not likely to be taken up for final hearing within a short time. Even the paper book is not yet ready.

14 Considering all the relevant aspects of the matter, I am inclined to allow the application.

15 Pending the hearing and final disposal of the appeal,

the substantive sentence imposed upon the applicant shall stand suspended and the applicant shall be released on bail in the sum of Rs.30,000/- with one surety in the like amount, or two sureties in the sum of Rs.15,000/- each, on the condition that he shall report to the trial court on first Monday of every calendar month, till the disposal of the appeal.

Should the trial court be closed on any given Monday on account of a holiday, the applicant shall report to the trial court on the next working day.

(ABHAY M. THIPSAY, J.)