

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.475 OF 2016

IN

CRIMINAL APPEAL NO.122 OF 2016

KISHOR NANDU MOHITE

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA & ANR.

)...RESPONDENTS

Mr.Kuldeep S. Patil i/b. Mr.Prashant Hagare, Advocate for the Applicant.

Mr.Ashish Pawar i/b. Mr.Amit Karande, Advocate for Respondent No.2.

Mrs.M.R.Tidke, APP for the Respondent - State.

CORAM : P N. DESHMUKH, J.

DATE : 25th OCTOBER 2016.

P.C. :

1 This application is filed for suspension of substantive sentence and for grant of bail by original accused no.4 Kishor Mohite for having been convicted for the offence punishable under Sections 147 and 148 of IPC and is sentenced to suffer rigorous imprisonment for 2 years and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for 3 months and for the offence punishable under Section 307 of IPC is sentenced to suffer rigorous imprisonment for 6

years and to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for 6 months. As such, it is contended that maximum punishment imposed upon applicant is under Section 307 of IPC for a period of 6 years and pending trial applicant was on bail. On merits, learned counsel for applicant has referred to evidence of complainant together with evidence of injured eye witness and other two witnesses, who claims to be eye witness to the incident of assault on Nana, and by referring to this evidence, has submitted that from their evidence, no charge leveled against the applicant can said to be established, in view of the fact that evidence of neither of these witnesses is convincing to be acted upon.

2 By referring to evidence of PW7 Jayram Ranpise, who is examined by prosecution as witness on recovery of sword at the instance of applicant, it is submitted that his evidence does not substantiate the case of prosecution in any manner, as this witness is not even in a position to describe the weapon alleged to be seized at the instance of applicant, nor has identified applicant to be same accused, at whose instance sword is recovered.

Further, by referring to doctor's evidence, it is submitted that his evidence does not establish injury on right hand of injured, and

as such, does not corroborate oral version of eye witness account. It is, therefore, prayed that application be allowed.

3 Learned APP, on the other hand, opposed the application contending that there is direct evidence of eye witness, which is fully corroborated with the evidence of doctor and prayed that application be rejected.

Admittedly, no application for intervention is filed by original complainant. Learned counsel Mr.Ashish Pawar is present for respondent no.2. Admittedly, respondent no.2 is made as party respondent in the present application as he is injured victim and as per the judgment, is directed to be entitled for amount of Rs.50,000/- as compensation. In that view of the matter, there is no necessity to hear said respondent no.2.

It appears to be the case of prosecution that on 30th June 2007, report came to be lodged against present applicant and co-accused by PW1 Kishor Asbe, involving them in an assault on injured Nana. In the light of facts as aforesaid, complainant Kishor has stated that he knew all the accused and on the day of incident, which has taken place near Maruti temple, where he was present with his brother and was about to climb steps, all accused persons came and started

abusing his brother and in the course of same transaction, accused Atul Mohie and Dada Tamboli having armed with sword, assaulted his brother Nana, while co-accused Prashant Sagar and Shankar who were armed with knife and committed assault on his brother Nana. Admittedly, complainant has not attributed any assault by applicant, who is tried as original accused no.4.

4 Record reveals that in all five accused were tried together. Original accused no.2 died pending trial. As such, from the evidence of complainant, no involvement of applicant is found to be established, as he is neither named by him nor any role is attributed to the applicant in the incident of assault. In the circumstances, it is material to note that though incident appears to have occurred on 30th June 2007 in the morning, at around 8.30 a.m., of which report is lodged within one hour i.e. by 9.30 a.m., had applicant been involved or even present on the spot, there is no reason for PW1 Kishor to not to name him, though in his evidence he had named other co-accused as above.

5 Evidence of PW2 Nanasaheb Aasbe, who is injured eye witness, when perused, reveals that applicant has committed assault on his right hand by sword. In his cross-examination he has stated that

on his attending hospital, he has informed doctor that while he was purchasing coconut near the temple, he was assaulted. After sometime, police contacted him in the hospital, however, he did not talk with police. No reason is on record which prevented PW2 Nanasaheb – the injured to not to disclose name of applicant till his statement came to be recorded by police after ten days. Even there appears no satisfactory explanation on record to not to record statement of injured for a period of ten days. Moreover, case of applicant of his false implication also cannot be ruled out as from further evidence of injured, it has come on record that there are three cases pending against him including for the charge of murder, and as such, possibility of assault on Nana by somebody else also cannot be ruled out, as set out on behalf of applicant, who is also stated to be one of the witnesses, in these cases against injured Nana.

6 Evidence of PW3 Ranjeet Deokar and PW4 Vishnu Ghadge though are relied by prosecution as eye witnesses and PW3 Ranjeet had stated that at the time of incident along with other co-accused, applicant was armed with sword, while other accused were committing assault on Nana; it has come in his cross-examination that when he reached the spot, he saw Nana lying on the road, having sustained

bleeding injuries on his person. It has further come in his evidence that he therefore inquired with PW1 Kishor as to how incident took place and who assaulted Nana, and how he sustained injuries and also about weapons used by the assailants. According to him, then he learnt about the incident. Above admissions on the part of PW3 Ranjeet thus creates reasonable doubt to rely upon him as an eye witness to the incident.

7 Similar is the evidence of PW4 Vishnu who claims to be an eye witness and had stated that applicant along with other co-accused were beating injured Nana, in which assault, he intervened. However, it is found that he has not attributed any specific act upon the applicant and has admitted that since he knew that Nana was injured and was admitted in Inamdar Hospital, he went to hospital after one hour to see him. This admission falsifies his evidence when he has stated that in the quarrel, applicant along with other co-accused, having armed with sword was beating Nana. Even otherwise, his evidence is not convincing in view of the fact of his improving the version, when he denied to have not stated in his statement recorded by police that he had asked from PW1 Kishor about the incident as well as about assault. However, on being confronted with said portion from the statement,

could not assign any reason, why it is so mentioned. Even on considering case of prosecution about alleged recovery of sword at the instance of applicant, same does not appear to be trustworthy, when evidence of PW7 Jayram, panch witness, reveals that he could not identify applicant to be the same person, at whose instance sword is alleged to be discovered and seized by police, neither he is in a position to give description of sword. Similar is the evidence of injured PW2 Nana when he has admitted to have not described weapon, especially sword, before the police.

8 Involvement of applicant, even otherwise, is not established as there is no corroboration from the medical evidence on record, as according to PW6 Dr.Anant Kulkarni, no injuries are found to be sustained by injured Nana on his right hand, but is found to have sustained injuries on right palm, while it is specific evidence of PW2 Nana that applicant had assaulted injured by sword on his right hand.

9 Having considered above evidence, and since applicant was on bail pending trial and has deposited the fine amount, application is allowed as per order below :

- i) Applicant shall be released on bail on his executing PR.Bond in the sum of Rs.25,000/- with one surety in like amount.
- ii) While on bail, applicant shall mark his presence with Akluj Police Station, once in three months, pending revision.
- iii) Applicant shall submit proof of his residence to the Investigating Officer and change in address, if any, in future, to the concerned Police Satation.

(P N. DESHMUKH, J.)