

3] Heard Mr. Memon learned counsel appearing on behalf of Applicants and Mrs. Kantharia learned Spl. PP for the Union Territory.

4] Mr. Memon, learned counsel submitted that the perusal of the material placed on record would reveal that the incident is an outcome of family feud. He submits that in very same incident, the Applicant No.1 had also suffered injuries and for the said offence in Sessions Case No.9 of 2012, the members of the family of the deceased have been convicted for the offence punishable under Section 325 of the IPC and sentenced to suffer rigorous imprisonment for three years. He submits that had the deceased survived, in all probabilities, taking into consideration the nature of injuries suffered by the Applicant No.1, he would have been convicted for the offence punishable under Section 307 of the IPC.

5] Learned senior counsel further submits that though according to the prosecution, there are independent witnesses available, neither a single independent witness has been examined and the conviction is based only on the basis of the interested witnesses.

BGP.

6] Mr. Memon learned counsel further submits that the Applicants were on bail during trial and it is nobody's case that they have misused the liberty and therefore this is an additional ground, on which the application deserves to be considered. He further submitted that even if the prosecution case is taken as it is, case would not come under Section 302 of the IPC, but the conviction will have to be altered to a lesser offence.

7] Mrs. Kantharia, learned Spl. PP vehemently opposes the application. She submits that the learned Trial Judge on the basis of the evidence of eye witnesses has passed an order of conviction. She further submits that merely because the witnesses are interested witnesses i.e. they are relative of the deceased, cannot be a ground to discard their testimony, if their evidence is found to be cogent, trustworthy and reliable.

8] As held by the Hon'ble Apex Court in the case of Niranjan Singh and another Vs Prabhakar Rajaram Kharote and others reported in (1980) 2 SCC 559, a detailed elaboration of evidence at the stage of grant of bail should be avoided.

9] We have to consider the case, upon prima-facie appreciation of evidence and material placed before us.

10] In so far as the contention of learned counsel, Mr. Memon that the Applicants were on bail during pendency of the trial and therefore they are entitled to bail is concerned, the Apex Court in the case of **Kishori Lal Vs. Rupa and others** reported in **(2004) 7 SCC 638** has specifically held that post conviction, the application shall not be granted on the basis that the Applicants were on bail during trial. Their Lordships have held that only in exceptional cases, such a factor can be taken into consideration while considering post conviction application for bail. The Court will have to prima-facie appreciate the evidence to find out as to whether the order of conviction is sustainable or not.

11] There are two eye witnesses in the present case, one is wife of the deceased and other one is brother of the deceased as well as the Applicant No.1. Merely, because the witnesses are interested, cannot be a ground to discard their testimony. The only requirement is that their evidence has to be scrutinized with greater caution and circumspection.

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12] We have perused the evidence of PW-1 – Minaxi, wife of the deceased and PW-2 – Manubhai, brother of the deceased as well as the Applicant No.1. Perusal of the evidence would reveal that at least prima-facie, their testimony is found to be credible. Both the witnesses have clearly implicated present Applicants. The evidence of the two eye witnesses is also corroborated by the evidence of PW-3 – Dr. Siddharth Rathod.

13] Prima-facie, we find no reason to disagree with the finding of the learned Trial Judge that it is the present Applicants, who are author of the assault, which caused death of the deceased Uttam.

14] Assuming for a moment that the deceased and his family were aggressors and that the present Applicants were not the aggressors, at the most, the conviction under Section 302 of IPC, would be altered to the one under Part I or Part II of Section 304 of IPC. If the Applicants are in a position to establish at the stage of final hearing that they are entitled to the benefit under exception I or IV of Section 300 of IPC. Even if it is altered to Part II of Section 304 of IPC, the most liberal Judge would at least award sentence for *BGP*.

five years onwards.

15] The Applicants have been behind the bars hardly for 1 to 1 ½ years. In that view of the matter, we are not inclined to allow the application at this stage. Therefore, the application is rejected.

16] We clarify that the observations made by us are only prima-facie observations for consideration of bail application and would not be considered at the time of final hearing of appeal.

17] We further grant liberty to the Applicants to apply for bail, in the event their appeal is not heard for a period of three years from today.

[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]