

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO. 731 OF 2017
IN
CRI. APPEAL NO. 363 OF 2016**

Bhanudas S/o. Eknath Kotkar ... Applicant.

V/s.

The State of Maharashtra ... Respondent.

**ALONGWITH
CRI. MISC. APPLICATION NO. 117 OF 2018
IN
CRI. APPEAL NO.363 OF 2016**

Bhanudas S/o. Eknath Kotkar ... Applicant.

V/s.

The State of Maharashtra ... Respondent.

Mr. Aabad Ponda, Advocate, a/w. Nilesh Tribhuvan. Mr. Abhay Ostwal, Mr. Harshad Sathe, Mr. Aashish Agarkar for the Applicant in APPA No. 731/2017 & APPA No. 117/2018.

Mr. J. P. Yagnik, APP for the State.

Mr. Anilkumar Patil, Advocate, a/w. Mr. Jitendra Gaikwad for the Applicant/Intervenor in APPA No. 841/2016.

Mr. Rajendra Dashrath Pawar, Police Sub Inspector, Parner Police Station, Ahmednagar is present.

**CORAM : B. R. GAVAI AND
SMT. BHARATI H. DANGRE,JJ.**

DATE : FEBRUARY 26, 2018

P.C. :

1 This application is for suspension of sentence and grant of bail during pendency of the Appeal.

2 Heard Mr. Aabad Ponda, learned counsel appearing for the Applicant, Mr. J. P. Yagnik, APP for the State and Mr. Anilkumar Patil, learned Advocate, who assisted the prosecution.

3 Mr. Ponda submits that excluding the period during which the applicant was on bail, the applicant has in fact undergone five and half years in the custody. Learned counsel fairly states that though the applications of the other co-accused, i.e. the sons of the present applicant, have been rejected on merits by this court but the application of the present applicant deserves to be considered independently in view of the fact that those applicants i.e. sons of the present applicant, were on bail during trial and the present applicant, has undergone a long period in the custody. Learned counsel

has also taken us through the evidence of PW-1, the first informant, the evidence of PW-14 the medical expert and the evidence of PW-8, the father of the deceased Ashok.

4 This application is vehemently opposed by Mr. Yagnik, learned APP and Mr. Anilkumar Patil, learned Advocate, who appeared for assisting the prosecution. It is submitted that the co-ordinate bench of this court, after considering the entire material, by the elaborate order of 16 pages, has found that no case for suspension of sentence was made out in respect of the sons of the present Applicant and that on the same ground, the present application deserves to be rejected. It is submitted that though the said applicants had approached the Hon'ble Apex Court, the Hon'ble Apex Court has maintained the said order.

5 As held by the Apex Court in the case of **Niranjan Singh & Anr. vs. Prabhakar Rajaram Kharote & Ors.**, reported in (1980) 2 SCC 599, a detailed elaboration of the

evidence at the stage of suspension of sentence and grant of bail will have to be avoided.

6 No doubt that the co-ordinate Bench of this court, while considering the case of other applicants i.e. convicted sons of the present applicant, has rejected their applications by the elaborate order.

7 However, what it is to be taken into consideration by the court at this stage, while determining the application for suspension of sentence, is the prima facie value of the evidence. Perusal of the reasoning given by the learned Judges of this court would reveal that the basic reason which has weighed with the learned Judges, while rejecting the application of other applicants, is that there was an evidence of two eye witnesses and the evidence of those eye witnesses has been found to be trustworthy by the learned trial Judge and, therefore, the case for suspension of the sentence was not made out.

8 We are of the considered view that since we are dealing with the liberty of the citizens, merely because the applications of the co-applicant have been rejected, it would not preclude us from prima facie considering the weightage of the evidence, which has been relied upon by the learned trial Judge.

9 The evidence of the Medical Expert (PW-14), who has carried out the post-mortem, would reveal that the following injuries were found on the body of the deceased :

- i. linear abrasion 4 x 1 cm. below right eye,
- ii. imprint abrasions (sand impressions) of right cheek,
- iii. blackening of whole of the back area from neck to T-12 level and left to right mid axillary line, superadded four abrasions of 1 x 1 cm.,
- iv. puncture wound below left knee,
- v. abrasions on chest right side around nipple,
- vi. linear abrasion 3 cm. On back in lumbar region.

I also found other injury fracture rib 5th on right side on his body. All above injuries were anti-mortem injuries.”

10 In the light of these injuries, it would be relevant to refer to the evidence of PW-1 - Shankarrao Vitthalrao Raut. It could thus be seen from the evidence of this witness that the deceased -Ashok was initially assaulted by Sandeep Kotkar by means of black wire and that Ajay Gaikwad was assaulting the deceased by fist and kick blows. Subsequently, the present applicant came there alongwith his sons, having the weapons like pipe or tommy in their hands and they started assaulting the deceased with the weapons like pipe or tommy. Thereafter, 7 to 8 persons came to the spot in the Omni Car. One person was holding sword in his hand. Those 7 to 8 persons also started assaulting deceased Ashok Lande and the person, who was holding sword, started to pierce it on backside part of the waist of deceased - Ashok, having fatty surface. He was also piercing sword on his back side.

11 A similar evidence is given by the wife of PW-1 Parvatibai Shankarrao Raut. It is to be noted that both these witnesses claimed to be eye witnesses. However, the complaint, for the first time, is lodged on 28th July, 2008 i.e. after about seventy days from the date of the incident. The explanation given by the PW-1 in his evidence in para 54 is thus :

“54. It is not correct to say that I falsely stated that after obtaining documents, I came to know that on 19.05.2008 no any accident was taken place. After obtaining photographs of dead body of Ashok and other documents from various departments, I studied those documents. After studying documents and collecting names of witnesses, I decided to lodge complaint, which is at (Exh.81). Prior to lodging complaint (Exh.81), I used to meet Suresh Gaikwad, Ganesh Dalvi and Nandu Surse.”

12 It could thus be seen that this witness himself says that though he has witnessed such a brutal incident; he has obtained photographs of dead body and other documents,

thereafter studied the matter and decided to lodge the complaint.

13 It is further to be noted that PW-8 Bhimraj Keshav Lande, the father of the deceased, in his evidence has stated in paras 12 and 14 thus :

“12. On 25.06.2008 and on 04.07.2008 I had filed applications with the Police Station, Kotwali. Those applications were typed applications. It is true to say that contents in applications dated 25.06.20-8 and 04.07.2008 were prepared by Shankar Raut and he brought those applications to me after 10-12 days of death of Ashok and he obtained my signatures thereon. It is true to say that at that time Suresh Gaikwad was also with Shankar Raut. It is true to say that then they took me to Ahmednagar and they obtained my signatures on typed applications.”

14 It could thus be seen that the father of the deceased has categorically admitted that the contents of the

complaint were prepared by PW-1 and he was made to sign thereon by PW-1.

15 PW-1 has admitted in his evidence, regarding his animosity with the present applicant and that he still holds that, it is the present applicant who had killed his son - Dattatraya.

16 In the light of the delay of seventy days in lodging the FIR, the explanation given in the cross-examination by PW-1 regarding the delay, admission by the PW-8 that it is the PW-1, who had prepared the application and obtained his signature, admitted animosity of PW-1 with the present applicant and the medical evidence, not being in tune with the oral testimony of the deposition of the PW-1; it will have to be decided at the stage of the Appeal as to what weightage has to be given to the evidence of these witnesses.

17 The medical evidence does not corroborate with the assault by sword as attributed by PW-1 on the back part of waist of the deceased, there is no single injury which would corroborate the said version. As such at this stage, it could be seen that the evidence of PW-1 and PW-2 would lead towards exaggeration.

18 However, at-least, prima facie, we find that the present applicant, who has spent five and half years in custody, cannot be denied the bail.

19 As already discussed herein-above, a detailed elaboration of evidence has to be avoided at this stage. However, since coordinate bench of this court had, after considering the material on record, rejected the suspension of sentence of the other accused, we have discussed the evidence to the minimum possible extent.

20 Another ground on which we find that the present applicant deserves to be released on bail, is his medical condition.

21 Taking into consideration that the appellant is suffering from malignancy and that he is operated with radiation and earlier in Cri. Misc. Application No. 1688 of 2017, we had granted him temporary bail on the medical ground and in that view of the matter, the present application of the applicant deserves to be allowed. However, while doing so, stringent conditions will have to be imposed on the applicant. Hence, we pass the following order :

ORDER

- i. The order of substantive sentence / execution of sentence in sessions case no. 62 of 2014 dated 11.04.2016 is stayed insofar as the present Applicant is concerned.

ii. The Applicant is directed to be released on bail on furnishing bail bond in the sum of Rs.25,000/- with one or more solvent sureties in the like amount.

iii. The Applicant shall not enter the area of Ahmednagar District during the pendency of the Appeal. The Applicant shall intimate his address, where he resides, to the Kotwali Police Station, Dist. Ahmednagar and also report the police station of the area where he would reside, on every Monday between 8 a.m. to 10 a.m..

iv. The Applicant shall not leave India without prior permission of the court.

In view of this order, the criminal Misc. Application No. 117 of 2018, for extension of temporary medical bail, shall stand disposed of.

(SMT. BHARATI H. DANGRE, J.)

(B. R. GAVAI, J.)

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