

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO.605 OF 2018
IN CRIMINAL APPEAL NO. 598 OF 2017
(Vijay s/o Raju @ Kailas Sarwan vs. The State of Maharashtra)

Office Notes, Office Memoranda of
Coram, appearances, Court's orders Court's or Judge's orders
or directions and Registrar's orders.

Shri R.M. Daga, Advocate for applicant.
Shri A.D. Sonak, Additional Public Prosecutor for
respondent.

CORAM : P.N. DESHMUKH AND
M.G. GIRATKAR, JJ.

DATED : JULY 4, 2018

Heard Shri Daga, learned Counsel for
applicant, and Shri Sonak, learned Additional Public
Prosecutor for respondent.

This application is filed by original accused
no.2 Vijay Sarwan for suspension of sentence of life
imprisonment imposed upon him by learned Additional
Sessions Judge, Khamgaon in Sessions Trial No.33/2016
for the offence punishable under Section 302 of Indian
Penal Code along with sentence for other offences.

Shri Daga, learned Counsel for applicant, has
referred to evidence of P.W.1 Rahul, alleged eye witness
along with other evidence on record and has contended
that evidence of P.W.1 Rahul is doubtful. It is submitted
that when evidence of said witness is considered with
evidence of defence witness, namely, D.W.1 Rajkishor,
presence of P.W.1 Rahul on the spot is doubtful. It is

further contended that evidence of P.W.1 Rahul, even otherwise, is not liable to be relied upon having material omissions therein, which are said to have been duly proved by Investigating Officer. It is, therefore, submitted that if the evidence of eye witness is disbelieved for the above said reasons, there is no other evidence establishing involvement of applicant in the present crime. It is also pointed out that this Court while considering applications for suspension of sentence of other co-accused has observed that evidence with regards to recovery of knife is disbelieved by trial Court. Knife is, even otherwise, not stated to be attributed to applicant.

In the light of above submissions, it is submitted that application be allowed by imposing suitable conditions on applicant and he be released on bail.

Shri Sonak, learned Additional Public Prosecutor for respondent, has opposed the application contending that there is direct evidence of eye witness, which is corroborated by evidence of P.W.11 Ajay, who had seen applicant along with co-accused on spot and the said facts are sufficient to reject the application.

Perusal of documents filed in support of the application would reveal that present application is filed by original accused no.2 Vijay. Sentence of co-accused no.4 Ram alias Bhagat and co-accused no.6 Kalu is already suspended while accused no.3 Akash and accused no.5 Dharma are acquitted by trial Court.

Perusal of evidence of P.W.1 Rahul would

reveal that incident took place on 4/1/2016 at about 9.45 p.m. at the weekly bazar at Khamgaon where he saw deceased Abhinav proceeding on his two wheeler and was intercepted by applicant along with accused nos.1, 6 and 7. Some altercation took place and, therefore, deceased Abhinav started running towards one wine shop and was followed by accused. He has further deposed that applicant gave blow on the back of deceased Abhinav by some pointed weapon. He has further deposed that other accused nos.1 and 7 inflicted injuries by some weapons on his waist, due to which he fell down in front of wine shop and thereafter co-accused nos.4 and 6 caught hold of him and accused no.1 gave blows by knife on his chest and abdomen while accused no.7 by sitting on the legs of deceased gave knife blows on his abdomen. With regards to applicant, P.W.1 Rahul deposed that in the course of same transaction, applicant pierced screw driver in the stomach of deceased Abhinav, due to which his intestines came out.

While considering above stated evidence, role attributed to applicant and particularly that of he piercing screw driver in the stomach of deceased Abhinav, moving it and taking out intestines, P.W.1 Rahul appears to have materially improved the case to this effect and claims to have stated so in his statement recorded by Police as evidence of P.W.12 Dulba, Investigating Officer in clear terms has admitted that no such fact was stated by P.W.1 Rahul at the time of recording his statement. The omission as aforesaid in fact is material and goes to the root of the case insofar as

involvement of applicant is concerned. Similarly, P.W.1 Rahul has admitted that he had taken no steps to lodge report though he claims to be an eye witness to the incident. Co-accused nos.3 and 5 are acquitted by trial Court while sentence imposed upon accused nos.4 and 6 is already suspended by this Court whose roles are stated above.

Evidence of P.W.11 Ajay establishes fact of all the accused persons found running from the spot and nothing more.

D.W.1 Rajkishore, though cited as witness in the charge-sheet, since not examined, appears to have been examined as a defence witness and from his evidence, presence of P.W.1 Rahul at the time of incident is in fact doubtful as according to him, at the time of incident at 9.45 – 10 p.m. he and P.W.1 Rahul alias Sonu were together when he received phone call informing about quarrel of deceased and accordingly both of them proceeded towards the spot. He further states that on their reaching the spot, number of persons had gathered and in the source of torch light, he could identify deceased Abhinav lying on the lap of Umesh Kadam (not examined). His evidence thus establishes fact of arrival of P.W.1 Rahul on the spot after the incident. In the circumstances, evidence of P.W.1 Rahul as eye witness is doubtful, which even otherwise is full of material omissions.

In the light of above facts, we are thus, inclined to allow the application by imposing suitable conditions as per order below :

Applicant/accused no.2 Vijay Sarwan shall be released on bail on his executing a P.R. bond in the sum of Rs.50,000/- with one surety in the like amount. While on bail, applicant shall mark his presence with Police Station, Shivaji Nagar, Khamgaon on the first day of each month initially for a period of six months and thereafter on first day of every quarter pending appeal.

The application is accordingly allowed.

JUDGE

JUDGE

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