

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

**CRIMINAL APPLICATION NO.510 OF 2018  
IN  
CRIMINAL APPEAL NO.357 OF 2018**

Rajendra Bapurao Nikam

Age : 27 years,

R/o : Chhaya Sadan, Near Nigal Park,

Shivaji Nagar, Satpur, Nashik

(At present in Nashik Road Central

Prison)

.... Applicant

Vs.

The State of Maharashtra

(At the instance of Gangapur

Police Station)

.... Respondent

Mr. Aniket U. Nikam for the applicant

Mr. S.H. Yadav, APP for State.

**Coram : Smt. Sadhana S. Jadhav, J.**

**Date : 16<sup>th</sup> January 2019**

P.C.:

1            Heard the respective counsel.

2            This is an application under Section 389 Code of Criminal  
Procedure seeking suspension of substantive sentence imposed upon

the applicant in Sessions Case No.49 of 2014 vide judgment and order dated 16<sup>th</sup> February 2018, wherein the applicant is convicted for the offence punishable under Sections 304(II) of Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and fine of Rs.1,000/-, in default to suffer simple imprisonment for two months by the District Judge-5 and Additional Sessions Judge, Nashik. The applicant has been in custody since 19<sup>th</sup> May 2013.

3                Sessions Case No.49 of 2014 was tried alongwith Sessions Case No. 144 of 2014 as Sessions Case No. 49 of 2014 was arising from Crime No.119 of 2013 registered at Gangapur Police Station, Nashik, whereas Sessions Case No.144 of 2014 arising out of Crime No. 120 of 2013. There were cross complaints in respect of the same incident. The wife of the present applicant was the complainant in Crime No. 120 of 2013. The applicant had sustained injuries. By the judgment and order dated 16<sup>th</sup> February 2018, three eye witnesses in Sessions Case No. 49 of 2014 have been convicted for the offences punishable under Sections 324 and 427 read with 34

of Indian Penal Code and have been sentenced to suffer rigorous imprisonment for three years and fine of Rs.500/- each.

4           The facts in the present case are as follows :

That the relative of the present applicant had harassed the niece of Vijay Vishwakarma and therefore the relations between the parties were strained. According to the prosecution in the present case, on 14<sup>th</sup> May 2013, Vijay Vishwakarma, Prashant Pawar and Sanjay Pawar were passing through Mahendra Provision Stores, they saw the present applicant, who had stopped at the spot after he saw them. They had threatened all three of them. According to the prosecution more particularly PW-1, Prashant Suresh Pawar (convicted) in Sessions Case No.144 of 2014 has stopped the vehicle, threatened them and he had mounted assault upon Niranjana. He had assaulted Niranjana on his chest. The said injury was fatal and Niranjana had died in the said incident.

5           The learned Sessions Judge, after going through the evidence adduced by the prosecution, more particularly the evidence

of the Doctor had arrived at a conclusion that it was a single stab injury, which turned to be fatal. It is specifically observed in paragraph 77 that the present applicant was injured at the hands of the witnesses. It is observed as follows :

*“Though the deceased was the aggressor who had come suo-moto towards the house of accused and the other friends of deceased have also caused injuries to the accused cannot escape from the conviction for grievous injuries caused to the accused in the cross complaint”.*

The observations of the learned Sessions Judge while deciding Sessions Case No.144 of 2014 i.e. the cross-complaint are as follows :

*“The accused had played aggressive part in the incident. The accused had gone towards the house of the complainant. It is true one of them caused death. The husband of complainant had also lodged N.C. against these accused prior to this incident of which copy is produced in counter Sessions Case No. 49 of 2014.*

It is also observed that :

*“The investigating officer has done one sided investigation and not cared for the alleged fact that the incident is occurred near to the house of the accused”.*

It is also observed that :

*“Prashant has called the other three friends i.e. Sanjay, his brother Vijay and victim Niranjana near to the house of accused”.*

*There will not be a plan to commit murder of Nirranjan but the accused in Sessions Case No. 144 of 2014 i.e. the eye witnesses in Sessions Case No. 49 of 2014 had come in front of the house of the accused. That there was a quarrel in front of the house of the accused”.*

In the case of Moti Singh Vs. State of Maharashtra<sup>1</sup>, the Hon'ble Apex Court has held that :

*“10. Regarding the contention that the appellant is dis-entitled to get the benefit of right of private defence as he failed to make out a plea in that regard, we may point out that it would be quite unjust to deny such a right to the accused merely on the ground that he adopted a different line of defence. If the evidence adduced by the prosecution would indicate that the accused were put under a situation where they could reasonably have apprehended grievous hurt even to one of them it would be inequitable to deny the right of private defence to the accused merely on the ground that he has adopted a different plea during the trial. The crucial factor is not what the accused pleaded, but whether the accused had the cause to reasonably apprehend such danger. A different plea adopted by the accused would not foreclose the judicial consideration on the existence of such a situation.”*

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<sup>1</sup> (2002) 9 Supreme Court Cases, 494

In the case of Lakshmi Singh and Others Vs State of Bihar<sup>2</sup>, the Hon'ble Supreme Court has observed that :

*“This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow : (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants”.*

It is incumbent upon the prosecution to explain the injuries on the person of the accused as well.

6           Upon perusal of the substantive evidence of the eye witnesses, it is clear that the eye witnesses have suppressed the fact that the applicant was also injured in the said incident.

7           It is specifically denied by PW-1, Prashant Suresh Pawar that Priyanka, wife of the present applicant has approached Gangapur Police Station and lodged a report and that they were arrested in Crime No. 120 of 2013. It is, in these circumstances that the applicant who has undergone almost five years in prison deserves

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<sup>2</sup> (1976) 4 Supreme Court Cases, 394,

to be enlarged on bail during the pendency of the appeal. Hence, the following order.

**ORDER**

- i) The application is allowed and stands disposed of.
- ii) The substantive sentence imposed upon the applicant vide judgment and order dated 16<sup>th</sup> February 2018 is hereby suspended.
- iii) The applicant be enlarged on bail on furnishing P.R. bond in the sum of Rs.30,000/- with one or more solvent sureties in the like amount.
- iv) The applicant shall not reside within the jurisdiction of Gangapur police station till 30<sup>th</sup> March 2019.
- v) The applicant shall mark his presence before the Sessions Court at Nashik once in six months on the date assigned by the Sessions Judge.
- vi) Upon failure to attend any two consecutive dates, the Sessions Court shall report the same to the High Court and the prosecution would be at liberty to file an application seeking cancellation of bail.

( *Smt. Sadhana S. Jadhav, J*)