

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

**CRIMINAL APPLICATION NO. 938 OF 2019
IN
CRIMINAL APPEAL NO. 906 OF 2019**

Divesh Dipak Deshmukh .. Applicant

Versus

The State of Maharashtra .. Respondent

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Mr. Anand Palande for the Applicant.

Ms. Jyoti Lohokare, APP for the Respondent/State.

CORAM: P. N. DESHMUKH, J.

DATED : 24th SEPTEMBER, 2019.

P.C:-

This application is for suspension of sentence and for grant of bail, by original accused No.7 who is convicted by the Learned Additional Sessions Judge, Mangaon, District Raigad for the offence punishable under Sections 395, 397, 460, 120(B) of Indian Penal Code. The applicant is sentenced to suffer rigorous imprisonment for

10 years for the offence punishable under Sections 395 and 460 of Indian Penal Code and 7 years for the offence punishable under Section 397 of Indian Penal Code. In addition to this, he is punished for the offence punishable under Section 120(B) of Indian Penal Code and is sentenced to suffer rigorous imprisonment for 6 months. All the sentences are directed to run concurrently.

2. It appears to be the case of prosecution that, complainant Sandeep Nare was running rice mill. On 25th November, 2015, at around 10.20 p.m., his door bail rang which was attended by complainant's mother, when four persons were found present at the door, where complainant also arrived and had talk with them. In the meantime, two more persons who had muffled their faces, also arrived and all of six, pushed complainant inside his house and opened assault on complainant threatening to part away with cash, else extended threats to kill him. It is further case of prosecution that one amongst them, made assaulted on complainant's father and on his wife on her head by iron rod, due to which, she sustained bleeding

injury. Some others were armed with sickle. Due to such act, complainant removed ornaments, cash from the cupboard and handed over to accused who took away the same alongwith three mobile phones. According to the report, Muddemal property including cash, ornaments, mobile valued to the extent of Rs.2,78,000/- approximately, was looted. On the basis of complaint, offence came to be registered.

3. Learned Counsel for the applicant submitted that applicant came to be convicted without sufficient evidence, only on the basis of alleged identification of applicant by complainant and his wife and by referring to the report, submitted that the physical description of suspects given, is not at all sufficient to identify any of the accused person. It is further contended that apart from identification as aforesaid, other evidence available against applicant is of recovery of mobile phone which came to be seized from the person of applicant at the time of his arrest. However, it is contended that there is no identification of said mobile phone by the Complainant,

held during investigation. Learned APP did not dispute the said fact of non-identification of mobile phone. In these facts, it is prayed that application be allowed.

4. Learned APP opposed application on the ground that there is sufficient evidence establishing identification of applicant who from the evidence of PW-1 Sandeep Nare and PW-2 Samidha Nare is found to have assaulted PW-2 by an iron rod on her head and has therefore, contended that in view of evidence of these witnesses identifying the applicant in the Test of Identification Parade, applicant's involvement since has established in the present crime, application is prayed to be rejected.

5. Perusal of report by PW1 Sandeep Nare with regard to physical description of suspects would reveal that he had given such description of three suspects and only gave general description of remaining three suspects, out of which, one was armed with small steel rod. Prosecution had connected present applicant to be the assailant of complainant's wife submitting that he is the

only suspect armed with rod who was described to be belonging to Adivasi Tribal Community. Only on the basis of such statement in report and evidence of PW-1 Sandeep and his wife PW-2 Samidha, appellant is found convicted.

6. In the background of above, on perusal of evidence of Sandeep, it has come on record that at the time of incident, initially four accused arrived in his house who pushed him inside the house to whom, other two accused followed who had muffled their faces. His evidence then refers to all the accused, assaulting and demanding Rs.5 lakhs and extending threats to kill. His evidence further reveals that one amongst them, took his wife and his father in the bedroom and assaulted by iron rod on her head, due to which, she sustained bleeding injuries.

7. Learned APP by referring this evidence, submitted that since in the report, there is reference to one of the accused having armed with iron rod in his hand, and as per above evidence, Complainant's wife is

assaulted, applicant is the only accused to have caused assault. However, submissions advanced, do not find to be convincing for want of sufficient evidence establishing applicants involvement in this crime beyond reasonable doubt as merely in the report one suspect was said to be armed with some weapon, he alone on this limited evidence cannot said to be the assailant in the absence of other corroborative evidence. All the more, no such weapon rod is recovered either at the instance of applicant or from his possession.

8. In that view of the matter, evidence of PW-1 and his wife PW-2 Samidha do not establish applicants involvement. As such, the only evidence available against applicant is of complainant's identifying him in the Test Identification Parade held on 17th March, 2016 in respect of incident alleged to have occurred on 25th November, 2015, which evidence is not sufficient to consider rejection for grant of bail in this appeal. Moreover, it is also material to note that in the re-examination by prosecution, applicant alongwith other witnesses came to be identified in the

Court, as a person who have dealt iron rod on the head of wife of complainant. However, in the cross-examination, complainant admits that there was no person produced in the Court who was from Triable Community. In that view of the matter also physical description given in the report and the case of prosecution linking applicant to be a person to have committed assault on PW-2 Samidha is not convincing.

9. For the reasons as aforesaid, application, therefore, liable to be allowed as per order below :

ORDER

1. Applicant Divesh Dipak Deshmukh shall be released on bail on his executing P.R.Bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand Only) with one surety in the like amount.

2. While on bail, applicant shall mark his presence with Polladpur Police Station between 10.00 a.m. to 1.00 p.m. on the first day of each month, initially for the period six

months and thereafter quarterly on the first day of each such month, pending appeal.

3. Application is disposed of as allowed in above terms.

(P. N. DESHMUKH, J.)