

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

CRIMINAL APPLICATION (APPA) NO.357 OF 2019
IN CRIMINAL APPEAL NO.258 OF 2019

(Rajjak Ali @ Rajjo Ramjan Ali and others 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.K. Tiwari, Advocate for applicants.

Shri M.K. Pathan, Additional Public Prosecutor for respondent.

CORAM : P.N. DESHMUKH AND
 PUSHPA V. GANEDIWALA, JJ.

DATED : JULY 15, 2019

Heard learned Counsel for the parties.

This application is for suspension of sentence and grant of bail filed by original accused no.1 Rajjak Ali, accused no.2 Muzzaffar Ali alias Manju and accused no.3 Munnawar Ali alias Mannu, who came to be convicted by learned Additional Sessions Judge, Nagpur vide judgment dated 25/1/2019 in Sessions Trial Nos.425/2014 and 100/2015 for the offences punishable under Sections 143, 147, 148, 302 and 307 read with Section 149 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5000/- each and in default, to suffer rigorous imprisonment for one year for the offence punishable under Section 302 of Indian Penal Code, to suffer rigorous imprisonment for five years and to pay fine of Rs.5,000/- each and in default, to suffer rigorous imprisonment for one year for the offence punishable under Section 307 of Indian Penal Code and to suffer rigorous imprisonment for two years and to pay fine of Rs.500/- each and in default, to suffer

simple imprisonment for three months separately for the offences punishable under Sections 143, 147 and 148 of Indian Penal Code. All the substantive sentences are directed to run concurrently.

Shri Tiwari, learned Counsel for applicants, submits that the offences came to be registered on the basis of report lodged by P.W.5 Sk. Akil, who is brother of deceased Sk. Jalil, for the incident occurred on 21/6/2014 and by referring to the evidence of complainant as well as eye witnesses, namely, P.W.1 Sk. Jamil, P.W.2 Sk. Shaharukh and P.W.3 Nisarunnisa has contended that they are not even relied by the learned trial Court on the ground of delay in recording their statements by the Investigating Officer. It is further contended that even evidence of P.W.5 Sk. Akil has material omissions. It is submitted that on the same set of facts, though learned trial Court has acquitted original accused nos.4 to 6, has convicted present applicants for the aforesaid offences.

It is further contended by learned Counsel that though statement of P.W.5 Sk. Akil, injured complainant came to be recorded on 22/6/2014, which fact can be established from the requisition memo received by concerned Doctor, namely, P.W.9 Dr. Pratik on that day, first information report (Exh.120) is shown to be registered on 21/6/2014 which according to learned Counsel for applicant is thus ante dated. Another point, which is canvassed by learned Counsel, is of delay in forwarding muddemal articles for analysis to Chemical Analysis which according to evidence of Investigating Officer were not sealed after seizure came to be effected.

Learned Counsel Shri Tiwari has also made a statement that in the event applicants are found entitled to be released on bail, they are prepared to remain out of Nagpur as according to case of prosecution, there are many cases pending against applicants at Nandanwan Police Station, Nagpur.

It is submitted that in view of above aspects and as applicants, even otherwise, were on bail pending trial, application may be allowed by imposing suitable conditions.

Shri Pathan, learned Additional Public Prosecutor for respondent, has opposed the application by contending that omissions in the evidence of P.W.5 Sk. Akil are not sufficient to establish innocence of applicants. It is submitted that all the applicants are history sheeters and by referring to affidavit-in-reply has pointed out that applicant no.2 was also involved in another crime and came to be convicted for the offence punishable under Section 307 of Indian Penal Code and the appeal preferred by him was also dismissed by this Court. According to prosecution, thus all the applicants are having criminal background and are involved in the cases involving bodily offences, gambling and there is every possibility of applicants indulging in such crimes in the event they are released on bail and prayed for rejection of bail.

In view of submissions as above, at this stage itself, we note that admittedly no application is moved by prosecution for cancellation of bail of applicants at any point of time during pendency of trial and as such, without going into these niceties,

consider evidence whatsoever is available against applicants to establish their involvement in the present case in the background of submissions advanced as aforesaid.

From the evidence of P.W.5 Sk. Akil, injured eye witness, it has come on record that incident took place on 21/6/2014 at around 9.30 and 9.40 p.m. when he was standing along with his brother – deceased Sk. Jalil in front of Kolte Apartment and they were talking with each other when all the applicants along with co-accused having armed with sword and knife arrived and started assaulting deceased Sk. Jalil on his head and in the same course of transaction, had also assaulted complainant on his head, neck, left hand and left shoulder and ran away. It is noted that this witness has not identified any of the accused at the time of trial. From the evidence of this witness it is thus clear that before assault, he was present along with deceased Sk. Jalil on the spot and they were talking to each other when assault was committed. As against this, evidence of P.W.11 Arvind Ghodke when perused, in para 37 he admits that during the course of investigation, he had recorded statements of adjoining shopkeepers wherefrom it is revealed that at the time of incident at around 9 p.m. - 9.30 p.m. deceased Sk. Jalil was abusing near one pan shop at Aurangazeb Chowk wherefrom he was chased by number of persons and he thus came running towards Kolte Apartment where he was subjected to assault. This evidence of Investigating Officer is thus contrary to evidence of injured eye witness P.W.5 Sk. Akil/complainant that deceased Sk. Jalil was present along with him near Kolte apartment and was subjected to assault.

The Investigating Officer has even admitted that

none of the eye witnesses has stated full names of accused in their statements, but they have mentioned only their first names. The reason for non mentioning of full names as stated by Investigating Officer is that witnesses were not knowing full names of assailants. It was, therefore, suggested to witness that incident took place at Hasanbagh area having Muslim community residing there and names like Razzak, Muzaffar, Nasir, Bashir, Anni and Munnu are common, which suggestion appears to be having substance and in fact, has not been denied by the Investigating Officer.

Admittedly, no test identification parade is held by the Investigating Officer. The Investigating Officer is thus, suggested that since he had knowledge that no purpose would be served by holding test identification parade, he did not feel it necessary to hold the same, which is duly denied by him. However, fact remains that no test identification parade was conducted during investigation nor applicants are identified in the Court.

Evidence of P.W.5 Sk. Akil further reveals that on his admission to Medical College and Hospital, his statement was recorded on 21/6/2014, which is on record at Exh. 120 as proved by the Investigating Officer P.W.6 Manish Wakode, PSI and it is the case of prosecution that on the basis of said statement, offences came to be registered. It has come in the evidence of complainant that he had signed the statement on 21/6/2014 at around 10.15 p.m, which is on record as Exh. 120. P.W.6 Manish Wakode, who recorded this document has deposed that before recording of the same on visiting Hospital, he issued

requisition letter to Medical Officer for medically examining the patient at Exh. 124 and he thereafter recorded statement of P.W.5 Sk. Akil.

Shri Tiwari, learned Counsel for applicant, during the course of hearing has tendered at bar copies of requisition letters (Exh. 124) which bear acknowledgment of concerned Medical Officer, who has signed the same having mentioned on it date as 22/6/2014.

Evidence of P.W.6 Manish Wakode, PSI would reveal that on issuing aforesaid document, he immediately recorded statement of P.W.5 Sk. Akil, which, therefore, should have been of 21/6/2014. However, endorsement by Medical Officer shows that the requisition was received by him on 22/6/2014. When evidence of P.W.6 Manish Wakode, Investigating Officer is considered along with requisition memo to Medical Officer, then statement of P.W.5 Sk. Akil has to be of 22/6/2014, upon which offences came to be registered. However, First Information Report is dated 21/6/2014. It, therefore, raises sufficient doubt if the F.I.R. is ante dated as has been submitted on behalf of applicants. This aspect goes unexplained by the Investigating Officer.

Evidence of P.W.5 Sk. Akil, when perused, though involves applicants as assailants of deceased Sk. Jalil, his evidence is full of material omissions when he admits to have not stated in his statement recorded by Police that the assault was on his neck, and left hand or that on receiving injuries, he fell down on the ground. He also admits to have not stated that deceased Sk. Jalil was assaulted by spade and after assault, deceased Sk. Jalil as

well as he himself were taken by Shaharukh, Jamil, Khairunissa and Nisarunnisa to the Hospital contending that he did not say such facts in his statement before Police as he was not asked by Police. His evidence would also reveal that his statement under Section 164 of Code of Criminal Procedure is recorded by learned Magistrate and though claims to have stated in that statement that while he along with deceased Sk. Jalil was on the spot opposite to Kolte Apartment, applicants along with co-accused having armed with sword and knife in their hands arrived and committed assault on both of them on head and neck, admits to have not stated said facts nor that deceased Sk. Jalil was assaulted by spade and after assault, he fell down on the ground. Considering the omissions as aforesaid on the point of assault by applicants upon deceased Sk. Jalil as well as P.W.5 Sk. Akil, his evidence is thus doubtful.

Admittedly, apart from evidence of P.W.5 Sk. Akil, other evidence which needs to be considered is of P.W.1 Sk. Jamil, P.W.2 Sk. Shaharukh and P.W.3 Nisarunnisa, whose evidence has not been relied by the learned trial Court noting that there is delay of three days in recording their statements though all these witnesses have claimed to have witnessed the incident and had sufficient opportunity to be in company of Police immediately after the incident.

In the evidence of P.W.1 Sk. Jamil, it has come on record that after incident, he visited hospital and was present throughout night till death of Sk. Jalil when Police was present. However, he did not make any statement to Police. From the evidence of P.W.2 Sk. Shaharukh, it has come on record that on

23/6/2014 he visited Police Station for identifying accused and drawing arrest panchanama, however, he did not inform anything to Police and he has stated that he was informed by Investigating Officer that his statement would be recorded on 24/6/2014. Similarly, P.W.3 Nisarunnisa though she claims to be present on the spot and had opportunity to disclose facts of incident to the Investigating Officer, who was present on the spot after the incident, did not find it necessary to disclose the same. Though she also had another opportunity to disclose the incident to Police while in Medical College and Hospital, Nagpur, she had not even disclosed on the second occasion.

For the above reason, trial Court thus appears to have rightly not relied upon testimonies of said eye witnesses. When evidence of these three witnesses as well as of P.W.5 Sk. Akil is considered, same prima facie does not establish applicants' involvement as the case of prosecution right from incident of assault in front of Kolte apartment where deceased Sk. Jalil and complainant Sk. Akil are claimed to be present is doubtful. As already stated, it has come in the evidence of Investigating Officer that from the statements of eye witness it is clear that deceased Sk. Jali was in fact chased and was assaulted, while according to complainant, prior to assault on deceased Sk. Jalil, he and deceased Sk. Jalil were present on the spot and were in fact talking for 5-7 minutes with each other.

Another aspect submitted by prosecution about recovery of sword at the instance of applicant no.1 having human blood found on it as per Chemical Analyser's report also needs to be kept out of consideration for the reason that though such recovery came to be effected at the instance of said accused on

24/6/2014, the seized muddemal items were sent for analysis to Chemical Analyser on 30/8/2014 and the Investigating Officer in clear terms has admitted that after effecting seizure of sword, seal was not affixed. Thus, after seizure of sword, there is a possibility of sprinkling of blood on it.

Shri Pathan, learned Additional Public Prosecutor while opposing this application has relied upon the law laid down by the Hon'ble Apex Court in the case of **Vijay Kumar vs. Narendra and others** {(2002) 9 SCC 364}. It is a well settled principle that while considering application for bail, the Court should consider the relevant factors like the nature of the accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.

In the case in hand, from the evidence, which has been discussed as aforesaid, prima facie applicants' involvement is not found established. The observations of the Hon'ble Apex Court in the case of **Vijay Kumar** (supra) are with regards to facts involved in that case when it is observed that in the context of facts and circumstances of the case the High Court was in error in passing the order releasing the respondents on bail. It was further observed that in fact High Court had neither given any reason nor had intimated exceptional circumstances for releasing accused on bail, which is not the case in hand.

Having considered available evidence against the

applicants collectively, except for having criminal background of applicants, we do not find any reason to reject the application. Hence, we pass the following order :

The applicants shall be released on bail on their executing P.R. bond of rupees fifty thousand each with one surety in the like amount. The applicants shall not reside in the territorial jurisdiction of Nagpur District pending appeal and shall not indulge in any criminal activity.

The applicants shall mark their presence in Police Station within whose jurisdiction they prefer to reside out of Nagpur District once in a week until further orders. The applicants shall provide their residential addresses to said Police Station, which Police Station shall also forward these addresses to Police Station, Nandanwan, Nagpur.

Needless to state that in the event any of the applicants contravene any of the aforesaid conditions, prosecution would be at liberty to take appropriate steps as available under law.

The application is accordingly disposed of as allowed.

JUDGE

JUDGE

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