

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Criminal Application [APPA] No. 451 of 2019
IN
Criminal Appeal No. 635 of 2018
[Shaikh Mubarak Shaikh Hayat Vs. State of Mah., Sakkardara PS,
Nagpur]

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

Court's or Judge's orders

Mr. H. D. Dangre & Mr. C.R. Thakur, Adv., for the Applicants.
Mr. Ashirgade, APP for respondent.

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

DATE : 19th June, 2019

01. This application is filed by the applicant-accused for suspension of conviction and sentence and for grant of bail, pending the appeal. The Applicant-accused is convicted by the learned Additional Sessions Judge, Nagpur, in Sessions Trial No.25 of 2016 by Judgment and Order dated 1st September, 2018, of the offences punishable under Sections 302 and 201 of Indian Penal Code, and is sentenced to suffer Life Imprisonment and to pay a fine of Rs.50,000/-, in default of payment of fine, to suffer Simple Imprisonment for one year, and, on the count of offence punishable under Section 201, Indian Penal Code, he is sentenced to suffer Simple Imprisonment for six months and to pay a fine of Rs.1,000/-, in default whereof, to suffer Simple

Imprisonment for three months. Both the sentences are directed to run concurrently.

02. Learned Counsel for the Applicant submitted that though the case of prosecution is based on the direct evidence and prosecution relied upon the evidence of PW 1 - Haji Sayyad Amjad Ali, PW 4 - Sayyad Ahmad Ali Sayyad Asgar Ali, PW 5 - Mohd. Auwes Mohd. Kaiser, and PW 7 - Safiya Anjum Faij Mohd. Siddiqui, as eye-witnesses to the incident, by referring to their respective evidence, it is demonstrated as to how their evidence is not convincing for being acted upon, for the reason that the same is inconsistent on material aspects. It is also pointed out from record that only interested witnesses who are related to the deceased are examined and in spite of there being other eye-witnesses and the witnesses whose statements are simultaneously recorded during the course of investigation with the witnesses examined by the prosecution, other independent witnesses are not examined. It is also pointed out that even the spot of incident has not been fixed by the prosecution by leading convincing evidence. It is submitted that as per the Spot Panchanama, pool of blood is found at a distance of twenty feet from the shop in which, according to the eye-witnesses, the incident took place on 24th May, 2015 at 8.00 p.m. Lastly, it is submitted that though according to the medical evidence, as many as twelve external injuries in the nature of incised, lacerated and chopped wounds and

even a stab wound was found on the person of deceased, as per the Chemical Analyser's report, no blood is detected on the axe, which, according to the case of prosecution, is the weapon used in the crime. Similarly, it is also submitted that since deceased is also found to have sustained the stab wound, there is every possibility of assault by more than one assailants. By pointing out above material evidence, it is, therefore, prayed that the application be allowed by imposing suitable conditions upon the applicant as the applicant does not have any criminal antecedents.

03. Learned Addl. Public Prosecutor, by referring to the evidence of the eye-witnesses, submitted that there is a direct evidence and the submissions advanced on behalf of the Applicant can be considered at the time of final hearing. Learned APP has, thus, contended that since the applicant's involvement as an assailant of deceased Sayyad Salim Sayyad Khalil is established, the application be rejected.

04. In the background of submissions advanced as afore stated, we have perused the evidence of PW 5 - Mohd. Auwes Mohd. Kaisar who claims to have seen the accused assaulting the deceased by an axe in front of his shop styled as "Nawaz Kirana Shop", which he claims to be situated near the spot of incident. As such, the evidence of said eye-witness is specific as to fixing the spot where from he has witnessed the incident.

However, in the cross-examination, he has admitted that the spot of incident where it took place is visible from his shop and not from Barkatiya Chicken Centre, and he claims that at the time of incident, he was busy in cutting up chicken. Though in his cross-examination, portions 'A' and 'B' from his statement recorded under Section 164, Criminal Procedure Code, are marked, we do not go into that aspect as no such portions are proved in the trial. However, even skipping that piece of evidence, when further cross-examination is perused, evidence of this witness does not inspire confidence to rely upon him as an eye-witness to the incident when he claims to have stated before police that he had seen the incident from his shop, while in his statement recorded by the Magistrate, he claims to have witnessed the incident from Barkatiya Chicken Centre where he was cutting up chicken. In fact, he has further voluntarily deposed that at the time of incident, he was not even cutting up the chicken, but was engaged in downing the shutter of his shop. All the more, evidence of this witness is further not at all convincing when he claims to have stated in his statement recorded by police as well as by the Magistrate that the accused had dealt a blow by an axe from the backside of the deceased, no such fact is mentioned in his statement for which he is unable to assign any reason. In view of such material omissions in his evidence which is duly proved, we do not find it safe to read his evidence in favour of prosecution.

05. Evidence of PW 4 - Sayyad Ahmad Ali Sayyad Asgar Ali, another eye-witness, relied by the prosecution, when considered, would reveal that he was knowing the deceased being from the same locality. At the time of incident, he was standing in his plot in front of Bareli Kirana shop, and on hearing the shouts, he turned to that direction and saw that deceased had fallen down in a pool of blood in front of Bareli Kirana Shop, and accused was assaulting him on his head and neck. He further deposed that he, therefore, ran towards the accused who after ran towards the lane near Masjid and one Sheikh Mukhtyar and Habibullah Khan also chased the accused along with him. However, neither of these witnesses are examined. Apart from above evidence, further evidence of PW 4 - Sayyad Ahmad needs to be considered when he has deposed that thereafter in ten to fifteen minutes, police arrived and took the deceased to hospital while this witness along with Habibullah Khan, Mukhtyar, Patel, Imran and PW 1 - Sayyad Amjad Ali accompanied the Police to hospital. Out of them, except for PW 1 - Sayyad Amjad Ali, who admittedly is brother of deceased, no other independent witnesses are examined. It is further material to note from the evidence of PW 4 - Sayyad Ahmad it reveals that in spite of his being with the police in the hospital and despite informing the police, that he is a witness to the incident and, therefore, his statement was necessary to be recorded, his statement was not recorded immediately after the incident. He further

admits that his statement was recorded three days after the incident. Thus, his evidence demolishes the case of prosecution. His further evidence, in fact, is not required to be considered when he admits to have not stated to police about the incident which he had seen. Moreover, according to his further admissions, three days after the incident, i.e., on 27th May, 2015, he along with Mukhtyar, Amirullah and Jabbar on their own went to Sakkardara Police Station where their statements were recorded by the police simultaneously. However, as already stated earlier, except for this witness who admittedly is related to deceased, no other witnesses are examined.

06. Another witness relied as an eye-witness is PW 1 – Sayyad Amjad Ali who has deposed to have witnessed the incident of assault by accused on the back side of neck, head and throat of deceased, as a result of which, he fell down on the spot in a pool of blood. Without going into further details of the evidence of this witness, suffice it to say that his evidence is specific about the deceased being assaulted in the shop and falling down there in a pool of blood, which evidence, when considered with the Spot Panchanama, doubts the case of prosecution, as, according to said document, the incident is mentioned to have occurred in front of Bareli Kirana Shop, which spot was pointed out by the complainant and in the Spot Panchanama, it is specifically stated that blood was found on the spot at a

distance of twenty feet from Bareli Kirana Stores. In that view of the matter, apart from doubtful evidence of eye-witnesses, the version of this witness also creates a doubt about the spot where the incident took place. Moreover, this witness has denied the suggestion that there were more than one assailant, out of whom one was armed with a knife, which suggestion is duly denied. There appears to be much substance in the case as suggested aforesaid, as from the evidence of PW 11 – Dr. Amol R. Mayyar and on perusal of external injuries sustained by the deceased, there is a reference to Injury No.11 which is stated to be a stab wound 3cm x 5 cm x 6 cm present over nape of neck placed obliquely with lower end on left side and upper end on right side, directed medially and downward which prima facie established use of a knife in the assault which admittedly is not the case of prosecution. Said aspect is further found to have been substantiated when the Medical Officer in clear terms admitted that Injury No.11, i.e., stab wound, cannot be caused by the weapon – Article 1, i.e., a small axe with which he was confronted, and he admits that no weapon by which Injury No.11 is possible was referred to him.

07. The tenor of evidence of eye-witnesses above, coupled with the injuries and the Spot Panchanama and the number of injuries and the fact of the axe, the weapon of assault, having no blood found on it, doubt the case of prosecution.

08. In view of above discussed evidence and considering the undisputed fact that there are no criminal antecedents to the credit of applicant, application is allowed as per order below:-

[a] The applicant-appellant-accused shall be released on bail on his executing a Personal Bond in the sum of Rs.50,000-00 [rupees fifty thousand only] with one surety in the like amount.

[b] The applicant shall mark his presence with Sakkardara Police Station, Nagpur, once in three months, on the first day of each such month, pending appeal.

09. At this stage, learned counsel for the applicant refers to Prayer Clause [ii] of the application and submits that the applicant be allowed to deposit Rs.50,000/- [rupees fifty thousand only] as cash security, and shall furnish the surety within a period of three weeks. The prayer as made is allowed.

Judge

Judge