

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1213 OF 2020
(ASIF S/O MUNIR SHAIKH VS. THE STATE OF MAHARASHTRA)
IN
CRIMINAL APPEAL NO.333 OF 2018

Mr.Shaikh Mazhar A.Jahagirdar, Advocate for the applicant.
Mr.R.V.Dasalkar, APP for respondent No.1.
Mr.S.B.Jadhav, Advocate for the appellants in Cri.Appeal
No.527/2020 and 528/2020.

**(CORAM : RAVINDRA V. GHUGE AND
B.U.DEBADWAR, JJ.)**

DATE : 12/10/2020

PER COURT :

1. This application has been filed by the applicant Asif Munir Shaikh, original accused No.3 in Sessions Case No.116/2016. He has been convicted for the offences punishable u/s 326 r/w Section 149 of the IPC and has been sentenced to undergo rigorous imprisonment for a term of 10 years alongwith fine.

2. We have considered the extensive submissions of the learned Advocates for the applicant/accused No.3, on behalf of the State and on behalf of the original complainant (father of the deceased) and the injured victim, who is the first informant.

3. Before we deal with the specific submissions of the learned counsel for the parties, we find it necessary to deal with the first argument advanced by the learned Advocate for accused No.3 that Nohid Nisar Bagwan, original accused No.5 was granted suspension of sentence and bail by this Court vide order dated 27/03/2019 in Criminal Application No.3855/2018. The State had moved an application for cancellation of the bail and by order dated 12/12/2019, the earlier order dated 27/03/2019 was recalled and the bail granted to Nohid was cancelled. Nohid had approached the Hon'ble Apex Court in Criminal Appeal No.453/2020 and by order dated 17/06/2020, the order of this Court dated 12/12/2019 was set aside and the earlier order of this Court dated 27/03/2019 was restored. Further contention in connection with the first argument is that the present applicant stands on a better footing than Nohid as blood stains were found on the clothes of the Nohid and no blood stains were found on the clothes of the present applicant Asif. Asif had withdrawn his first Application No.1330/2018 on 26/10/2018. Asif had also withdrawn his second application No.2013/2019 on 03/07/2019. He prays for parity.

3. We have perused the order passed by this Court (Coram : T.V.Nalawade and Mangesh S.Patil, JJ.) on 27/03/2019 when Nohid

had prayed for suspension of the sentence and for bail. This Court had considered the submissions of the learned counsel in one paragraph No.3, while allowing the application, which reads as under :-

“3. The evidence given against the applicant Nos.3 and 4 shows that he is said to be friend of main accused Akram. Akram had old dispute with deceased Rameshwar. The incident took place on 28/01/2016. the first incident took place in the morning time and the incident in question took place in the night time. The allegations are made that the first informant and Rameshwar were present on the spot of incident. All the accused came there with weapons like iron rods and wooden logs. Allegations are made that in all 10 persons took part in the incident and two of them were unknown. Present applicant was known to the first informant. Allegations are made against the present applicant that he had assaulted the first informant. The first informant sustained injuries like a fracture of right tibia fibula and some injuries like blunt trauma over left forearm and CLW below left knee. Hematoma was found at right front of head portion but there is no allegation that the injury was caused to the head by the present applicant. Evidence given in respect of the deceased show that fatal blow which caused injury to skull of the deceased was given by Akram. Deceased sustained other injuries like CLW over right front CLW over left foot, CLW over right foot and abrasion to the right shoulder. Death took place due to fracture of skull and intracranial hemorrhage. In view of this circumstances the trial Court has convicted the present

applicant for the offence punishable under Section 326 of the Indian Penal Code.”

4. While dealing with Criminal application No.3058/2019 filed by the State seeking cancellation of bail, this Court came to the conclusion that Nohid had earlier withdrawn his application for bail when the learned Single Judge was about to reject it and this was not brought to the notice of this Court when the order was passed on 27/03/2019. Additional reasons were assigned by this Court in its order dated 12/12/2019 while cancelling the bail granted to Nohid.

5. We find from the order of the Hon'ble Apex Court dated 17/06/2020 that it disproved the cancellation of bail by recalling the earlier order dated 27/03/2019, since it was based on an earlier application having been withdrawn. The Hon'ble Apex Court, therefore, concluded that when the High Court was earlier satisfied in suspending the sentence by order dated 27/03/2019, it could not have recalled the said order vide the subsequent order dated 12/12/2019 on the ground that an earlier application withdrawn by Nohid, which was not brought to its notice.

6. We find it appropriate to refer to the 4 paragraphs of the order

dated 17/06/2020 passed by the Hon'ble Apex court, hereunder :-

“ This appeal has been filed against interim order dated 12.12.2019 passed by the High Court of Judicature of Bombay in Criminal Application No.3508/2019 by which the earlier order passed on 27.03.2019 in Criminal Application No.3855/2018 in favour of the appellant for suspension of sentence was recalled and bail was cancelled. The reason given by the High Court in its order is that the earlier application for suspension of sentence was withdrawn by the accused, hence order dated 27.03.2019 could not have been passed suspending the sentence.

The mere fact that the application was permitted to be withdrawn at an earlier stage does not in any manner inhibit the jurisdiction for suspending the sentence on being satisfied that the case was made for suspension of the sentence. It appears that the High Court has reviewed its earlier view that it was a for suspension of sentence.

We are of the view that the High Court being satisfied in its order dated 27.03.2019 on merits that it was a case for suspension of sentence, the said order could not be recalled by the impugned order.

The order dated 12.12.2019 passed by the High Court is set aside. The civil appeal is allowed.

Pending application, if any, stands disposed. of.”

7. In the above backdrop, we have considered the extensive submissions of the learned Advocate for the respective parties as the

learned Advocate appearing on behalf of the applicant Asif has contended that his case is better than the case of Nohid.

8. The submissions of the learned Advocate appearing on behalf of accused No.3 Asif can be summarized as under :-

[a] Asif has been convicted for the offences punishable u/s 326, 149 of the IPC.

[b] There were 12 accused before the Trial Court out of which 7 are convicted, 4 are acquitted and one minor is facing trial before the Juvenile Court.

[c] No blood stains were found on the clothes of Asif.

[d] Neither an iron rod nor a wooden log was recovered from Asif.

[e] Though 4 eye witnesses have deposed before the Trial Court viz P.W.No.1, P.W.No.7, P.W.No.9 and P.W.No.11, 3 eye witnesses claimed that Asif was armed with an iron rod and one eye witness says that he was armed with a wooden log.

[f] There are discrepancies in the testimonies of these 4 witnesses which is visible from their deposition (which have been read out to the Court extensively).

[g] Asif had produced a witness, who is the owner of a Motor Rewinding Shop. The said witness stated that Asif was with him in the shop on the date of the incident till 9.00 p.m. The Trial Court has illegally discarded the testimony of such witness and hence Asif

could not prove his plea of alibi.

(h) As Nohid has been granted bail by the Hon'ble Apex Court, Asif should be given the benefit of parity and this application should also be allowed.

9. The learned APP has strenuously opposed this application. He submits that the State has also filed 2 appeals. One is against the acquittal of 4 persons and the other appeal has been filed seeking enhancement in sentence against the present applicant Asif. He further submits that it is apparent from the record that the present applicant is a part of a group of persons belonging to a particular community which is creating communal tension in the society.

10. It is obvious that on a trivial issue of passing of some comments by the other side, led to accused No.1 bringing alongwith him a large group of persons who attacked the deceased, the injured victim and the eye witnesses when they were relaxing on an Oota (platform) in Sambhaji Chowk. They deliberately picked up a quarrel on the ground that the victims were staring at them in an incident that had occurred earlier in the day. Because the victims were looking angrily towards the accused, all of them attacked these persons who were sitting on the platform. A vicious blow with an

iron rod was inflicted by accused no.1 on the head of the deceased and few blows were inflicted on P.W.No.1, who survived the assault and became the first informant. This caused the friends of these two victims to flee and run helter-skelter out of fear and to save their lives. 3 accused had caught hold of the deceased as he was attempting to escape and dragged him back to the platform where accused Nos. 1 to 4 assaulted him with iron rods/wooden logs.

11. The learned APP further submits that there were at least 4 surface wounds on the dead body (one out of the 2 persons brutally attacked, had died and the other person is P.W.No.1 informant). One injury was to the left ear at the lateral margin. Further examination revealed 5 internal wounds like [a] Contusion left parietal temporal region, [b] Heamatoma left parietal region, [c] Fractured skull at the left side of middle liner possa, [d] Intra cranial haemorrhage at the left leg side of middle cranial, [e] Haemorrhagic contusion left parietal zone.

12. Medical evidence brought on record indicates that the death of the deceased occurred on account of head injuries and the weapons that were used to cause such injuries were iron rods and wooden logs. The present applicant Asif is said to be one of these 4 persons

who have assaulted the 2 victims.

13. The learned APP further submits that the informant P.W.No.1 also suffered 4 surface wounds like – Haematoma over frontal region on the right side, blunt trauma over left forearm, CLW below the right knee and CLW below the left knee. These injuries were caused by iron rods and wooden logs. The right leg of P.W.No.1 suffered a fracture of the tibia and a rod and a plate has been inserted as a part of the medical treatment.

14. The learned Advocate appearing on behalf of the father of the deceased and P.W.No.1 informant, submits that the present applicant Asif has a history of crimes committed by him. He, alongwith accused no.1 in this case, who has been sentenced for life, were involved in Crime No.37/2013 when Asif was only 19 years of age. Offences alleged to have been committed u/s 392 and Section 34 of the IPC find mention in the said crime. In 2018, the year in which Asif has been convicted in the present crime, he has committed another crime in which Sections 323, 389, 143, 147 and 148 of the IPC have been invoked. He is practically building his criminal record and that too in between the age of 19 years to 24 years. He, therefore, submits that this case cannot be compared

with Nohid and the application deserves to be rejected.

15. We have perused the testimonies of the witnesses with regard to the prime accused who are accused Nos. 1 to 4. Accused No.1 has been convicted with life imprisonment. The present applicant Asif is accused No. 3. Nohid is accused No.5 and is not included in the first 4 prime accused, who were the persons who brought iron rods to attack the gathering at Sambhaji Chowk. Without enlarging the size of this order, we are referring briefly to the testimony of the 4 eye witnesses viz P.W.No.1, P.W.No.7, P.W.No.9 and P.W.No.11 as under :-

[a] Each of these 4 eye witnesses have narrated the incident which occurred on 28/01/2016 when accused No.1 alongwith his friends were staring at P.W.No.1 and his friend at *Bajar Ves* at about 11.00 a.m. The accused appeared to be abusing P.W.No.1. However, by ignoring them, P.W.No.1 had left the place. At 2.00 p.m., accused Nos. 1 and 2 once again intercepted P.W.No.1 and his friend and manhandled them. It was then at 8.00 p.m., when all the accused went to the Sambhaji Chowk, where the 4 eye witnesses and some more persons were sitting under the Halogen lamp at the Sambhaji Chowk.

[b] According to P.W.No.1, accused Nos. 1 to 4 were carrying

iron rods and other persons were carrying wooden logs. They began an abusive verbal attack on the victims and accused No.1 Akram Shaikh hit an iron rod on the head of P.W.No.1. The present applicant Asif Shaikh alongwith accused Nos. 2 and 4 Yunus Shaikh and Naim Bagwan, beat P.W.No.1 with iron rods, wooden logs on his hands and legs and on his back. His friends ran away as they were terrified by the sudden assault. P.W.No.1 then narrates the manner in which the deceased was assaulted.

[c] P.W.No.7, an eye witness has stated in his testimony that he resides at Sambhaji Chowk and his father runs a jewellery shop by name Vaishnavi Jewellers. His double storeyed house is above the shop. He was taking education in Dr.D.Y.Patil Hotel Management Institute at Pune and had come to the native place on account of the Sankrant festival. He had not returned to the college thereafter. He has also narrated the manner in which accused Nos. 1 to 4 abused the deceased and P.W.No.1 and assaulted them with iron rods. As P.W.No.7 saw accused No.1 hit the deceased with an iron rod on his head and present applicant Asif hit P.W.No.1 with an iron rod on his head and started assaulting him, P.W.No.7 ran off to his house and went on the terrace watching the events that occurred on the ground. In his lengthy recording of the testimony, he has corroborated the version of P.W.No.1.

[d] In his extensive testimony, P.W.No.9 saw the prime accused Nos. 1 to 4 arriving with an iron rod on 28/01/2016 to the Sambhaji Chowk. Other persons accompanying them were holding wooden logs. The shop of P.W.No.9 on the ground floor was facing the area where the victims were sitting. He has also described the manner in which the deceased and P.W.No.1 have been assaulted with iron rods and wooden logs.

[e] P.W.No.11 has stated that he resides with his parents at Sambhaji Chowk and they have a shop by name Krushna Jewellers. He was a part of the group of boys sitting on the platform in Sambhaji Chowk. He noticed accused Nos. 1 to 4 and the other accused arrived at the same place with iron rods and wooden logs. The only difference is that he submits 4 names of accused (Asif not being one amongst them) who were wielding iron rods and he has not mentioned that Asif was also carrying an iron rod.

16. All these witnesses have strenuously supported the version of P.W.No.1 and have narrated the incident that they have seen. Their testimony could not be shaken in their cross examination.

17. Considering the fact that the present applicant Asif is said to be one amongst the 4 prime accused, merely because the iron rod or the wooden log was not recovered from him, would not mean that he

is not involved in the crime. Form V-C available in the record indicates that 5 wooden logs and 6 iron rods were recovered from accused No.1 Akram Akil Shaikh. These weapons were discovered at his instance and were given Article Nos. 7 to 18. It is, therefore, obvious that after completing the attack, all the iron rods and the wooden logs were collected and hidden at one place at the instance of accused No.1 Akram Shaikh. It was in this backdrop that the iron rods and the wooden logs were not recovered individually from the other accused persons including the present applicant Asif.

18. The applicant has taken a stand of *alibi*. He examined defence witness No.2 Ramesh Amolik who stepped into the witness box and stated that accused No.3 Asif was working in his Wire Rewinding Shop up to 9 p.m. He used to pay labour charges to the accused. On 28/01/2016, D.W.No.2 and accused No.3 Asif were working at the Lakhote Farm. He has not produced the appointment letter or identity card or attendance sheet or salary payment slip or any such documentary evidence, which would establish that accused No.3 Asif was working in his shop. Actually, D.W.No.2 admitted in cross examination that he is the President of the Republican Party of Belapur City. Regular Criminal Case No.202/2017 has been registered against him on the basis of a complaint filed by P.W.No.7

and offences u/s 341, 323, 504 and 507 of the IPC were invoked against him. He spent 93 days in jail. He conceded that the police have not recorded his statement, though he intended to offer the same.

19. Humans may lie but documents would not lie. The Trial Court has concluded that D.W.No.2 has deposed before the Court only to support the case of alibi by Asif. Since there is no corroboration and besides the word of the mouth, there is nothing on record to prove the Alibi, that the Trial Court has disbelieved the said witness.

20. We have considered the evidence available against the applicant Asif. We have perused the reasons assigned by the Trial Court for convicting him. Barring the statement of P.W.No.11, of not including the name of Asif in the list of iron rod holders, 3 eye witnesses including the surviving victim, have stated that Asif was carrying an iron rod and had assaulted the victim P.W.No.1, who suffered grievous injuries.

21. We, therefore, at this prima-facie stage, do not find that the case of Asif could be equated with the case of Nohid and he should be granted bail. Several criminal cases of unlawful assembly, attacking

persons and creating a scene of terror for heightening communal tension, have been registered against Asif. In view of the above, this application stands rejected.

(B.U.DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)