

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPLICATION NO.1660 OF 2020
IN
CRIMINAL APPEAL NO.506 OF 2020**

1. Sham S/o. Vishwanath Shinde
2. Sandeep @ Timepass S/o. Saudagar Bhojane .. Applicants

Versus

The State of Maharashtra .. Respondent

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Shri M.L. Dharashive, Advocate for the applicants
Shri R.B. Bagul, APP for the Respondent / State.

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

Date : 26-11-2020

ORDER (PER: B.U. DEBADWAR, J.) :-

1. This is an application filed by the appellants / applicants under Section 389 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') for suspension of substantive sentence and for bail pending the appeal.

2. Heard Shri M.L. Dharashive, advocate representing the appellants / applicants and Shri R.B. Bagul, Additional Public Prosecutor representing the respondent / State.

3. The appellants / applicants have assailed the judgment and order dated 20-08-2020 passed by the learned Sessions Judge, Latur in Sessions Case No.96 of 2014 whereby the appellants/applicants along with one other accused have been convicted for the offences punishable under Sections 394, 365, 342 r.w. 34 of the Indian Penal Code, 1860 (in short 'I.P.C.') and sentenced them to suffer imprisonment for life and to pay fine of Rs.10,000/- each, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 394 r.w. 34 of the I.P.C., rigorous imprisonment for 7 years and to pay fine of Rs.5000/- each, in default to suffer rigorous imprisonment for 3 months for the offence punishable under Section 365 r.w. 34 of the I.P.C. and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- each, in default to suffer rigorous imprisonment for one month for the offence punishable under Section 342 r.w. 34 of the I.P.C.

4. Facts of the case, in brief, are as under :

. Balbhim Ramdas Kaswid (PW-3), resident of village Tembhurni, Tal. Madha, Dist. Solapur was owner-cum-driver of the tanker bearing registration no.MH-04/DD-6176 (hereinafter referred

to as the 'tanker'). On 04-03-2014 Kirti Agrotech Ltd., Latur hired his tanker for transportation of 15990 kg refined edible oil to Kirti Agrotech Ltd., Boramani, Dist. Solapur. After filling edible oil in the tanker, he left Latur on very day at about 10:00 p.m., for proceeding to Solapur. He was alone in the tanker. On the way to the Solapur, during midnight at about 12:30 a.m. to 01:00 a.m. after crossing limits of village Ashiv, one tempo popularly known as '*Chota Hatti*' suddenly came from back side. On his halting the tanker, out of the three accused, one boarded from driver side and remaining two boarded in cabin from cleaner side. They were armed with hockey stick and iron rods. After entering into the cabin of the tanker, they gagged his mouth with adhesive tape and tied his hands and legs by rope. Then they assaulted him with hockey stick, snatched cash of Rs.5,500/- and cell phone from his person and fled away with tanker filled with edible oil, after leaving him in a field situated within the limits of Barshi, Tal. Solapur. After loosening the knot of the rope and removing adhesive tape, by which his mouth was gagged, at about 11:00 a.m. on 06-03-2014 he reached to Bhada Police Station, Dist. Latur and lodged the FIR.

5. On the basis of aforesaid, FIR lodged by Balbhim Ramdas Kaswid - the complainant crime bearing no.30 of 2014 for the

offences punishable under Sections 394, 364, 341, 342 read with 34 of the I.P.C. came to be registered against unknown robbers. Investigation of the said crime was carried by two Police Officers, one was Police Inspector - Usman Chand Shaikh (PW-10) and another was Satyawar Madhukar Hake (PW-11), Police Officer attached to Special Crime Branch, Latur. During the course of investigation, panchanama of the place (field) where the complainant Balbhim was left after gagging his mouth with adhesive tape and tying his legs and hands by rope was drawn. Empty tanker was seized from Lonand to Khandala road near Dhom Balkawadi canal situated within the limits of village Aahire where it was lying unclaimed. Then the accused were traced out and arrested. Thereafter at the instance of the accused cash of Rs.11,00,000/- which they had collected by selling refined edible oil filled in a tanker robbed by them was recovered. During further investigation, tempo (*Chota Hatti*) and mobile handset used in crime was seized at the instance of the accused - Suresh from his house situated at village Nandurga, Tal. Ausa, Dist. Latur. After completion of investigation as there found sufficient evidence, all the three accused came to be charge-sheeted for the aforesaid offences and offence under Section 420 r.w. 34 of the I.P.C.

6. The learned Sessions Judge, Latur framed charge for the

aforesaid offences against the accused on 28-03-2016 vide Exh.23. Conducted the trial and held all the three accused guilty for the offences under Sections 394, 365, 342 r.w. 34 of the I.P.C. and sentenced them to suffer imprisonment and fine as referred above and acquitted them for the offences under Sections 341 and 420 r.w. 34 of the I.P.C.

7. While taking us through the evidence on record, Shri Dharashive, Advocate representing the appellants/ applicants vehemently argued that, though the evidence adduced by the prosecution was highly insufficient to prove the complicity of the appellants / applicants, in the alleged crime, the learned Sessions Judge, Latur held them guilty for aforesaid offences and arbitrarily sentenced them to suffer life imprisonment, rigorous imprisonment of one year and rigorous imprisonment of one month for the offences under Sections 394, 365 and 342 r.w. 34 of I.P.C., respectively. The evidence of PW-3 Balbhim, who is a star witness, is full of omissions and contradictions. In spite of that the learned Sessions Judge, Latur convicted the appellants / applicants keeping implicit reliance on his evidence and recovery of an amount of Rs.11,00,000/- alleged to have been recovered at the instance of the appellants / applicants and co-accused. According to Shri Dharashive, Advocate, PW-3

Balbhim was not acquainted with the appellants/ applicants. Alleged incident of robbery took place during midnight on road leading to Solapur. FIR lodged by PW-3 Balbhim is against unknown robbers. Detailed description of robbers does not find place in the FIR. No identification parade to identify the robbers, was conducted after arresting the accused. In spite of all these shortcomings, learned Sessions Judge, Latur, only relying on evidence of PW-3 Balbhim falsely identifying the appellants / applicants in the Court during the course of evidence recorded, after about four years of incident, held the appellants / applicants along with other accused guilty for the alleged robbery. Lastly Shri Dharashive, Advocate representing the appellants/ applicants submitted that, the impugned judgment is incorrect and improper. The appellants / applicants have every hope of success in appeal. The offences for which the appellants / applicants have been convicted, are triable by the Judicial Magistrate First Class. Though the charge for the offence under Section 364 r.w. 34 of the I.P.C. framed which was triable by the Court of Sessions, the learned Sessions Judge, Latur did not hold the accused guilty for the said charge, however held them guilty for the lesser offence under Section 365 r.w.34 of the I.P.C. The sentence of life imprisonment awarded for the offence under Section 394 r.w. 34 of I.P.C. is highly disproportionate. Reasons for awarding life imprisonment for the

offence of robbery are not cogent. The appellants / applicants were on bail during the trial. They never jumped the bail. They are ready to furnish the bail to the satisfaction of this Court and also abide by the conditions that shall be imposed.

8. Per contra, Shri R.B. Bagul, Additional Public Prosecutor vehemently argued that, the impugned judgment and order is correct, proper and legal in all respects. The evidence of PW-3 Balbhim, a star witness, is clear, cogent and sufficient to connect the appellants / applicants with the incident of robbery. He was in the company of the appellants / applicants for sufficient period. Therefore, he has rightly identified them in the Court during the course of evidence. There is no reason to discard the evidence of PW-3 Balbhim on the point of identification, only for the reason that no identification parade was conducted. Nothing is brought on record through his cross-examination on the basis of which his evidence supported by recovery of huge cash, at the instance of the appellants / applicants and the co-accused establishes beyond doubt that, none other than all three accused committed the offence of robbery. According to Shri R.B. Bagul, Additional Public Prosecutor Section 394 of I.P.C. is punishable with imprisonment for life or with rigorous imprisonment for term which may extend to 10 years.

Having considered the fact that, the appellants/ applicants committed offence of robbery of tanker filled with huge edible refined oil during midnight at Highway, learned Sessions Judge, Latur rightly awarded maximum punishment of life imprisonment, which cannot be said to be disproportionate. There is no merit in the appeal, therefore, the appellants / applicants do not deserve to be released on bail by suspending the sentence.

9. In the light of aforesaid submissions made at bar, we have carefully gone through ocular and documentary evidence adduced by the prosecution. Out of 12 witnesses examined by the prosecution, Balbhim (PW-3), Dattaprasad (PW-9), Usman Chand Shaikh, Investigating Officer (PW-10) and Satyawar Madhukar Hake, Second Investigating Officer (PW-11) are material witnesses.

10. Herein this case, serious dispute is not about recovery of aforesaid amount, but serious dispute is about identification of appellants / applicants by Balbhim (PW-3).

11. The evidence on record demonstrates that,

- (i) Incident of road robbery took place during midnight on the road leading to Solapur from Latur,

- (ii) Detailed description of robbers does not find place in FIR,
- (iii) Balbhim (PW-3) was not acquainted with the appellants/ applicants.
- (iv) Identification parade to identify the appellants / applicants after their arrest was not conducted.
- (v) Balbhim (PW-3) during the course of his evidence, which was recorded after about 3 years and 10 months of the incident first time in the Court identified the appellants / applicants.

12. Having regard to the aforesaid evidence, finding of learned Sessions Judge, Latur about complicity of appellants / applicants with the incident of robbery, *prima facie*, not appears to be correct.

13. Moreover, punishment of life imprisonment for the offence of voluntarily causing hurt and committing robbery under Section 394 r.w. 34 of the I.P.C. appears to be disproportionate. Such a maximum punishment of life imprisonment prescribed in Section 394 of I.P.C. should be confined to a worst case. We feel that the present case does not fall under the category of worst case.

14. Having regard to the totality of facts and circumstances and the facts that, the appellants/ applicants were on bail during the trial, they never jumped the bail, they have deposited the fine amount, we inclined to bail them out during the pendency of appeal by suspending substantive sentence, subject to certain conditions. With this, we pass the following order :-

ORDER

- (i) The appellants / applicants are released on bail on their furnishing PR. bond of Rs.25,000/- (Rs.Twenty Five Thousand Only) with one solvent surety of like amount, each, subject to following conditions, by suspending the substantive sentence, during pendency of the appeal :-
 - (a) They shall attend Ausa Police Station, Ausa, Dist. Latur on every Monday and Saturday, during 01:00 p.m. to 04:00 p.m. till the appeal is finally decided.
 - (b) Police Station Officer Ausa, Dist. Latur shall record their attendance in Station Diary and obtain their signatures.
 - (c) They shall not indulge in any criminal activity.

- (d) Breach of any of the aforesaid conditions would be a good ground for cancellation of bail.
- (ii) Criminal Application is accordingly allowed.

(B. U. DEBADWAR)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE

Gajanan Punde.