

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

**3 CRIMINAL APPLICATION NO.1843 OF 2020
IN APEAL/333/2018 WITH ALS/92/2020 IN APPLN/683/2019
WITH APEAL/534/2020 WITH APEAL/923/2018 WITH
APEAL/533/2020 WITH APEAL/509/2020 WITH APEAL/333/2018**

SALMAN @ JAVED S/O SHABBIR BAGWAN	.. Applicant
VERSUS	
THE STATE OF MAHARASHTRA	.. Respondent

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Mr G.J. Pahilwan, Advocate, h/f. Mr S.K. Shaikh,
Advocate for the appellant (in Criminal Application No.1843 of 2020)

Mr S.B. Jadhav, Advocate for the appellant (in Criminal Appeal
Nos.533 of 2020 & 534 of 2020)

Mr Syed Zahed Ali, Advocate, h/f. Mr Saeed S. Shaikh,
Advocate for the appellant

(Appellant Nos.1, 2, 6 & 7 in Crim. Appeal No.333 of 2018)

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

Date : 19-10-2020

PER COURT :-

1. This application has been filed by the applicant Salman @ Javed s/o. Shabbir Bagwan, original accused No.8 in Sessions Case No.16/2016. 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.8, 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.8 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. Salman had withdrawn his first Application No.1330/2018 on 26/10/2018. He prays for parity.

4. 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.”

5. 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.

6. 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.

7. 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.”

8. 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 Salman has contended that his case is better than the case of Nohid.

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

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

[d] 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, who claim that Salman was armed with a wooden log.

[e] 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).

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

10. 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 Salman. 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.

11. 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. Salman was one amongst 3 accused who 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.

12. 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.

13. 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.

14. 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.

15. The learned Advocate appearing on behalf of the father of the deceased and P.W.No.1 informant, submits that the present applicant Salman has a history of crimes committed by him. He, therefore, submits that this case cannot be compared with Nohid and the application deserves to be rejected.

16. 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 Salman is accused No. 8. 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 Salman had assaulted the victims with a wooden log. Friends of the victims 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 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 (Salman not being one amongst them) who were wielding iron rods and he has not mentioned that Salman was also carrying an iron rod.

17. The case of the present applicant Salman is more serious than the role played by the Aasif, whose Criminal Application No.1213 of 2020 for seeking suspension of sentence and bail, has been rejected by us with detailed reasons, vide order dated 12-10-2020. The additional factors against the present applicant – Salman are as under:

(a) It was specifically proved that, blood stains were found on his clothes.

(b) The eye witnesses have consistently testified against Salman by stating that, the deceased was almost successful in making good his escape from the clutches of accused nos.1 to 4. However, accused no.8 - Salman along with accused no.6, two unknown persons and Suraj Rannanaware, ran behind the deceased, caught hold of him and dragged him back to the otta (platform) at Sambhaji Chowk, where accused no.1 hit the fatal iron rod blow on his head.

(c) If Salman had not dragged back the injured deceased, accused no.1 would not have got an opportunity to inflict the fatal blow on the head of the deceased.

(d) All eye witnesses have identified applicant - accused no.8 Salman who saw him drag the deceased back to the Sambhaji Chowk Otta, which was the cause behind the deceased being once again beaten, causing his death.

18. 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.

19. 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 Salman.

20. The learned Full Bench of this Court has recently taken a view vide Judgment dated 28-08-2020 in Criminal Application (APPA) No.270/2020 in Criminal Appeal No.336/2016 (Maksud Sheikh Gaffur Sheikh Vs. State of Maharashtra), while interpreting the scope S. 436-A of the Code of Criminal Procedure, 1973. The learned Full Bench was called upon to answer “*Whether a convict who has challenged his conviction under Section 374 of the Cr.P.C., 1973 is entitled to the benefit of Section 436-A of the Code?*”.

21. The learned Full Bench has answered the said issue ‘in the negative’ by concluding that, even if the principal conditions of Section 436-A Cr.P.C. are satisfied, bail would not follow as a matter of course. The Court may, for reasons being recorded in writing, deny relief of bail if it is of the opinion that, the release of the convict would be detrimental to the society and the Court is convinced that, *prima facie*, a strong case was made out by the prosecution which has attracted conviction of the accused.

22. We, therefore, at this prima-facie stage, do not find that the case of Salman could be equated with the case of Nohid and he should be granted bail. In view of the above, this application stands rejected.

(B. U. DEBADWAR)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE

Gajanan