

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 1331 OF 2020
IN
CRIMINAL APPEAL NO. 1711 OF 2019

Bhau Dharma Diwane ...Applicant
Versus
State of Maharashtra ...Respondent

Mr. Mr. Ajit Ram Pitale, for the Applicant.
Ms. P. P. Shinde, APP for the State/Respondent.

**CORAM: SMT SADHANA S. JADHAV &
N. J. JAMADAR, JJ.**

DATED : 26th NOVEMBER, 2020

P.C. :

1. This is an application for suspension of sentence under Section 389 of the Code of Criminal Procedure, 1973, and to enlarge the applicant Bhau Dharma Diwane (accused no.3) on bail till disposal of the appeal. The applicant has been convicted along with co-accused nos.1, 4, 5, 10 and 17 for the offence punishable under Section 149 read with Section 302 of the Indian Penal Code, 1860 ("the Penal Code"), for having formed an unlawful assembly and caused death of Haribhau ("the deceased") in prosecution of the common object of the said assembly and sentenced to suffer imprisonment for life and pay fine of Rs.10,000/- with default stipulation. The applicant, alongwith abovenumbered co-accused, was also convicted for

the offences punishable under Sections 148 and 149 read with 324 of the Penal Code and sentenced to suffer various periods of imprisonment and fine for having caused hurt to the prosecution witnesses, namely; Narayan, Vimal, Vatsala and Vasant, in prosecution of the common object of the said unlawful assembly, by the judgment and order dated 27th November, 2019, passed by the learned Additional Sessions Judge, Kalyan, in Session Case No.68 of 1996.

2. The prosecution case, as unfolded by Narayan Diwane (PW-1), the first informant, was that the deceased Haribhau was the Sarpanch of village panchayat Gersai-Palsoli. Accused no.1 Balu was insisting NOC from the villagepanchayat for occupancy rights over 11 acres of the government land. As the villagepanchayat refused to grant NOC, dispute arose between the deceased and accused no.1. There were certain incidents, prior to the occurrence in question on 25th September, 1987, in respect of which complaints and counter complaints were lodged.

3. On the date of occurrence, at about 7.15 am. the accused party had gathered armed with weapons. Sanjay, the son of the deceased had gone to a shop to fetch tea powder. The accused abused Sanjay. Thereupon Vasant (PW-4) went to bring back

Sanjay. Initially, Vasant (PW-4) was assaulted by the accused. After hearing commotion, Narayan and his other brothers Haribhau, the deceased, and Vilas went thereat. Thereupon accused no.1 Balu Gaikar exhorted the other accused to mount assault on the informant party. Accused Balu had thrown an acid bulb on the person of Haribhau. Accused no.3 Bhau Dharma Diwane had ignited the gelatin stick used for blasting and threw the same on the person of Haribhau, the deceased, who fell down. Thereupon the rest of the accused assaulted the deceased Haribhau and the other witnesses by means of deadly weapons, including sword, axe and sticks. The deceased Haribhau succumbed to the injuries and the rest of the witnesses also suffered grievous injuries.

4. The co-accused Laxman Shankar Diwane (A5), Suresh Ambo Gaikar (A10) and Chandrakant Ambo Gaikar (A11) had preferred an application for suspension of sentence and release on bail (Interim Application No.1 of 2019). By an elaborate order dated 1st October, 2020, we had suspended the substantive sentence imposed upon those co-accused till disposal of this appeal and released them on bail.

5. We have heard Mr. Pitale, the learned Counsel for the applicant and Ms. Shinde, the learned APP for the State at some length.

6. Mr. Pitale, the learned Counsel for the applicant urged that the role attributed to the applicant was, in effect, abandoned by the prosecution during the trial itself. Laying emphasis on the observations of the learned Sessions Judge in paragraph 31 of the impugned judgment, wherein it was, *inter alia*, recorded that the learned Special PP had fairly conceded that the prosecution evidence lacks conclusive details with regard to use of gelatin material (attributed to the present applicant), it was submitted that the case of the applicant for bail, thus, stands on a better footing than that of the applicants who were enlarged on bail.

7. In opposition to this, Ms. Shinde, the learned APP stoutly submitted that specific role of having thrown an ignited gelatin stick on the person of the deceased has been attributed to the applicant. In fact, the applicant (A3) can be stated to be the person who mounted the initial attack. Inviting the attention of the Court to the observations of the learned Sessions Judge in paragraph 31 of the impugned judgment, referred to above, to the effect that the witnesses being rustic villagers might have

rendered an inconsistent account, in a confused stage, it was urged that the applicant does not deserve to be enlarged on bail.

8. It would be suffice to note that Narayan Diwane (PW-1), the first informant, who was also an injured witness deposed that the applicant (A3) ignited the gelatin stick used for blasting and had thrown the same on the person of the deceased. The submission on behalf of the applicant that the prosecution had given up the said version finds support in the observations of the learned Additional Sessions Judge in paragraph 31, which read as under:

"31. It is the evidence of all the injured witnesses that the accused threw gelatin stick and it exploded and deceased fell back on the ground. This is consistent case of all the witnesses, the medical evidence does not support the contentions of burn marks of explosives and the Medical Officer has specifically stated that there is no evidence of injuries caused because of explosives or gelatin explosion. The Ld. Special PP fairly conceded that the prosecution evidence lacks conclusive details with regard to use of such gelatin material. It is the basis of defence namely that highly exaggerated contentions have been made to falsely implicate the accused. The witnesses alleges throwing of gelatin and accused falling down, he was also assaulted with acid bulb nearly at the same time. Thus confusing the effect by rustic villagers cannot be ruled out. The deceased falling down because of the gelatin burst far away from him not causing any burn injuries may be probable."

9. Moreover, the testimony of Mr. Pramod Satpute (PW-7) the Autopsy Surgeon seals the issue. Pramod Satpute (PW-7) claimed to have found acid burn marks on the left side of the face and nose and right lower leg, from knee to ankle, on the

body of the deceased. He conceded in the cross-examination in no uncertain terms that burn injuries on the dead body were of acid and not by any other substance. It is the case of the prosecution that accused no.1 Balu Gaikar had thrown acid bulb on the person of the deceased.

10. In the aforesaid view of the matter, there is an element of uncertainty about the role played by the applicant in the occurrence. The fact that the applicant was on bail for almost 30 to 32 years during the pendency of trial, also bears upon the entitlement of the applicant to be released on bail. We are thus inclined to exercise the discretion in favour of the applicant. Hence, the following order:

: O r d e r :

- (i) The application stands allowed.
- (ii) The substantive sentence imposed upon the applicant Bhau Dharma Diwane (A3) by the learned Additional Sessions Judge, Kalyan, in Sessions Case No.68 of 1996, by the judgment and order dated 27th November, 2019, stands suspended till disposal of this appeal.
- (iii) The applicant Bhau Dharma Diwane (A3) be released on bail on furnishing a P.R. Bond in the sum of Rs.25,000/- with one or two solvent sureties in the like

amount to the satisfaction of the learned Additional Sessions Judge, Kalyan.

(iv) The applicant shall attend the Court of Additional Sessions Judge, Kalyan, to mark his presence, once in six months, on the date to be specified by the learned Additional Sessions Judge, Kalyan. In the event of two consecutive default in attending the Court on the dates so specified, the learned Additional Sessions Judge shall make a report to the High Court and thereupon the State shall be at liberty to move for cancellation of bail.

(vi) The application stands accordingly disposed of.

[N. J. JAMADAR, J.]

[SMT SADHANA S. JADHAV, J.]