

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.326 OF 2021
IN
CRIMINAL APPEAL NO.82 OF 2021

1. Rukaya Bahaddur Khan]
2. Sharif @ Chippi Asaraf Shaikh] ...Applicants

Versus

The State of Maharashtra] ... Respondent

Mr. Amir M. Shaikh for Applicants.
Ms. M. M. Deshmukh, APP for State.

CORAM :- PRASANNA B VARALE &
S. M. MODAK, JJ.

DATE :- 22 FEBRUARY, 2021

P. C. :-

1. Heard learned Counsel for Applicants and learned APP for State.

2. The Appeal filed by both these Appellants bearing Criminal Appeal No.82/2021 is challenging the Judgment and Order passed by the learned Additional Sessions Judge, Thane, in Sessions Case No.24/2018 whereby the accused nos.1 and 2 are convicted for the offence punishable under Section 302 read with 34 of the IPC and are sentenced to suffer rigorous imprisonment for life along with fine and the accused nos.1 and

2 are also convicted for the offence punishable under Section 201 read with 34 of the IPC and are sentenced to suffer rigorous imprisonment for 3 years along with fine. The Appeal is admitted by this Court by the order dated 12/02/2021.

3. By the present application, the Applicants pray for their enlargement on bail and suspension of sentence pending Appeal. Learned Counsel for the Applicants vehemently submitted that the learned trial Court committed serious error in appreciating the evidence. The learned Counsel then submitted that the learned trial Court appreciated the evidence of PW 5 as a gospel truth when there were many discrepancies in the version of PW 5 who is a child witness. The learned Counsel then submitted that the investigating agency failed to conduct any identification parade and the identity of these accused persons is brought on record only by way of a weak evidence of PW 5 – the child witness. Another ground raised by the learned Counsel for the Applicants in challenge to the version of PW 5 is an inordinate delay in recording the statement of the witness i.e. PW 5. The learned Counsel for the Applicants then submitted that the Applicant No.2 was on bail during the trial and he has not misused the liberty granted to him. It is also submitted by the learned Counsel that considering the fact that the Appeal is filed recently i.e. in the year 2021 and considering the fact that

there is a large pendency of old Appeals, there is possibility that the Appeal of the Appellants may not be listed for hearing in near future. Thus, these are the ground canvassed by the Learned Counsel for the Applicants in support of the application.

4. Learned APP appearing for the State, *per contra*, vehemently opposed the application. It was submitted by the learned APP that the learned trial Court has not committed any error in appreciating the evidence of the witnesses namely PW 2, PW 3, PW 8 and the important witness i.e. PW 5, an eye witness. The learned APP also submitted that the at the stage of consideration of application for bail, this Court may not undertake the exercise of in-depth scrutiny of the evidence as the same can be done at a later stage i.e. while hearing the Appeal on merits for final decision.

5. On going through the Judgment of the trial Court, we are of the opinion that the application is devoid of merits. Though the learned Counsel for the Applicants vehemently submitted before this Court that the version of PW 5 – child witness – suffers from discrepancies, on perusal of the evidence of PW 5, we found that these so called ‘discrepancies’ are minor in nature and these discrepancies are of not such a nature so as to throw the version of PW 5, which is otherwise

trustworthy and inspiring confidence of the Court. We are also unable to accept the submission of the learned Counsel for the Applicants that the investigating agency committed error in not conducting the identification parade and there is no sufficient material on record to establish the identity of the applicants-accused. Insofar as the Applicant No.1 is concerned, she is mother of PW 5. As such, there is no question of an erroneous identification of the accused no.1 by PW 5 who is the daughter of the accused – Applicant No.1. Insofar as the Applicant No.2 is concerned, a perusal of testimony of PW 5 clearly shows that the witness was knowing the accused – Applicant No.2 as he was a frequent visitor to the house of the deceased. The submission of the learned Counsel for the Applicants that there is inordinate delay in recording statement of PW 5, is satisfyingly explained in the Judgment of the trial Court and more particularly in para 26 of the Judgment. The learned trial Judge has observed that an explanation was provided by the I.O. for recording the statement of PW 5 after 10 days and that is, PW 5 being a child of tender age, was under shock and the investigating agency thought it fit to give some time to the witness so as to come out of the shock. On perusal of the evidence of PW 5, we find that though the witness is a child witness, was carrying a reasonable and rational mental capacity and this reflects from the replies given by the child witness to the questions asked in the cross-examination. The learned Counsel for the Applicants submitted that

the Applicant No.2 was on bail during trial and has not misused the liberty granted to him. In our opinion, the consideration for grant of bail during trial defer from the consideration post trial for the important reason that at the stage of trial, the trial Court is yet to arrive at a final conclusion about the guilt of the accused. Now here, the trial Court, on appreciation of evidence, found that the investigating agency brought sufficient material against the accused persons to establish the guilt of the accused persons and accordingly passed Judgment and Order of conviction awarding sentence to the accused – Applicants. In view of these facts, we are of the opinion that the application is devoid of merits and deserves to be rejected.

6. We find some merit in the submission of the learned Counsel for the Applicants that considering the fact that the Appeal is filed in this Court in the year 2021 and there are old Appeals, the Appeal filed by these Appellants may not be listed for hearing in near future. In view of this fact, the Applicants are at liberty to pray for early hearing of the Appeal if the Appeal is not listed for hearing for the reasonable period.

7. Application is accordingly disposed of.

(S. M. MODAK, J.)

(PRASANNA B. VARALE, J.)