

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

**CRIMINAL APPLICATION NO. 1002 OF 2021 IN
CRIMINAL APPEAL NO. 236 OF 2021**

01 Rahul s/o Mohan Kakade;

02 Amol s/o Mohan Kakade

Applicants

Versus

The State of Maharashtra & another

Respondents

Mr. R. S. Deshmukh, Senior Counsel along with Mr. Govind A. Kulkarni, advocate i/by Mr. Devang R. Deshmukh, advocate for the applicants

Mr. S. J. Salgare, with Mr. M. M. Nerlikar, APPs for Respondent No.1.

**CORAM : V.K.JADHAV AND
SANDIPKUMAR C. MORE, JJ.**

DATE : 01st April, 2022.

PC:

1 Criminal Appeal No. 236 of 2021 is preferred against the judgment and order of conviction dated 19.03.2021, passed by the Additional Sessions Judge-1, Jalna in Sessions Case No. 150 of 2015, convicting the appellants-accused for the offence punishable under Section 304 (Part I) read with Section 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for ten years each and to pay fine of Rs.One lakh each, in default, sentencing them to suffer simple imprisonment for one year each. The learned Judge has also directed that compensation out of the

fine amount be paid to Respondent No.2 herein. Both the applicants-accused have preferred this application for suspension of substantive part of their sentence and for getting released on bail.

2 The prosecution case, in brief, is that:

On account of previous enmity, the incident had taken place. Both the applicants-accused allegedly used weapons i.e. iron rod and knife and murdered deceased Sattar. Applicant no.1 – Rahul allegedly used knife and inflicted the injuries on the abdomen of deceased Sattar, whereas, applicant-accused no.2 Amol has given a single blow of iron rod on the head of deceased Sattar.

3 Learned Senior Counsel Mr. Deshmukh submits that in respect of the incident occurred on the same date, time and place, on the basis of complaint lodged by applicant no.2 – Amol, Crime No. 88 of 2015 came to be registered in the same Police Station against deceased Sattar and nine others for having committed an offence punishable under Sections 324, 143, 147, 148, 149, 504, 323 read with Section 34 of the Indian Penal Code, under Section 135 of the Bombay Police Act and under Section 3(1)

(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities), Act. The learned Senior Counsel submits that in connection with the said crime, investigation has been carried out and charge sheet came to be submitted, which is numbered as RCC No. 820 of 2015 and subsequently, same has been registered as Special Case (Atrocity) No. 153 of 2019, which is still pending.

4 Learned Senior Counsel submits that it is, thus, well settled that where there are cross cases, the same Judge must try both the cases one after another and after recording of evidence in one case is completed, the same Judge may hear the arguments but reserve the judgment and thereafter proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same Judge must thereafter dispose of the matters by two separate judgments. The learned Senior Counsel submits that despite the fact about the cross case brought to the notice of the trial Court, the learned Judge of the trial Court has not proceeded with the cross case nor called the said cross case for trial before him along with the present case. Learned Senior Counsel submits that the applicants-accused have examined three defence witnesses and also proved the complaint through D. W. 3, filed in connection with

the said crime, which is marked at Exhibit-172. Learned Senior Counsel Mr. Deshmukh submits that though the learned Judge of the trial Court has not tried the cross case along with this case, however, has considered the aspect that the prosecution has failed to prove injuries on the person of the applicants-accused and also considered that the incident had taken place on sudden and grave provocation. Thus, the trial Court has convicted both the applicants-accused for the offence punishable under Section 304 (Part I) of the Indian Penal Code.

5 The learned Senior Counsel submits that applicant-accused no.1 Rahul is in jail since 1st July, 2015 and he has almost undergone imprisonment of seven years so far. Learned Senior Counsel submits that so far as applicant-accused no.2 – Amol is concerned, he was on bail during the trial.

6 The learned A. P. P. Mr. Salgare, assisted by learned A. P. P. Mr. Nerlikar, submits that there are three eye witnesses to the incident and their evidence is reliable, trustworthy and consistent. According to these three eye witnesses, out of them one is an independent eye witness, applicant-accused no.1 Rahul has given blows of knife on the abdomen of deceased Sattar and

applicant-accused no.2 Amol has given a blow of iron rod on the head of deceased Sattar. The learned A. P. P submit that the prosecution has proved homicidal death. The learned A. P. P submits that so far as the consequences for not following the mandate that the cross case should be tried along with the present case is concerned, same can be considered during final hearing of the appeal.

7 Learned A. P. Ps submit that as the prosecution has also preferred Appeal No. 296 of 2021 for enhancement of the sentence and also Appeal against Acquittal bearing No. 45 of 2021 against the acquitted accused, both the applicants-accused may not be released on bail.

8 Learned Senior Counsel Mr. Deshmukh has raised following points before us:

(i) That the cross case should have been tried together with the present case irrespective of the nature of offence involved and in view of the same, serious prejudice has been caused to the defence of the applicants-accused;

(ii) The trial Court has recorded conviction against the applicants-accused for the offence punishable under Section 304 (Part I) of the Indian Penal Code i.e. culpable homicide not amounting to murder and in view of the same, both the applicants-accused are entitled to be released on bail.

(iii) Applicant-accused No.1 – Rahul is in jail since 1st July, 2015 in connection with the present case and as such he has almost undergone imprisonment of seven years entitling him to be released on bail and further, applicant-accused no.2- Amol was on bail during the trial.

8 We have carefully gone through the contents of the complaint Exhibit-172. Present applicant-accused no.2- Amol is the complainant in the said case and on the basis of his complaint, Crime No. 88/2015 came to be registered in the same Police Station. It has been alleged in the said complaint that the incident had taken place on 29.06.2015 at about 7.45 p.m. in front of one Sham Tea House. It is further alleged in the complaint that deceased Sattar along with other accused persons had been to the said spot and extended beating to him and also to applicant-accused no.1 Rahul initially with the help of fists, kicks and blows

and thereafter by wooden log. The applicants-accused have been referred to the Medical Officer who has examined both of them and issued Medico Legal Certificates. Both the applicants-accused have sustained injuries.

9 The present incident had taken place on 29.06.2015 at about 7.45 p.m. in front of Sham Tea House. It, thus, appears that the date, time and place of both the complaints is same.

10 Learned Senior Counsel has placed reliance on following two cases:

- (i) **Nathi Lal and others Vs. State of U. P. & another**, 1990 (Supp) SCC 145; and
- (ii) **State of M. P. Vs. Mishrilal (dead) & others**, (2003) 9 SCC 426;

11 In the case of **Nathi Lal** (*supra*), in para no. 2, the Hon'ble Supreme Court has made following observations:

“2 We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned

Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.”

12 In the case of **State of M. P. Vs. Mishrilal (dead) & others** (*supra*), in para no.8 of the judgment, the Hon’ble Supreme Court has made following observations:

“8 In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the

accused Mishrilal in respect of the same incident. It would have been just, fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathi Lal case. The cross-cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross-cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either one of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from falsehood. Unfortunately, the investigating officer has failed to discharge the obligating resulting in grave miscarriage of justice.”

13 In the instant case, undisputedly, the trial Court has not tried the cross case with the present case. Though learned A. P. P. Mr. Salgare and learned A. P. P. Mr. Nerlikar have carried out extensive research, however, they have not come across with any judgment observing the consequences of not following the

mandate of trying the cross case together in terms of the ratio laid down by the Hon'ble Supreme Court in the afore-cited judgments. Following questions have arisen in connection with the same:

- (a) Firstly, as to whether, in the instant case, the defence of the applicants-accused has been seriously prejudiced;
- (b) Secondly, as to whether in the absence of the trial of the cross case, can there be a fair trial; and
- (c) furthermore, the question also arises, as to whether the entire trial, in which conviction is recorded, stands vitiated.

All these three questions need consideration.

14 In the facts of this case, applicant-accused no.1 – Rahul has inflicted blows on the abdomen of deceased Sattar with the help of knife. The prosecution has examined P. W. 11 Dr. Sachin Nanasaheb Darandale, who conducted *post mortem* examination on the dead body of deceased Sattar. In his opinion, the cause of death is, due to “*Septicemia and bilateral lobar pneumonia in a post-operated case of exploratory laparotomy and*

splenectomy following multiple stab wounds over abdomen". The eye witnesses have specifically deposed about the multiple blows given on the abdomen of deceased Sattar by applicant-accused no.1-Rahul by using a sharp and dangerous weapon knife.

15 So far as applicant-accused no.2 Amol is concerned, though P. W. 11 Dr. Darandale has opined that the injuries on the abdomen so also on the head are sufficient in the ordinary course of nature to cause death, however, as per the evidence of the eye witnesses, applicant-accused no.2 Amol has given a single blow of iron rod on the head of the deceased. Thus, considering the same and since applicant no.2 – Amol was on bail during the course of trial, we are inclined to release applicant no.2 Amol on bail. However, considering the role of applicant-accused no.1-Rahul and since the questions raised by learned Senior Counsel Mr. Deshmukh are remained presently unanswered, we are not inclined to release applicant-accused no.1 Rahul on bail. However, we grant liberty to applicant-accused no.1 – Rahul to file an application for expeditious hearing of the appeal.

16 Hence, we pass the following order:

(i) Criminal Application is hereby allowed to the extent of applicant-accused no.2 – Amol Mohan Kakade.

(ii) Pending hearing and final disposal of the appeal, substantive part of the sentence awarded by the learned Additional Sessions Judge-1, Jalna, in Sessions Case No. 150/2015, vide judgment and order dated 19.03.2021, sentencing him to suffer rigorous imprisonment for ten years and to pay fine of Rs.One lakh, in default, sentencing him to suffer simple imprisonment for one year for the offence punishable under Section 304 (Part I) of the Indian Penal Code, is suspended to the extent of applicant-accused no. 2 – Amol Mohan Kakade, and applicant-accused no.2 Amol Mohan Kakade be released on bail on furnishing P. R. bond of Rs.20,000/- with one solvent surety for the like amount.

(iii) Application of applicant-accused no.1 – Rahul Mohan Kakade is hereby rejected.

(iv) We direct that the Record & Proceedings be sent back to the trial Court forthwith with further direction to the trial Court to prepare the paper book, as expeditiously as possible.

(v) The applicant-accused no.1 – Rahul is at liberty to file an application for expeditious hearing of appeal.

17 Criminal Application is accordingly disposed of.

(SANDIPKUMAR C. MORE)
JUDGE

(V.K.JADHAV)
JUDGE

adb