

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 2788 OF 2021
IN
CRIMINAL APPEAL NO. 673 OF 2019

1. Kundan Chandrashekhar Choudhary ...
2. Damodhar @ Babu Kanhayya Sav Appellants/Applicants
V/s.
The State of Maharashtra ... Respondent

Mr. Anil Munde advocate for the applicant No. 1 and 2/original
accused no. 1 and 3

Mr. Arfan Sait- APP for the respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATED : MARCH 15, 2022.

PC. :

. This application was listed before the Court on 11th March 2022. After hearing both the sides the order was dictated in the Court and the application was disposed of. However, the order was not signed.

2. Learned APP mentioned the matter yesterday i.e 14th March 2022 and submitted that there is a suppression of vital fact from the Court. Hence the application was directed to be listed on board today.

3. Learned APP submit on instructions that, the applicant no.1 was granted Covid Parole by the Court, Nagpur Bench by order dated

31st August 2021. He continues to be on Parole. Hence his application for suspension of sentence may not be considered. He is already out of Jail. This fact was not brought to the notice of the Court by learned Advocate for applicant.

4. It is further submitted that the present application was filed on 17th November 2021 and it was registered on 18th November 2021. The applicant was released from jail on 18th November 2021. The applicant no. 1 was aware that he is out of custody on account of Covid Parole. This Court would not have considered grant of relief to both applicants since applicant No.1 is not in custody.

5. Learned Advocate Mr. Munde submitted that application was sent to jail for affirmation on 11th November 2021 and it was affirmed on 11th November 2021 before the Jailor at Amravati Central Prison. On the date of affirmation of the application, the applicant was in custody. There was no deliberate intention to suppress facts from this Court. He was not aware that applicant no.1 is out of Jail when this application was heard by this Court. It is submitted that the application of applicant no.1 may be allowed to be withdrawn with liberty to prefer fresh application for suspension of sentence and bail as and when the applicant no.1 surrenders to custody.

6. In view of aforesaid facts order passed on 11/03/2022, which is not yet signed is recalled qua applicant no.1. The application of applicant no.1 is allowed to be withdrawn.

7. This is an application for suspension of sentence and grant of bail pending Criminal Appeal No.673 of 2019. By judgment and order dated 26th February 2019 the applicants are convicted for the offence under Section 304(II) of Indian Penal Code r/w 34 of Indian Penal Code. They are sentenced to suffer rigorous imprisonment for ten years.

8. The case of prosecution is that the deceased was conducting his business of chicken shop. On the day of incident the accused had visited the shop of deceased. They were demanding chicken on credit. The deceased was demanding arrears of previous sale of chicken. There was quarrel between accused and deceased. The accused assaulted the deceased. One of them tried to strangle his neck. Another person gave fist blow on his chest. Another accused gave kick blow. The victim fell down. He was taken to hospital. He was declared dead. The FIR was registered for offence under Section 302 of IPC. The accused were arrested. Charge sheet was filed.

9. Learned advocate for applicants submitted that the applicant No.2 was on bail during trial. He has not misused the facility of bail. On the date of conviction he was taken in custody. He has undergone the sentence of about four years. There are no criminal antecedents against applicant No.2. The incident had occurred on account of sudden quarrel. The accused were not armed with any weapon. Post mortem report is silent about the cause of death. There is no opinion on record showing that death was result of the assault by accused. The Trial Court has opined that there was no intention to kill the deceased.

10. Learned APP submitted that manner in which the victim is assaulted may be considered. All the accused had assaulted him. The informant is the wife of deceased. She was present at the scene of offence. She was pushed by them. Specific role was attributed to the applicants. All of them had assaulted the deceased and accused fell down on ground and declared dead. Therefore, bail may not be granted. The co-accused had preferred application for suspension of sentence and grant of bail. That application was rejected by order dated 14-3-2019. While rejecting said application this court has taken into consideration the evidence of medical officer. The said order has attained finality. Hence, application for suspension of sentence may be rejected.

11. The incident in question had occurred on 26-1-2015. Undisputedly the quarrel erupted suddenly. Accused were not armed with any weapon. The victim was assaulted by fist and kick blows. The post mortem was conducted. The post mortem report is silent with regards to the opinion of cause of death. The report indicate that "opinion is reserved, pending for accessory examination report". In the evidence of medical officer PW-7 Dr.Shashank Tyagi he refers to the fact that he conducted the post mortem. On the basis of injuries he can say that the cause of death might be due to cardiac arrest due to vagal inhibition. The police report shows use of multiple blunt force on chest portion and neck portion of the deceased from which he was of the opinion that that use of force in the neck region may result in vagal inhibition. It is pertinent to note that post mortem report was silent on the cause of death. In the cross-examination he stated that any type of abrasion does not result in cause of death.

12. It is pertinent to note that application of the co-accused was rejected on 14-3-2019. The fact remains that applicant No.2 is in custody for

a period of four years. The applicant No.2 was on bail during trial. There is no adverse report about misuse of facility of bail. The accused were not armed with weapon. The applicant No.2 is not having criminal antecedents. In the circumstances, sentence of imprisonment can be suspended.

Hence, I pass following order :

ORDER

(i) Application qua applicant no.1 is allowed to be withdrawn with liberty to prefer application for suspension of sentence and grant of bail after he surrenders to custody on expiry of covid Parole.

(ii) The sentence of imprisonment imposed vide judgment and order dated 26th February 2019 by learned Additional Sessions Judge, City Civil & Sessions Court, Greater Mumbai in Sessions Case No.580 of 2015 qua applicant no.2 is suspended and he is directed to be released on bail on executing PR bond in the sum of Rs.20,000/-with one or more sureties in the like amount;

(iii) The applicant No.2 is permitted to furnish cash bail in the sum of Rs.20,000/- for a period of eight weeks in lieu of sureties;

(v) The applicant shall not contact the relatives of victim in any manner;

(vi) The applicant No. 2 shall attend Trial Court once in

six months on First Saturday of the month till disposal of the Criminal Appeal;

(vii) In the event there are two consecutive defaults in attending the Trial Court, the Trial Court shall submit report to this Court;

(viii) In the event of default committed by the applicant in attending the Trial Court, the prosecution will be at liberty to prefer application for cancellation of bail.

(PRAKASH D. NAIK, J)