

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPLICATION (APPA) NO.1043/2019

IN

CRIMINAL APPEAL NO.799/2019

Nilesh @ Bhuriya s/o. Ashokrao Athawale Vs. The State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri R. M. Daga, Advocate for Applicant.
Shri S. M. Ghodeswar, A.P.P. for Non-applicant/State.

CORAM : V. M. DESHPANDE AND
AMIT BORKAR, JJ.

DATE : 29/04/2022.

1. This is an application under Section 389 of the Code of Criminal Procedure for suspension of substantive jail sentence and for grant of bail. This application is filed by the original accused No.2 Nilesh @ Bhuriya Ashokrao Athawale. He along with other five accused persons were convicted by the learned Additional Sessions Judge, Amravati on 02.11.2019 in Sessions Case No.36/2016. By the same, all the accused persons were convicted for the offences punishable under Sections 302, 307, 324, 143, 147, 148 and 149 of the Indian Penal Code. Principally, they are all sentenced to suffer life imprisonment for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code though they are convicted and sentenced for different durations for the offences punishable under Sections 307, 324 read with Section 149 of the Indian Penal Code. The learned Judge has directed that all the sentences shall run concurrently.

2. Heard Shri R. M. Daga, learned counsel for the applicants and Shri S. M. Ghodeswar, learned A.P.P. for the State. Criminal Appeal No.799/2019 wherein the present application is filed, it is filed by two accused persons namely Nilesh (the present applicant) and Dinesh (original accused No.3). On 04.12.2019, this appeal was admitted and record and proceedings were called. It was ordered that the application for bail shall be considered after the receipt of the record and proceedings. Accordingly, the record and proceedings are received and those are placed before the Court when this application was placed before this Court.

3. According to the learned counsel for the applicant, so far as present applicant is concerned none of the prosecution witnesses are attributing any overt act on his part in respect of assault made on deceased Sayyad Mushir Alam @ Chintu nor they are attributing any overt act in respect of the assault on PW-12 Baba. He submitted that the only overt act that is attributed to the present applicant is that he gave slap on cheek of PW-1- Tanvir Alam. He submitted that no recovery is made at his behest on his disclosure statement. He submitted that his clothes were found to be having human blood stains. He submitted that the applicant was on bail during the trial and at no point of time he has misused the liberty granted to him. He therefore prayed that the application be allowed.

4. Per contra, the learned A.P.P. Shri S. M. Ghodeswar would vehemently submit that the applicant was found to be guilty with the aid of Section 149 of the Indian Penal Code. He submitted that since his presence was there at the time of incident, he was rightly convicted by the trial Court. He therefore, prayed that the application be dismissed.

5. PW-1-Tanvir, PW-12-Sayyad Masrur @ Baba and PW-13-Suresh Rajgure are the eye witness. Incident in question has occurred in the premises of the hotel of PW-13- Suresh Rajgure. Oral report is at Exh.99 lodged by PW-1-Tanvir. Perusal of the Exh.99 would show that insofar as actual assault on deceased is concerned first informant and the eye witness has attributed all the overt acts to accused No.1 – Umesh Athawale. He also in Exh. 99 has attributed role of Umesh Athawale. The name of the present applicant was not mentioned in the First Information Report. It is not at all necessary also that the names of all the assailants should be mentioned in the First Information Report. From the witness box PW-1- -Tanvir discloses to the Court that he knows all the accused persons. In his substantive evidence, he did state that accused No.1 Umesh Athawale has assaulted deceased Chintu and accused No.4 – Shubham and accused No.5 - Ankush assaulted on the deceased by means of sword and knives in their hands. He also said that when he tried to rescue, he was also assaulted by Umesh Athawale by means of sword. It has

also come in his evidence that accused No.1 Umesh also assaulted on PW-12- Baba.

6. Even in his substantive evidence, he did not attribute any overt act qua deceased or injured Baba by the present applicant. The only role that is attributed is that he gave slap to PW-1- Tanvir. The learned A.P.P. also did state that no role is attributed to the present applicant by PW-12- Baba. Prosecution has also examined Suresh PW-13 in whose hotel premises the incident in question has occurred.

7. His evidence would show that prior to the actual incident of assault, accused No.1 Umesh had been to his hotel and placed order for Egg Curry. When this prosecution witness has prepared the same, Umesh picked up a quarrel with two other customers who were sitting in the hotel. His evidence would show Egg Curry was served to Umesh and he gave understanding not to quarrel that time. According to his evidence he gave kick blow on leg of one other customer, resultantly, quarrel ensued in between Umesh - accused No.1 and other customers. Umesh thereafter threw Rs.200/- towards Suresh and extended threat to him and left the place. His evidence however shows that after his departure, after five minutes, present applicant came and asked what happened in the hotel. Upon that as per the evidence of Suresh, he narrated this incident to him. His evidence further shows that thereafter, Umesh came and he was accompanied by other accused

persons. According to his evidence other accused persons and Umesh started assault. His evidence also corroborates the evidence of PW-1 and PW-12 that Umesh and the other accused persons assaulted the deceased and Baba. However his evidence is conspicuously silence about any overt act on the part of the present applicant qua deceased and the injured witness – Baba.

8. In this case, scientific evidence is also available on record which is discussed by the learned Judge in the judgment. Paragraph No.55 of the judgment it shows that CCTV footage shown the presence of the present applicant however except giving fist blow by the present applicant on the face of the informant, no other overt act was captured by any of the CCTV cameras which were available in the hotel and nearby places.

9. The prosecution case as it is available through the eye witness version and other documents, it is clear that the present applicant was not holding any dangerous weapon though a cursory observation is made by the learned Judge in the impugned judgment that all the accused persons were holding dangerous weapon. The learned Judge has convicted a present applicant with the aid of Section 149 of the Indian Penal Code that there was a common object on the part of all the accused persons to eliminate deceased. Of course, the motive is always locked in the closed mind of the accused person however that can be dissected through the attending circumstance. One of

the attending circumstance would be as to whether the persons who is convicted with the aid of Section 149 was armed with deadly weapon. In the present case, there is no evidence to show that the present applicant was armed with any deadly weapon. Further there is no evidence on record to show that the present applicant obstructed the deceased or Baba from running away from the spot or he forbidden them just to receive murderous assault from the other accused persons. In our view, in respect of the common object, the detailed inquiry will have to be made at the time of final hearing of this appeal. Presently, the learned counsel for the applicant has sufficiently pointed out that *prima facie* there is nothing to show that at the time of actual assault, the applicant was sharing common object with other assailants.

10. Presently, this Court is taking the criminal appeals of 2018-19 onwards. Thus, it is clear that in near future, the appeal of the present applicant will not be taken up for final hearing. In addition to the aforesaid, the applicant was on bail during trial and at no point of time he is misused the liberty granted to him. Cumulative effect of the discussion made in the present paragraph, we are of the view that the application filed on behalf of the applicant can be considered favourably. Resultantly, we pass following order.

ORDER

i] The judgment and order of conviction convicting the applicant Nilesh @ Bhuriya s/o. Ashokrao Athawale in Sessions Case No.36/2016 by the learned Additional Sessions Judge, Amravati dated 02.11.2019 shall remained suspended qua applicant only during the pendency of the present appeal.

ii] Applicant Nilesh @ Bhuriya s/o. Ashokrao Athawale be released on bail on he executing PR bond of Rs.5000/- with one solvent surety in the like amount.

iii] The applicant is directed to report to the Police Station City Kotwali of Amravati once in three months and shall mark his presence during the pendency of the present appeal.

iv] The applicant is directed to remain personally present before this Court at the time of final hearing.

v] The learned Judge who ultimately will be issuing the release of warrant shall ensure that entire fine amount is deposited by the present applicant if not already deposited.

With these observation, the application is disposed of.