

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

7 CRIMINAL APPLICATION NO.182 OF 2022
IN
CRIMINAL APPEAL NO.38 OF 2022

MANOHAR KONDIBA WAGHMARE
VERSUS
THE STATE OF MAHARASHTRA

...

Mr. R.A. Tambe, Advocate for applicant

Mr. R.D. Sanap, APP for respondent

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CORAM : SMT. VIBHA KANKANWADI
Y.G. KHOBRAGADE, JJ.

DATE : 02nd MAY, 2023

ORDER : (SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed for suspension of sentence and release of the applicant on bail pending hearing and final disposal of criminal appeal.

2 The applicant is the original accused No.1 in Sessions Case No.130/2017. He faced the trial for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code before learned Additional

Sessions Judge-4, Parbhani. He has been held guilty by Judgment and order dated 03.11.2020 and has been sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default to suffer rigorous imprisonment for six months. He has filed Criminal Appeal No.38 of 2022 to challenge the said conviction. By order dated 21.01.2022 his appeal has been admitted.

3 Heard learned Advocate Mr. R.A. Tambe for the applicant and learned APP Mr. R.D. Sanap for the respondent.

4 It has been vehemently submitted on behalf of the appellant/applicant that it is the case of the prosecution that the applicant and wife of deceased had illicit relations and, therefore, they have committed murder of deceased. Accused No.2 was the wife of deceased and she has been acquitted by the learned Trial Judge, but the present applicant has been held guilty even under Section 34 of the Indian Penal Code. No doubt, he was on bail throughout the trial, but, still if we consider the evidence that was adduced by the prosecution, the case is now made out for suspending the sentence, as the applicant has every hope of success in his appeal. The prosecution had failed to prove the motive to commit the offence. The call details between the applicant and co-accused on the day of incident have not

been produced and proved. The case is based upon circumstantial evidence. Even the Postmortem Report is doubtful. As regards the nature of injuries, the age of the injuries have not been provided. The applicant has rebutted presumption about the presence of blood stains on his clothes. He has explained that he had met with an accident on the day of incident and he has taken treatment in Civil Hospital. Even the seizure panchnama of the weapon on the basis of alleged memorandum statement is doubtful. The applicant was released on Covid-19 Pandemic parole. He has not committed any unlawful act. Applicant is now residing at Pune with his brother-in-law and he is doing a private labour work. He was attending the Police Station as per the conditions to his release. He has also paid the fine amount in the Trial Court. He is ready to abide by any terms and conditions.

5 Learned Advocate appearing for the appellant/applicant has also filed affidavit of the wife of the applicant and it is with the background that even after the Hon'ble Supreme Court had directed that all those accused, who were released on Covid-19 Pandemic parole, should report back to the jail, still the appellant/applicant had not reported. The wife says that after the release of the applicant since 15.10.2021 till 15.11.2022 the applicant was regularly attending CIDCO Police Station, Aurangabad and he has maintained diary for his attendance. The applicant had then taken up work

at Pune. The wife was pregnant and was not keeping well in the last month of pregnancy and, therefore, she was admitted in Sassoon General Hospital, Pune on 11.01.2023. The baby was born, however, it could not survive and expired on the same date. After the matter was listed, the Advocate for applicant had directed the applicant first to surrender before the jail authority, as till that time the applicant was not aware about the fact that the time to surrender as Covid-19 emergency bail period was over. There was no ill intention in not surrendering before the jail authorities. It was on account of illiteracy and the medical problem faced by the family members he had not surrendered and, therefore, according to the learned Advocate for the applicant, the said circumstance should not be considered adversely to the applicant. He reiterated the fact that it was he who had insisted that the applicant should surrender before the jail authorities and upon his understanding the applicant has surrendered.

6 Before we consider the submissions on behalf of the prosecution opposing the application, we would like to mention here that when the fact was pointed out that the applicant was attending the CIDCO Police Station, Aurangabad, but as the applicant has not surrendered before the jail authorities i.e. Harsul Jail, Aurangabad and the matter i.e. the sessions case was from Parbhani, the address that was given of the accused No.1 in

sessions trial was Ukhalad, Tq. & Dist. Parbhani. The jail authorities informed the said fact to the concerned police authorities with Jinsi Police Station, Aurangabad and crime No.343/2022 came to be registered against him on 22.12.2022. When we found that CIDCO police was allowing the attendance of the applicant when already the offence under Section 224 of the Indian Penal Code was registered against him with Jinsi Police Station, specific order was passed on 05.04.2023 that the APP should file affidavit of the Police Inspector/in-charge of Police Station, those police officers who have given endorsements, as to why they had not informed the appellant that he is required to surrender to the jail authorities as the order in respect of releasing him on Corona-19 Pandemic parole had come to an end with the subsequent orders passed by the Hon'ble Supreme Court as well as by the State Government. Such affidavit was directed to be filed on or before 17.04.2023 and the matter was to come up on 21.04.2023; yet, there was no compliance. By a detailed order passed on 21.04.2023 this Court extended the said period of filing affidavit and also expressed displeasure for not complying with the order passed by this Court on 05.04.2023 by reserving the right to impose costs. In response to the same, affidavit of PSI Mr. Ashok Avchar of CIDCO Police Station, Aurangabad has been filed on 28.04.2023. We are again expressing our displeasure that it is not the total compliance of our order dated 05.04.2023. It can be seen from the copy of the diary, that

has been filed by the applicant, that various police officers have given the endorsement regarding his attendance on different dates, but still affidavit of only one person has been filed. The order dated 05.04.2023 was specific. When this fact was pointed out to the learned APP, he tried to seek adjournment once again. We could not see any reasonable ground for the non compliance of our order dated 05.04.2023. Still now we are reserving our right to impose costs which we will consider at a later point of time.

7 The affidavit filed by PSI Mr. Ashok Avchar is not specifically on the said point which we wanted. No doubt, the history has been given as to how the applicant came to be released on Covid-19 Pandemic parole, that was the order passed by this Court in Criminal Writ Petition No.208 of 2021 that the jail authorities were directed to release the petitioner within a week after the petitioner provides two sureties. When petitioner could not provide two sureties, this Court appears to have modified the order by saying that one surety should be considered sufficient. Thereafter the compliance was made and he was released on 14.10.2021. We have perused both the orders, especially in Writ Petition No.208 of 2021 dated 22.02.2021 that was considered along with other writ petition also and modified order was given directing those petitioners to be released on PR. Bond of Rs.10,000/- and one surety of Rs.20,000/-. It was then stated that usual terms and conditions are

imposed, which were imposed in any bail application. We could not find any condition in respect of attendance to a particular Police Station. We have also seen order dated 24.02.2021 passed by the jail authorities, wherein it was stated that he should attend before the concerned Police Station, once in a month. Now, in the communication dated 06.03.2023 by Superintendent of Jail, Aurangabad Central Prison it is said that the applicant had given surety of one Shaikh Jilani Shaikh Yakub, r/o Katkat Gate, Near Osmaniya Masjid, Aurangabad and as he remained absent it is said that offence was directed to be registered to Jinsi Police Station. Along with the affidavit, PSI Mr. Ashok Avchar has produced copy of the order, which does not bear any date, but it says that the applicant was released on 14.10.2021 and he was given understanding that he should surrender back to the jail on 29.11.2021. To that order there is condition that he should attend CIDCO Police Station, Dist. Aurangabad, once in a month. Neither the jail authorities nor PSI Mr. Ashok Avchar nor learned APP is explaining, when the Central Jail comes under Harsul Police Station, why applicant was not asked to give attendance to that Police Station or when that surety's residence was given, which is stated to be in Jinsi Police Station area, why he was not allowed to Jinsi Police Station and how CIDCO Police Station came in picture. So also, the fact remains that without application of mind the CIDCO police authorities were giving/marking attendance sheet/diary of the applicant. This cannot be the

way to treat an accused who has been convicted for the offence punishable under Section 302 of the Indian Penal Code. If you are imposing condition, then it should be specific and only the concerned authorities ought to be brought in picture. Equal responsibility lies on the authorities to whom such direction has been given to ask the said authority as to why they have been saddled with such responsibility. PSI Mr. Ashok Avchar does not say that there was communication between his Police Station and Superintendent of Jail, after they received the order Exh.R-1 as to how and in what manner CIDCO Police Station is involved in the picture. However, one thing is clear from Exh.R-1 and it is printed format, that it was the order for Corona leave/parole. When Hon'ble Supreme Court as well as State Government had asked of such convicts and jail inmates, who were released on co-parole to surrender back to the jail authorities, then the CIDCO Police ought to have stopped giving attendance mark to the applicant and ought to have informed the applicant that he is required to surrender before the jail authorities. It has been never informed that the charge sheet has been filed in the said offence under Section 224 of the Indian Penal Code against the present applicant showing it under Section 299 of the Code of Criminal Procedure. That means, what efforts Jinsi Police Station had taken before filing the charge sheet to arrest the present applicant is a different aspect. No doubt, even the applicant appears to be responsible for the same. If we consider the

impugned Judgment, his address is of Ukhald, Tq. & Dist. Parbhani and when he filed the criminal appeal, he gave address of Pune. It appears that he filed the appeal while he was on Covid leave which was against the terms those were imposed when he was released on bail. When he changed his residence, he ought to have informed the said fact to the concerned Court as well as the Police Stations involved. Therefore, we are expressing that the entire matter has not been handled by CIDCO Police Station in proper way, especially there is non compliance of order passed by this Court on 05.04.2023.

8 The question, therefore, arises – as to whether the said absence of applicant, for offence under Section 224 of the Indian Penal Code can be considered in the present application, because if a convict is not abiding the terms in any way, cannot be given benefit of such breach. However, in this case we have taken note of all those events and it appears that though there was fault on the part of the applicant that he ought to have paid attention to the fact that Hon'ble Supreme Court and even State Government has passed the order that the convicts like him as well as the under trial prisoners, who were given the benefit of Covid leave, should surrender back to the jail; he ought to have surrendered to the jail. His contention that he was not aware about such order cannot be considered at all, when he himself had filed the

writ petition and canvassed that he should be released on bail under a particular scheme. If that scheme or concession has been taken away and further directions have been given that he should report back to the jail authorities, he ought to have done that. But, here, in this case, he was attending the Police Station. That means, he had no intention to abscond can be spelt out and, therefore, we do not want to consider the said situation as adverse to him.

9 We would like to consider the application on its own merits. At the outset, we would like to say that when the appeal was filed by him and the first order regarding admission was passed on 21.01.2022, he was directed to file notes of evidence, so that the criminal application can be listed. After filing of the copies of evidence, it can be seen that the circulation was not sought for a considerable time. It was got circulated for 14.12.2022, but on that day on the request of learned Advocate for the appellant it was adjourned. Similarly, it was adjourned on 18.01.2023, 09.02.2023 and thereafter on 27.02.2023 onwards when it was noticed by learned Advocate for the appellant that appellant has not surrendered, he was directed to file affidavit, but in the meantime the applicant surrendered before the jail authorities. Therefore, even appellant is responsible for keeping the application pending.

10 Now, it is to be noted that the allegations against the appellant was that he has committed murder of one Ashroba. Co-accused Alka was the wife of Ashroba and it is alleged that the present applicant and co-accused Alka were having illicit relations. The learned Trial Judge has held that death of Ashroba Malhari Waghmare was homicidal in nature and it has been so proved by examining PW 7 Dr. Rahul Ranveer, who conducted the autopsy. CDR has been obtained and proved. But it appears that there were no calls on the day of incident. The case was based on circumstantial evidence. PW 1 Kailash is the brother of Ashroba. It was told that Ashroba had gone to Nanded for work on 12.09.2017 and he returned around 10.00 p.m., but his wife was not present in the house. Ashroba went to search wife, but did not return till 12.00 a.m., therefore, PW 1 was calling Ashroba. The mobile rang in front of the house of accused No.1. Then Kailash found that Ashroba was lying near the frame of door of middle house of accused No.1 i.e. applicant. He was dead and his mobile was in his pocket. Now, on the basis of this fact that the dead body of Ashroba was found lying near the frame of door of middle house of the accused No.1, the learned Trial Judge says that burden was on the applicant under Section 106 of the Indian Evidence Act to explain the circumstance. The blood stains were found, so also, the blood stains were found on the clothes of accused. Prima facie it appears that C.A. report favours prosecution. The CDR of the mobile of accused No.1 shows there

were many calls between accused Nos.1 and 2, may not be on the day of incident but prior to that. Under such circumstance, the learned Trial Judge found that there was strong circumstantial evidence against the applicant. In view of this fact, we do not find this to be a fit case where a sentence should be suspended. Hence, following order.

ORDER

1 The application stands rejected.

2 For the non compliance of the order passed by this Court on 05.04.2023 and also for not handling the entire matter discussed in para No.6, we impose costs of Rs.10,000/- (Rupees Ten Thousand only) on the prosecution.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)

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