

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2846 OF 2023
IN
CRIMINAL APPEAL NO. 753 OF 2023

Madhav Balaji Kadam
Age 40 years, Occu. Agri.,
r/o Hipparga, Taluka Naigaon,
District Nanded. ... Applicant

Versus

The State of Maharashtra ... Respondent

WITH
CRIMINAL APPLICATION NO. 2236 OF 2023
IN
CRIMINAL APPEAL NO. 653 OF 2023

Sow. Vandanabai Madhav Kadam
Age : 30 years, Occu : Household,
R/o : Hipparga (Ja), Tq. Naigaon,
Dist. Nanded. ... Applicant

Versus

The State of Maharashtra ... Respondent

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Ms. Vaishali Dattatray More, Advocate for the Applicant in Criminal
Application No. 2846 of 2023.
Mr. Avinash D. Hande, Advocate for the Applicant in Criminal
Application No. 2236 of 2023.
Mr. S. G. Ghayal, App for the respondent-State.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

Reserved on : 16.10.2023
Pronounced on : 27.10.2023

ORDER [ABHAY S. WAGHWASE, J.] :

1. Both convicts for charge under Sections 302, 394 r/w 34 of the Indian Penal Code [IPC] i.e. original accused nos. 1 Madhav and 2 Vandana, who are husband and wife, are seeking suspension of sentence during pendency of respective appeals filed by them and also to enlarge them on bail by imposing appropriate conditions.

2. Sum and substance of the arguments advanced by both learned counsel is that there is apparently false implication. There is no incriminating material. There being no direct eye witness, the case is based entirely of circumstantial evidence, however, according to them, none of the circumstances are cogently proved. It is pointed out that theory of last seen together has been applied but said theory does not come into play as, according to them, the time gap between deceased and accused last seen together being huge, it was not open for prosecution to press said theory into service. It is their submission that mere recovery of ornaments, of which there is no prior identification and which are allegedly recovered under memorandum of disclosure, is relied by the prosecution and surprisingly, according to them, said circumstance is made the ground for holding applicants appellants guilty. Resultantly, it is their submission that conviction

being recorded on insufficient and weak evidence, appeal has been preferred but as much more time would be required for hearing of the appeal, it is submitted that till then sentence be suspended and applicants be set at liberty.

3. While opposing the applications, learned APP would submit that though case is based on circumstantial evidence, only because there were strong and incriminating circumstances and case being proved beyond reasonable doubt, conviction has been recorded. To rob the deceased of her ornaments, she was called and taken from the field. Witnesses have seen accused and deceased together. There is recovery of ornaments of deceased at the instance of accused and therefore they are rightly held guilty and so applications for bail and suspension of sentence are sought to be dismissed.

4. We have gone through the papers placed before us. It is emerging that Kuntur police chargesheeted accused Madhav, his wife Vandanabai and one Keshav for committing murder of Rukminibai Kadam on 07.03.2018. Out of three chargesheeted, only Madhav and Vandanabai i.e. present applicants are held guilty by learned trial Judge for commission of offence punishable under Sections 302, 394 r/w 34 of IPC.

5. Admittedly there is no direct evidence and prosecution has rested its case on circumstances like homicidal death, last seen together and motive of robbing deceased of her ornaments.

6. We have noted that homicidal death is not questioned at all. Therefore, while considering the limited relief in the proceedings, it is merely to be seen whether it is a fit case for exercising power under Section 389(1) of Cr.P.C. and to grant bail.

7. It is fairly settled position that while suspending or staying order of conviction, relevant factors are degree of probability of appeal being finally allowed, nature and gravity of offence, age and health of accused etc. Therefore, the best and probably the only guide for suspension of sentence is probability of appeal being allowed. Law to that extent is spelt out in the case of ***Laxman Malhari Sable v. State of Maharashtra; 1997 (2) Mh.L.J. 780.***

8. Admittedly, there is no direct evidence and the case is based on circumstantial evidence like last seen together, recovery and possession of ornaments. Prosecution has attributed motive to be

robbing ornaments of deceased. It seems that prosecution has relied mainly on the evidence of PW3 Vinayak and PW6 Suvarnamala and PW7 Dr. Pore, autopsy doctor. PW3 Vinayak is the brother whereas PW6 Suvarnamala is niece of deceased. They both claim that around 4.00 p.m., accused Vandana had approached deceased and asked her to accompany for plucking cotton and thereafter deceased did not return home and her dead body was found lying in her own field. It seems that both these witnesses had allegedly seen accused approaching deceased around 4.00 p.m and dead body was noticed and spotted lying in the field by PW3 Vinayak. Exactly when dead body was spotted by PW3 Vinayak that night has not come on record. Autopsy doctor also has not given time since death even by approximation and spot panchanama was drawn at 11.10 p.m. Therefore, exactly when deceased Rukminibai met death is not coming on record. It is essential when circumstance of last seen together is pressed into service.

9. Another circumstance is alleged recovery of ornaments from accused persons, that too on 10.03.2018. FIR *prima facie* does not show description of ornaments on the person of deceased. Therefore, taking such material into consideration, here, *prima facie* case is rested only on circumstantial evidence. Therefore, taking above

material into consideration and the fact that accused Vandanabai was on bail during trial, we consider it a fit case for suspending the sentence and extending further relief of bail as prayed for.

ORDER

- I. Both the applications stand allowed.
- II. The substantive sentence imposed on the applicants in Session Case No. 40 of 2018 by learned Additional Sessions Judge, Biloli on 13.02.2023 stands suspended till the final hearing and disposal of Criminal Appeal No.653 of 2023 and Criminal Appeal No. 753 of 2023.
- III. The applicants Madhav Balaji Kadam and Vandanabai Madhav Kadam be released on P.R. of Rs.30,000/- (Rupees thirty thousand) each with two solvent sureties of Rs.15,000/- (Rupees fifteen five thousand) each.
- IV. The applicants shall not commit any criminal activity.
- V. The applicants shall remain present before the learned trial Judge once in six months, till final hearing and disposal of the appeals, commencing from the date they tender bail papers and thereafter, the trial Judge to fix dates for their subsequent appearances.

VI. In case of two consecutive defaults on the part of the applicants to remain present before the trial court, the trial court to inform this court about the same and in that eventuality, the prosecution would be at liberty to file an application for cancellation of the bail granted to the applicants.

VII. Bail before the trial court.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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