

SGPunde

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

**CRIMINAL APPLICATION NO. 3115 OF 2022
IN
CRIMINAL APPEAL NO. 424 OF 2022**

- 1] Ashraf Khan s/o Kadir Khan,
Age : 25 years, Occu. Agriculture,
R/o. Khedi, Tq. Kannad,
District : Aurangabad.
- 2] Mushraf Khan s/o Kadir Khan Pathan,
Age : 32 years, Occu. Agriculture,
R/o. Khedi, Tq. Kannad,
District : Aurangabad.
- 3] Zahur Khan s/o Kadir Khan Pathan,
Age : 34 years, Occu. Agriculture,
R/o. Khedi, Tq. Kannad,
District : Aurangabad.

...Applicants

Versus

The State of Maharashtra

...Respondent

.....

Mr. Nilesh S. Ghanekar – Advocate for the applicants

Mrs. V. S. Choudhari – APP for respondent/State

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**CORAM : SMT. VIBHA KANKANWADI
AND
GAURI GODSE, JJ.**

DATED : 27th JANUARY, 2023

PER COURT : -

1. This application is filed for suspension of sentence. The applicants are original accused nos. 2, 3 and 7 in Sessions Case No.

190 of 2014, who were convicted by learned Additional Sessions Judge, Aurangabad, on 24th August, 2017, thus : -

- [i] The applicants are convicted for the offence punishable under Sections 143, 147, 148 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months on each count and to pay a fine of Rs. 500/- on each count.
- [ii] The applicants are convicted for the offence punishable under Section 302 r/w 149 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each.
- [iii] The sentence imposed upon the applicants shall run concurrently.

2. Heard learned counsel for the applicants and the APP for the State.

3. It has been pointed out that original accused nos. 1 and 4 have preferred Criminal Appeal No. 421 of 2017 and by order dated 23rd February, 2018, this Court has suspended the sentence as against them. So far as the present applicants are concerned, the role attributed to them is only assault by stick to the deceased and insofar

as applicant no. 2 is concerned, it was alleged that he had assaulted father of the deceased, Syed Salim, by an axe on his head, however, he has been acquitted of the offence under Section 307 of the Indian Penal Code. The learned trial Court has relied only on the testimony of PW2 – Syed Minhaj Syed Mehmood. Though the prosecution had come with a case that PW3 – Sarjerao Bhika Murme and PW4 – Gopinath Mawanjiba Gaikwad were also the eye-witnesses, the learned trial Judge himself has not believed in them. As regards testimony of PW2 – Syed Minhaj is concerned, there are important improvements and further, though he was meeting police between 23rd February, 2014 i.e. the day of incident to 26th February, 2014 (the day on which his statement under Section 161 of Code of Criminal Procedure was recorded), the police had not shown promptness in recording his statement at any earliest point of time nor he himself disclosed the police what he had seen. It has also been pointed out that the prosecution utterly failed to prove the motive. Deceased had performed love marriage with daughter of accused no. 1. Even she had baby and had taken the baby for polio dose. There appears to be some petty quarrel between the husband and wife and then wife of deceased had gone to her paternal home which was at a

distance of 1000 ft. from her matrimonial home. Further, taking into consideration the medical evidence, it cannot be said that there was any intention to kill the deceased so as to attract offence under Section 302 of the Indian Penal Code. The applicants / appellants are in jail since 2014. It will take further time to hear their appeals and, therefore, they deserve to be released on bail by suspension of the sentence imposed upon them.

4. Per contra, learned APP strongly supported the reasons given by the learned trial Judge and submitted that the testimony of PW2 – Syed Minhaj has been believed. There might be some discrepancy but, unless it is shown that they are going to the basic cause of dispute and the delay in recording the statement has caused prejudice, there is no reason to believe the eye-witness. If we consider the medical evidence, then it can be seen that the deceased had sustained contusion on back left side oblique and contusion on left chest front side near 4th, 5th and 6th rib. Both the said external injuries were ante mortem. The internal examination showed about eight injuries and the probable cause of death has been given as cardio-respiratory failure due to lung's injury with fracture skull base. Under such circumstances, the death is homicidal. We can gather the

motive behind causing such injury as murder.

5. It appears that, to bring home the guilt of the accused, the prosecution has examined in all 11 witnesses. The prosecution story is that the deceased was the son-in-law of the original accused no. 1 and brother-in-law of the present appellants. It is also stated that there were disputes between the deceased and his wife. It is stated that when accused no. 5 had gone to administer polio dose to the child on 23rd February, 2014, around 09:30 to 10:00 a.m., at the call of accused no. 4, the accused persons appeared at the spot and assaulted the deceased by stick, axe and other weapons. The record further shows that though three eye witnesses were examined, the learned trial Judge has believed in only PW2 – Syed Minhaj. Definitely, there is evidence as regards recovery of the weapons, clothes etc., however, when only one eye-witness has been believed, it will have to be seen at the time of final hearing as to whether learned trial Judge was justified in doing so in view of the fact that the improvements as well as omissions were pointed out and there is admittedly delay in recording the statement of the said witness under Section 161 of the Code of Criminal Procedure. Another fact is that whether the motive was so strong is also required to be considered.

When the charge was levelled that these accused persons had tried to commit murder of the father of the deceased but from that charge they have been acquitted. The appreciation of evidence at the appellate stage is incumbent. So also, the operative order appears to be confusing. At one hand it is stated that the present applicants and the original accused nos. 1 and 4 are convicted for the offence under Section 143, 147, 148 of IPC, on the other hand it is stated that all of them i.e. accused nos. 1 to 9 are acquitted of the offence punishable under sections 143, 147, 148 and 149 etc of the Indian Penal Code.

6. Though the present applicants were never released on bail during the trial, still taking into consideration the period since when they are in jail and the above referred facts and circumstances on record, we are of the opinion that, till Criminal Appeal No. 424 of 2017 is heard and decided, they deserve to be released on bail by suspension of sentence. Hence, the following order.

ORDER

- [i] Application is allowed subject to condition that applicants should deposit fine amount imposed upon them, with the trial Court within four (04) weeks.

- [ii] The sentence awarded to the accused no. 2 - Ashraf Khan s/o Kadir Khan, 3 - Mushraf Khan s/o Kadir Khan Pathan and 7 - Zahur Khan s/o Kadir Khan Pathan in Sessions Case No. 190 of 2014 by the Additional Sessions Judge, Aurangabad, on 24th August, 2017 is hereby suspended till the hearing and final disposal of the appeal bearing Criminal Appeal No. 424 of 2017.
- [iii] Till then, all the applicants herein be released on bail on their furnishing P.R. and S.B. of Rs. 15,000/- (Fifteen Thousand), each.
- [iv] Bail be furnished before the trial court.

[GAURI GODSE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE