



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.3450 OF 2023
IN
CRIMINAL APPEAL NO.01 OF 2023

1. Vishal Parmeshwar Shinde
Age: 25 years, Occu.: Labour,
R/o. Kamlapur, Tq. Purna,
Dist. Parbhani, A/p. Shindgaon,
Tq. Tuljapur, Dist. Osmanabad.
2. Kiran Vilas Bhosale
Age: 29 years, Occu.: Labour,
R/o. Sindgaon, Tq. Tuljapur,
Dist. Osmanabad.

.. Applicants

VERSUS

The State of Maharashtra

.. Respondent

...

Mr. Sudarshan J. Salunke, Advocate for applicants.
Mr. S. D. Ghayal, APP for the respondent – State.

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

DATE : 29th November, 2023

ORDER [Per Smt. Vibha Kankanwadi, J.] :-

. Present application has been filed for suspension of substantive sentence by original accused Nos.2 and 3. Accused Nos.2 and 3 faced prosecution along with original accused No.1 in Sessions Case No.22 of 2021. They came to be convicted for the offence punishable under Sections

302, 307 read with Section 34 of Indian Penal Code on 24.11.2022 by learned Additional Sessions Judge, Omerga, Dist. Osmanabad. For both the offences, they have been sentenced to suffer imprisonment for life.

2. Heard learned Advocate Mr. Sudarshan J. Salunke for the applicants and learned APP Mr. S. D. Ghayal for the respondent – State.

3. It has been vehemently submitted on behalf of the applicants that the learned Trial Judge has not appreciated the evidence properly. The informant - injured P.W.4 Santosh Pawar has turned hostile, so also alleged eye witness P.W.7 Divya, minor granddaughter of informant and deceased has also turned hostile. However, the conviction appears to have been based on the alleged oral dying declaration by the deceased to her sister P.W.2 Janabai, P.W.3 Padma, a neighbouring person and P.W.6 Pradip Shinde, who allegedly went immediately after the alleged incident and to whom also alleged oral dying declaration has been given by the deceased. However, it was not considered by the learned Trial Judge that the said oral dying declaration was a weak kind of evidence, as there is no evidence that the maker of the statement was conscious and oriented while making the said statement to these persons. There was delay in taking down the statements of these witnesses. Further, opportunity to cross-examine P.W.4 and P.W.5 was not given and the learned Trial Judge proceeded under Section 309 of the Code of Criminal Procedure. The memorandum and

discovery under the same are under shadow of doubts when the injured himself is saying that he was not aware as to how the deceased has received injuries and also who had caused injuries to him. The applicants ought not to have been convicted by the learned Trial Judge. The applicants are in jail since long and it will take long time to stand their appeal. They need not be kept behind bar with such kind of evidence.

4. Per contra, the learned APP supported the reasons given by the learned Trial Judge and submitted that the hostility of the informant and the granddaughter of the informant and deceased is not fatal. Here, considering the fact that it has been proved by the prosecution that death of Jayabai was homicidal in nature. She had sustained in all 10 external injuries and the cause of death was hemorrhagic shock due to splenic injury leading to hemoperitoneum and associated with other multiple injuries. Even the injuries sustained by PW.4 the informant have been proved through the medical officer, who examined him. He had set the law in motion, but now for obvious reasons it appears that he has turned hostile. PW.2 Janabai is the sister of deceased and residing nearby to the house of the informant and deceased. She says that she heard the shouts around 10.30 p.m. from the house of informant and it was the voice of informant Santosh and thereafter his granddaughter Divya came running to her to call her. Thereafter she went at the place where the deceased was

lying. Deceased was alive at that time and told that the original accused No.1, present applicants and other seven persons had assaulted her. The assault was by *Jambiya* (Big knife) and *Bhala* (Spear). P.W.3 Padma and P.W.6 Pradip supported her. There is recovery of weapons at the hands of present applicants. Under the said circumstance, there is evidence against the present applicants.

5. At this stage, we are supposed to consider the *prima facie* evidence which has come on record. No doubt, it appears that as against P.W.4 and P.W.5, the Trial Court proceeded under Section 309 of the Code of Criminal Procedure when it came for the cross-examination. Whether it amounted to withdrawing of the fair opportunity of trial would be considered at the time of final hearing, but it has to be mentioned that thereafter from P.W.6 onwards, the accused persons were represented by Advocate. Whether the said Advocate had taken efforts to recall P.W.4 and P.W.5 is also then required to be considered and therefore, that cannot be a ground for suspension of sentence. P.W.2, P.W.3 and P.W.6 are the persons to whom the oral dying declaration has been given. Now, whether the said oral dying declaration was trustworthy or not is definitely required to be appreciated at the time of final hearing, but as regards these witnesses are concerned, they were thoroughly cross-examined on behalf of the present applicants. The autopsy doctor has proved the injuries on the person of the deceased

and, therefore, *prima facie* there is evidence regarding homicidal death of Jayabai. Whether the hostility of informant and his granddaughter as well as some other witnesses, who were examined to prove the panchanamas, is also required to be considered at the time of final hearing, but there appears to be strong evidence against the present applicants in respect of oral dying declaration and the homicidal death of Jayabai. There is discovery of weapons like Jambiya i.e. big knife and Bhala (Spear). The applicants were not on bail throughout the trial and, therefore, we do not find this to be a fit case where the applicants should be released on bail by suspending their sentence. Application, therefore, stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm