

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

**CRIMINAL APPLICATION NO.2803 OF 2021
IN
CRIMINAL APPEAL NO.576 OF 2021**

BABLU @ ABDUL MAHEBOOBSAB SAYYED

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. P.P. More, Advocate for applicant-appellant

Mr. R.V. Dasalkar, APP for the sole respondent

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

DATE : 10th JANUARY, 2023

ORDER : [PER : SMT. VIBHA KANKANWADI, J.]

1 Present application has been filed for suspension of sentence. The appellant-accused stood prosecuted for committing murder of one Lakhan in Sessions Case No.65/2019. He has been held guilty for the offence punishable under Section 302 of the Indian Penal Code by Additional Sessions Judge-2, Latur on 21.09.2021 and he has been sentenced to suffer life imprisonment and pay fine of Rs.10,000/- (Rupees Ten Thousand only), in default to suffer further rigorous imprisonment for six months.

2 The appeal is admitted.

3 Heard learned Advocate Mr. P.P. More for the applicant-appellant and learned APP Mr. R.V. Dasalkar for the sole respondent.

4 The learned Advocate appearing for the appellant has vehemently submitted that the evidence led by the prosecution cannot be said to be sufficient to the extent of proving an offence beyond reasonable doubt. Prosecution has mainly relied on testimony of PW 3 Rajendra Pandurang Sagar, who is the near relative of deceased Lakhan. He is resident of Killari, Tq. Ausa, Dist. Latur, however, Lakhan was serving as a Manager in Maharashtra-Andhra Transport Company at Latur. It can be seen that he was a chance witness at the most, but then he has not seen anything or he cannot be said to be a reliable witness. He had not tried to intervene when the appellant was allegedly assaulting deceased, rather he says that he stood across the road leaving Lakhan at the other end. The prosecution has also not proved the alleged motive behind the commission of the crime. Then the prosecution relied on the testimony of PW 4 Manoj Irappa Dhairya, however, he has turned hostile after halfheartedly supporting the prosecution. Then again he has supported the prosecution to some extent. His testimony, therefore, cannot be relied. The discovery panchnama is also unreliable.

Two medical officers have been examined. Even the CCTV footage has been recovered, however, clear incident was not seen. Therefore, there was no such quality material before the learned Trial Judge to come to a conclusion. The learned Trial Judge failed to consider that though there was eye witness to the incident; yet, his statement appears to have been belatedly taken and the Investigating Officer is not explaining any reason for such belated recording. The appellant has good case on merits. It will take long time to stand his appeal and, therefore, his sentence be suspended. He is ready to abide by the terms of the bail.

5 Per contra, the learned APP has strongly opposed the application and submitted that the applicant was not on bail throughout the trial. The murder has taken place in broad daylight, that too in a busy locality. The appellant was suspicious that deceased had illicit relations with his wife and statement to that effect has been made by PW 2 Prashant Sagar – younger brother of deceased Lakhan. There was a meeting held, in which the doubts were cleared, but still as Lakhan was called by the accused he had gone to the scrap market. At that time, PW 3 Rajendra was along with Lakhan. Manoj Dhairya was also present. The murder weapon is knife and it has been discovered by the present appellant and the discovery panchnama under Section 27 of the Indian Evidence Act has been proved by examining the

panch as well as the Investigating Officer. When there was ample evidence against the applicant, it can be said that the learned Trial Judge was justified in holding the accused guilty of committing the offence. This cannot be taken as a fit case to sustain the sentence.

6 At the outset, we would like to say that the criteria for considering application for suspension of sentence is different from dealing with an application for bail. The evidence that has come on record, which was assessed by the Trial Judge at the time of coming to the conclusion regarding holding the accused guilty of committing an offence, has to be considered prima facie. Here, in the present case we may consider the main witnesses leaving the testimony of those witnesses who were formal in nature. There are two eye witnesses to the incident PW 3 Rajendra and PW 4 Manoj. Prima facie there is consistency in their testimony. Only the belated statement under Section 161 of the Code of Criminal Procedure of these witnesses cannot be the ground. We would like to rely on **Ganeshlal vs. State of Maharashtra** [1992 (3) SCC 106], **Mohd. Khalid vs. State of West Bengal** [2002 (7) SCC 334], **Prithvi (minor) vs. Mam Raj and others** [2004 (13) SCC 279] and **Sidhartha Vashishta @ Manu Sharma vs. State** (NCT of Delhi) [2010 (6) SCC 1] wherein it has been held that delay in recording the statement of witnesses does not necessarily discredit their testimony. The

Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. No doubt, there are also contrary rulings e.g. **Ganesh Bhavan Patel vs. State of Maharashtra [1978 (4) SCC 371]**, wherein it was held that *delay in recording the statements of the prosecution witnesses under Section 161 of the Code of Criminal Procedure although those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter would cause doubt upon the prosecution case*. The principle of law is that if there is a delay then the prosecution has to explain the delay in recording the statement under Section 161 of the Code of Criminal Procedure and in certain circumstances non explanation of delay would create doubt on the testimony of the witness. Thus, it depends upon the quality of evidence that has been adduced. At this stage, we cannot go into that aspect. If the testimony of the eye witness is otherwise believable, then it would justify the conclusion of the Trial Court.

7 Here, the additional piece of evidence is the discovery of the murder weapon by the appellant and it has been proved by examining the concerned panch witness. The testimony of both the medical officers would support the prosecution story about homicidal death. In view of these aspects there appears to be prima facie case against the appellant and,

therefore, it cannot be taken as a fit case where the sentence should be suspended. Application stands rejected.

(Abhay S. Waghwase, J.)

(Smt. Vibha Kankanwadi, J.)

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