

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

**CRIMINAL APPLICATION NO.3832 OF 2022
IN
CRIMINAL APPEAL NO.672 OF 2020**

MANGESH @ BALU MALLIKARJUN BORADE

VERSUS

THE STATE OF MAHARASHTRA

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Mr. S.J. Salunke, Advocate for applicant

Mr. A.M. Phule, APP for respondent

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

DATE : 27th JANUARY, 2023

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed for suspension of sentence. The appellant faced trial in Sessions Case No.173/2014 before learned Additional Sessions Judge, Bhoom, Dist. Osmanabad. By Judgment and order dated 29.09.2020, the appellant i.e. original accused No.1 has been held guilty of committing offence punishable under Section 302 read with Section 34 of the Indian Penal Code and has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/- (Rupees Ten

Thousand only), in default to suffer rigorous imprisonment for one year. By the said Judgment, the learned Additional Sessions Judge has also convicted co-accused i.e. original accused Nos.2 and 3. It will not be out of place to mention here that co-accused Navnath Borade and Samadhan Borade had also filed applications for suspension of sentence, however, by order dated 14.09.2021, on instructions, their learned Advocate sought leave to withdraw applications. By the order on the same date, the appeal filed by the present applicant-appellant and co-accused-appellants were directed to be listed for final hearing on 11.10.2021. Now, by this application the appellant is seeking suspension of sentence.

2 Heard learned Advocate Mr. S.J. Salunke for the applicant and learned APP Mr. A.M. Phule for the respondent.

3 With the able assistance of learned Advocate for the applicant-appellant and learned APP, we have gone through the main evidence in the matter and it has been pointed out by the learned Advocate for the applicant that the learned Trial Judge has not considered the evidence properly. Though there are two eye witnesses to the incident; yet, the discrepancies and the conduct of those eye witnesses has not been considered. PW 4 Shivaji states that he had proceeded on motorcycle; whereas deceased Amol

had gone in Scorpio along with other persons. In fact, it is also a fact to be considered, as to whether it was possible for Shivaji to catch the Scorpio when he was proceeding on motorcycle and still he says that he had witnessed the incident. In spite of allegedly witnessing that the alleged persons were assaulting Amol by sword, he says that he went to village Devangra to inform about the incident to father of the deceased PW 3 Bapurao. All these unbelievable facts have been believed by the Trial Court. Same is the case with PW 6 Tukaram Barkade. He states that after seeing accused Navnath, Amol had stopped the vehicle and there was verbal wrangle between them. When this witness and other got down from the vehicle, Amol told them to proceed further. He then states that they all boarded the vehicle. Amol had sitting at the driver's seat and then accused Balasaheb came on motorcycle, who pelted the stone, which hit the glass of the right side door. Balasaheb caught hold of the collar of the Amol and shouted "bring swords" and Amol was pulled outside the vehicle and it is then stated that all the accused persons assaulted. Learned Trial Judge failed to see that neither PW 4 nor PW 6 had informed the incident to police. It was only the father of the deceased who had given the report to the police. Evidence of PW 8 Ram is also on the same line. The evidence of panch witnesses has been considered when in fact those panchnamas could not have been considered to be proved. The appellant has good case on merits.

He is in jail since 2014. Therefore, by relying on the order passed by Hon'ble Apex Court in **Saudan Singh vs. The State of Uttar Pradesh** [Criminal Appeal No.308 of 2022] on 25.02.2022 it was submitted that the sentence be suspended and the appellant be released on bail.

4 Per contra, the learned APP has supported the reasons given by the Trial Judge and submitted that there were three eye witnesses to the incident. They have withstood the cross-examination. The discovery and recovery has been proved. There was motive for the accused persons to commit the crime. Weapons used are two swords and two sheaths were recovered from the spot. The evidence of the autopsy Doctor would show that there were six surface injuries and in the cross it has come that injury No.3, which was incised would over neck was the fatal. The cause of death was "*due to severe hypovolemic shock due to severe haemorrhage due to penetrating injury to neck, leading to cutting injuries to carotids and trachea*", which shows it was homicidal in nature and, therefore, when there is strong evidence against the appellant, no case is made out for suspension of sentence and releasing the appellant on bail.

5 At the outset, the appellant cannot take benefit of the decision in **Saudan Singh** (supra). Though in this case also the appellant is in custody

for considerable reason, he was never released on bail throughout the trial, but the decision in respect of holding him guilty and convicting for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code has come on 29.09.2020. This Court had even listed the matter, however, due to paucity of time could not take the matter. It will not be out of place to mention here that this Court is dealing with the matters which are old enough than the present one, that is, the jail appeals of 2015. Still, when this Court had expedited the hearing the appeal would be heard in short period. The withdrawal of the application by the co-accused is also required to be considered here. The testimony of the autopsy Doctor and the Postmortem Report would definitely show that the death is homicidal in nature. The prosecution had examined three eye witnesses and they have categorically stated that they had seen the appellant and co-accused assaulting the deceased with sword. Now, why a particular witness behaves after seeing such incident and whether the reaction by these eye witnesses after they had witnessed the incident was proper, believable or not, would be decided at the time of final hearing. What evidence has been led by the prosecution is required to be considered while deciding application for suspension of sentence. The witnesses have also stated about the motive behind the incident. Further, additional factor that has come on record that the cousin of the deceased was admitted to hospital. The reason behind his

admission was that he was assaulted by the accused persons. Deceased Amol had gone to see his cousin in the hospital and while returning the present appellant and co-accused met him, resulting in altercation. Further, there is evidence in the form of discovery of clothes. Therefore, when murder is committed with weapon like sword and there is evidence against the appellant, this cannot be taken as a fit case where the sentence should be suspended. Application stands rejected.

(Gauri Godse, J.)

(Smt. Vibha Kankanwadi, J.)

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