

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

908 CRIMINAL APPLICATION NO.4175 OF 2022
IN
CRIMINAL APPEAL NO.956 OF 2022

VIKAS BAPURAO CHOUDANTE

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. S.J. Salunke, Advocate for applicant

Mr. R.D. Sanap, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI AND
Y.G. KHOBRAGADE, JJ.

DATE : 15th MARCH, 2023

ORDER :

1 Present application has been filed for suspension of sentence by the original accused No.1. He stood prosecuted in Sessions Case No.1/2021, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 before learned Sessions Judge, Parbhani by Judgment and order dated 22.09.2022. He has been held guilty and has been sentenced to suffer imprisonment of life and to pay fine of Rs.2,500/- (Rupees Two Thousand and Five Hundred only), in default to suffer rigorous

imprisonment for one month. Accused No.2 has also been held guilty under the same Judgment and order. It will not be out of place to mention here that the accused No.2 has preferred a separate appeal and application for suspension of sentence is Criminal Application No.3721 of 2022 in Criminal Appeal No.846 of 2022 was decided by the Coordinate Bench of this Court on 28.11.2022 and the said sentence against him has been suspended and he has been released on bail.

2 Heard learned Advocate Mr. S.J. Salunke for the applicant/appellant and learned APP Mr. R.D. Sanap for the respondent.

3 With the help of learned Advocate appearing for the applicant as well as learned APP we have considered the entire material which was before the Trial Court. Learned Advocate for the applicant submits that since accused No.2 has been released on bail by suspending sentence, the same treatment deserves to be given to the present applicant. The prosecution had examined in all 15 witnesses to bring home the guilt of the accused. Deceased Nitin Khargkharate was the friend of accused persons and PW 3 Vijay Madhukar Yangade, PW 6 Pandurang Nagorao Kamble and PW 8 Vishal Raju Jogdand. Out of the witnesses, who are friends of the deceased, PW 3 Vijay has turned hostile. PW 6 Pandurang supported the prosecution. PW 8

Vishal has also supported the prosecution. However, it is emerging that they are the witnesses on the point of last seen together and after allegedly leaving the deceased in the company of accused persons they went away. They both have tried to say that till 5.30 to 5.45 p.m. they were in the company of the deceased and accused, however, when they left the said spot, they cannot be the persons to say what had happened behind their back. They both have stated that the deceased, accused persons and other friends had gathered at the spot for consuming liquor and deceased had consumed excess liquor. But in the cross-examination it has been brought on record that these two witnesses were also suspected by the police and they were made to work in the Police Station for a considerable days. That means, their testimony cannot be said to be voluntary. He, therefore, relied on the decision in **Lalchand Cheddilal Yadav vs. State of Maharashtra** reported in **2000 ALL MR (Cri.) 1485**, wherein also the witness was detained at the Police Station for the whole night and it was considered that it was done apparently to pressurize him to become a witness in the case and, therefore, it was held that it will not safe to act on his testimony. Therefore, it cannot be said that on the said point i.e. on the last seen together the evidence has been led by the prosecution is trustworthy.

prosecution has come with a case that the present applicant had gone with the cutter/knife in the Police Station and produced the same before Police Officer. In order to prove the said fact prosecution has examined PW 9 Kishor Balasaheb Kauthekar. He has stated that at 7.30 p.m. on 24.09.2020 one Police Constable Mr. Ghode gave him phone call and asked him to come to the computer room of the Police Station. Accordingly, he went to the said room and saw that a person was present, whose right hand was stained with blood and he was holding iron cutter stained with blood. That person had thrown the iron cutter on the floor of the computer room. Station diary entry was taken and it is said that the accused i.e. present applicant was taken in custody. However, his cross-examination would show that there are doubts about the procedure that was adopted. Even though the CCTV cameras are required to be installed in the Police Station, this witness is stating that the CCTVs were not working. Under such circumstance, possibility of creation of the evidence cannot be ruled out.

5 Some other witnesses, who have posed as eye witnesses or panch witnesses, have turned hostile. Therefore, with this kind of evidence the applicant ought not to have been convicted. The applicant/appellant has great hopes of success in the appeal, however, it will take long time to hear his appeal and, therefore, by suspending the sentence he deserves to be

released on bail.

6 Per contra, the learned APP has supported the Judgment and order and submitted that the evidence that was led by the prosecution was of the quality by which it has been held that the prosecution has proved the offence beyond reasonable doubt. The role of accused No.2 is different and also the conduct from the present applicant and, therefore, suspension of sentence of the co-accused is not helpful to the applicant.

7 At the outset, it is to be noted that the case of the prosecution is based on following points.

- 1) Last seen together.
- 2) Present applicant going to Police Station with blood stained clothes and blood stained weapon and producing the weapon before the police.
- 3) Relatives of the deceased noting that the deceased had gone along with the accused.
- 4) Homicidal death of deceased Nitin.
- 5) Motive.

8 PW 12 Deepika Ganesh Khargkharate is the sister of deceased

and she has stated that around 2.30 p.m. deceased Nitin had come to home and had lunch. According to her, Nitin had talked to one Laddya on phone and went out of the house around 3.15 p.m., then she says that at 6.30 p.m. one Shatru Bhole informed about the fact that Nitin was lying on road in pool of blood. Thus, at the most, it can be taken that till 3.15 p.m. Nitin was in the house. Then PW 6 Pandurang Kamble and PW 8 Vishal Jogdand both have stated about deceased Nitin and other persons seen together consuming liquor near Hanuman temple. They have stated that they left around 5.30 to 6.00 p.m. by leaving deceased in the company of the accused persons. Whether their testimony was voluntary or was under pressure because of the suspicion from the police, would be considered at the final stage of appeal. The decision of **Lalchand Cheddilal Yadav** (supra) relied by the learned Advocate for the applicant was the decision of the appeal and after considering the entire evidence those observations found. That stage has not yet come in this appeal and that is not the only piece of evidence here. The further evidence is that the applicant/appellant went to Police Station around 7.30 p.m. and at that time his clothes, hands and the weapon all were having blood stains. At this stage itself, if we consider the C.A. reports, then the clothes on the person of applicant/appellant were stained with blood of group 'A'. His own blood group is 'O', blood group of accused No.2 is 'B', whereas blood group of deceased is 'A'. The production of weapon and the

condition in which the accused went to Police Station even at this prima facie stage can be considered under Section 8 of the Indian Evidence Act. This is where the role of the present applicant differs from that of accused No.2. The probable cause of death a per Postmortem Report is “haemorrhagic shock due to deep throat cut injury”. Though some of the witnesses appeared to have turned hostile, the fact remains is that there is such evidence on record which shows there was involvement of the present applicant. He was not released on bail throughout the trial. Under such circumstance, this cannot be taken as a fit case where he should be released on bail by suspending the sentence. Application stands rejected.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)

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