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Uday S. Jagtap

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 1891 OF 2023
IN
CRIMINAL APPEAL NO. 592 OF 2023**

Amod Anil Ghanekar
Age: 37 years, Occ. Service,
Permanent Address :- Joshi
Sankul, Flat No.17, 500/2,
Mehunpura, Shaniwar Peth,
Pune (At present in judicial
custody and lodgd at Yerwada
Central Jail, Pune)

.. Applicant

Vs.

1. The State of Maharashtra
Through Deccan Police Station, Pune
2. Devendra Shebrao Ingale
(Prosecution Witness No.9)
R/at Omkar Society, Pandav Nagar,
Shivajinagar, Pune
3. Sadhana Devendra Ingale
R/at Omkar Society, Pandav Nagar,
Shivajinagar, Pune

.. Respondents

.....

Mr. Subhodh Desai a/w Mr. Yashovardhan Deshmukh i/b Parinam
Law Associates for the applicant / appellant

Mr. A.R. Kapadnis, APP for the respondent – State

Mr. Amey Deshpande a/w Mr. M. Ansari, Harsh Nishar and Ms.
Vandana Bait i/b Jayendra D Khairnar for the respondent nos.2 & 3

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CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 14th JULY, 2023

Pronounced on : 24th JULY, 2023

ORDER :-

1. This an application seeking suspension of execution of the sentence pending the appeal and release of the applicant on bail.
2. The applicant has been convicted of the offence punishable under Section 304 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.5 lakhs, in default to suffer simple imprisonment for 1 year. He was *inter alia* directed to pay an amount of Rs.3 lakhs to the parents of the deceased towards compensation.
3. Prosecution case in brief is as follows.
4. The applicant was a NCC teacher in a school called Loyola High School, Pune. On 1st February 2023, he had taken 46 students of the said school to a firing range for firing practice through 0.22 rifles at the NCC Headquarter at Senapati Bapat Road, Pune. The pre-lunch session of firing was over. In the post-lunch session, students namely PW-1 Aman Manish Modi, PW-2 Kshitij Malvankar and the victim – Parag Devendra Ingale were

asked to fire rounds from 0.22 rifles.

5. It is the case of the prosecution that the applicant was standing behind the students and was also firing from another 0.22 rifle without any licence or authority. The students were firing from lying position. Despite having knowledge that any of the cadet students would suddenly stand-up and would incur risk of hitting with a bullet, the applicant, who was standing just behind the victim, started firing from 0.22 rifle. At the relevant time, because one of the student namely Steve shouted from behind “चलो उठो बस आ गयी” the victim – Parag Ingale suddenly got up and bullet fired from the 0.22 rifle by the applicant hit left side of his forehead, due to which he fell down. The applicant immediately put his hand upon the wound to stop the blood from oozing out.

6. The victim was then shifted to Command Hospital, Wanawadi. The victim was operated upon. However, he remained in Persistent Vegetative State (PVS) for about 3 years and expired on 7th January 2006 i.e. almost after 3 years.

7. At the relevant time, victim Parag Ingale was studying in 8th standard in the said school. The Commanding Officer, 1,

Maharashtra Signal Company NCC, Senapati Bapat Marg, Pune informed about the said incident by letter dated 01.02.2013 to Deccan Police Station, Pune on the same day. A.P.I. Smt. Salunkhe and a Senior Officer of the Deccan Police Station thereafter met PW-7 Colonel Rajesh Khosala, who had informed about the incident to the Police by the aforesaid communication.

8. A crime was registered being C.R. No.34 of 2013 with the Deccan Police Station, Pune for the offence punishable under Section 308 of the Indian Penal Code. The applicant was arrested on 5th February, 2013. After investigation, a charge-sheet was filed against him on 30th April, 2013 of the offence punishable under Section 308 of the Indian Penal Code. After the victim - Parag Ingale succumbed to the bullet injury on 7th January 2016, Section 304 of the Indian Penal Code came to be added.

9. The trial Court, after framing charge and having recorded the evidence of prosecution witnesses, convicted and sentenced the applicant as above. The defence of the applicant was denial of the commission of offence alleged. According to him, it was Havaladar PW-4 Kundalik Yellari, who was instructor in Army and was present

at the time of firing, had fired the cartridge from his 0.22 rifle, resulting into the death of the victim - Parag Ingale.

10. I heard learned Counsel for the applicant and the learned APP at length.

11. Learned Counsel for the applicant has invited my attention to the evidence of PW-16 P. Saravanan, who was then posted as a President -2 Air Force Selection Board at Mysuru, Karnataka. He was appointed as an Inquiry Officer on 2nd February 2013 in respect of the inquiry to be conducted in the said incident regarding the head injury sustained by the victim – Parag Ingale while carrying out firing practice from 0.22. rifle. However, his cross-examination reveals that at the relevant time, PW-4 Kundalik Yellari was found guilty for not following standard operating procedure of the range. He admits that PW-4 Kundalik Yellari was also found firing in the post-lunch session. However, PW-4 – Kundalik Yellari testified that he had asked the applicant accused to prepare a details of 4 cadets, who would be asked to practice fire at the firing range. He further testified that PW-7 Colonel Khosala briefed the students about the firing and thereafter provided 0.22 rifles to the cadets. One

Hawaladar Mr. Mane then provided 10 rounds each to all the four cadets. The students were asked to remain in lying position and thereafter they started firing. The evidence further indicates that at the relevant time the applicant – accused was standing behind the firers. This witness noticed the applicant firing with 0.22 rifle. This witness had asked the applicant not to fire till the four of the cadets completes their firing, however, the applicant started firing from 0.22 rifle. According to this witness, cadet no.2 (victim) gave a signal of completing the firing by raising his hand when suddenly this witness heard somebody shouting “चलो उठो बस आ गयी”. Cadet at Sr. No.2 (victim) suddenly got up and turned behind when the applicant was firing 0.22 rifle which hit left side of the victim’s forehead. The cadet collapse on the ground. The applicant-accused took the cadet on his lap and pressed his hand on the wound. This witness categorically deposed that despite asking the applicant – accused not to fire, he opened fire from 0.22 rifle when in fact, he was not authorized and instructed to fire.

12. There is no dispute that the round which hit the victim was fired from a rifle Butt No.2K05223 (**Article A**). It is also not in dispute that the said rifle was given to the Police on 1st February,

2013 itself in a sealed condition after the seizure panchanama. PW-7 Colonel Khosala, who is a quite Senior Officer in the Army, was posted as a Commanding Officer 1, Maharashtra Signal Company, NCC, Pune at the relevant time. He too, in his examination-in-chief testified that when he rushed to the scene of occurrence and asked the applicant as to what had happened to which the applicant replied that the cadet was injured by his mistake. From the evidence of the prosecution witnesses, it appears that it was the applicant because of whose negligence, the victim died due to a gun shot injury suffered by him. The applicant fired 0.22 rifle in a standing position behind the victim.

13. The learned Counsel for the applicant emphasized that the evidence of witnesses on the aspect of seizure of rifle creates a doubt in light of the defence raised by the applicant that the victim sustained gun shot injury from a 0.22 rifle, which was fired by PW-4 Kundalik Yellari and not by him. Learned counsel argues that despite seizure of the rifle by the Police, it was not immediately handed over by PW-7 Colonel Khosala which was kept in their store room and handed over subsequently. Possibility of shielding PW-4 Kundalik Yellari, being an Army personnel by PW-7 Colonel

Khosala cannot be ruled out.

14. PW-7 Colonel Khosala testified that the police had been to the unit area to take possession of the rifle which was seized by the police in the presence of panchas and was sealed and stamped. However, for want of sanction from the higher authorities, according to this witness, the rifle was not immediately handed over to the police on the same day. It was kept in a room where the weapons are stored. According to the learned Counsel, this creates a doubt as to whether PW-7 Colonel Khosala had handed over the 0.22 rifle from which the round was fired by the applicant or another 0.22 rifle used by PW-4 Kundalik Yellari in view of the fact that the Inquiry Officer PW-16 P. Saravanan admitted that PW-4 Kundalik Yellari was also found firing in the post-lunch session in order to exhaust all the remaining 100 rounds.

15. Evidence of PW-14 Kutubuddin Mulani, working as Assistant Director at Forensic Science Laboratory, Kalina, Mumbai would be important in ascertaining as to whether the bullet which hit the victim was in fact fired from the rifle seized from the spot. His evidence reveals that on 25th February, 2013 he received one sealed

parcel and three sealed envelopes from the Deccan Police Station, Pune. He examined the rifle (**Exh.1**) which was of 0.22 caliber and was in working condition. It was test fired. He testified that along with the said rifle live cartridges were not sent by the Investigating Agency. He, therefore, test fired one cartridge from the said rifle from its laboratory stock. It was successfully test fired. He had also examined fired bullet (Exh.2) under microscope. Taking into consideration the evidence of the ballistic expert, it is quite apparent that it was fired from the rifle which was seized by the Investigating Officer at the relevant time.

16. PW-1 Aman Modi and PW-2 Kshitij Malvankar were the students studying in Loyla School at the relevant time and had been to firing range for firing practice through 0.22 rifles at the NCC Headquarter at Senapati Bapat Road, Pune. PW-1 Aman Modi testified that in the post-lunch session, the fire practice started. PW-2 Kshitij Malvankar was given the first target while second target was given to the victim – Parag Ingale. This witness was at the 3rd position and at the 4th position there was a student by name Jai Kakani. All of them were in lying position and firing at their respective targets. He categorically deposed that applicant was

behind them but he did not know his exact position behind them. He heard some sound “what happened” and when he looked behind, victim – Parag Ingale was on the lap of the applicant and blood was oozing from his head. PW-2 Kshitij Malvankar supported the evidence of PW-1 Aman Modi in material particulars as regards occurrence of the incident. According to him, one of the cadets namely Steve shouted “चलो उठो बस आ गयी”, upon which victim – Parag Ingale suddenly got up and the bullet hit left side of his forehead. He testified that he came to know that the bullet was fired by the applicant. When victim fell down, applicant had put his hand to restrict the blood oozing from his head. His evidence further reveals that he was aware of the fact that the applicant was firing from behind the victim.

17. Learned APP, on the other hand, strongly opposed release of the applicant on bail by suspending execution of the sentence in view of the evidence of PW-7 Colonel Khosala, PW-4 Kundalik Yellari, PW-1 Aman Modi and PW-2 Kshitij Malvankar who had categorically testified against the applicant.

18. Learned APP has also invited my attention to the testimony of

PW-5 Manohar More, who was NCC Cadet Instructor in 1, Maharashtra Signal Company Pune and was present at the time of incident. The sum and substance of his evidence is that after PW-4 Kundalik Yellari had provided 0.22 rifles to the four cadets, he had tendered 10 rounds to each of the cadets for firing practice. He categorically deposed that at the relevant time, the applicant was standing with one 0.22 rifle in his hand in a firing position. He suddenly heard a commotion and noticed that blood was oozing from the head of the accused. The bullet had hit the head of that cadet. According to this witness, while taking the cadet to the hospital, applicant told him that while firing from 0.22 rifle the bullet had hit the head of that cadet.

19. Learned APP could not point out any exceptional circumstances refusing suspension of execution of the sentence. It is evident from the aforesaid discussion that though the applicant was negligent who was not authorized to open the fire had opened, resulting into the death of the victim, he could not anticipate that the victim would suddenly get up. It is also apparent from the record that the victim suddenly got up in response to the shouts behind “चलो उठो बस आ गयी” resulting into the tragic incident.

20. Learned Counsel for the applicant then submits that in light of various discrepancies in the evidence of the prosecution witnesses, especially the fact that PW-4 Kundalik Yellari was also found firing at the relevant time and in the absence of cogent evidence as regards to the rifle used in firing the round resulting into the death of the victim, the applicant may not be allowed to be incarcerated till the appeal is finally heard. He also submits that the applicant is not a flight risk who had attended the trial and has also deep roots in the society being permanent resident of Pune. He further submits that the applicant undertakes to bind himself by any condition which would be imposed by this Court, if his application is allowed. Considering the evidence on record as well as the argument of the learned Counsel for the applicant, I do not find any exceptional circumstance to refuse the prayer.

21. This being the appeal of 2023, the possibility of it being heard in near future would be quite difficult. There are no previous antecedents against the applicant.

22. Learned Counsel for the applicant has placed reliance on a judgment of the Supreme Court in case of **Satyendra Kumar Mehra**

alias Satendera Kumar Mehra Vs. State of Jharkhand¹ and invited my attention to paragraph 36 of the judgment, which reads thus :-

“36. We, however, make it clear that the appellate court while exercising power under Section 389 Cr.PC can suspend the sentence of imprisonment as well as of fine without any condition or with conditions. There are no fetters on the power of the appellate court while exercising jurisdiction under Section 389 CrPC. The appellate court could have suspended the sentence and fine both or could have directed for deposit of fine or part of fine.”

23. It is clear from the observations in the said judgment that the appellate court while exercising power under Section 389 of the Cr.P.C. can suspend sentence of imprisonment as well as the fine amount without any condition or with condition. It is clear that the appellate court has no fetters while exercising its jurisdiction under Section 389 of the Cr.P.C. by directing the appellant to deposit the fine or part of the fine.

24. Having considered the aforesaid facts and circumstances of the case, without expressing any opinion on merits / demerits of the case, I do not see any reason not to suspend the execution of the sentence, pending the appeal and to release the applicant on bail.

¹ (2018) 15 SCC 139

25. In view of the above observations, the following order is expedient :-

ORDER

(i) Pending the appeal, execution of the sentence is suspended on the applicant executing a P.R. bond in the sum of Rs.30,000/- with two sureties in the like amount to the satisfaction of the Registrar Judicial of this Court as well as deposit of an amount of Rs.4,00,000/- (Rupees Four Lacs only) in the Registry of this Court towards compensation to be paid to the parents of the victim.

(ii) The applicant shall attend the concerned police station once in every 15 days between 10.00 a.m. to 12.00 noon.

(iii) If the applicant commits two consecutive defaults in attending the police station, the prosecution will be at liberty to pray for cancellation of his bail.

(iv) The applicant shall surrender his passport, if any, in the Registry of this Court at the time of furnishing bail.

(v) The applicant shall furnish his permanent residential address as well as mobile number to the concerned police station.

(vi) The application is disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)