

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION NO.58 OF 2023

Rakesh @ Rahul s/o Manoharlal Kachhela and anr.

..vs..

State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri D.V. Chauhan, Advocate for the applicants.
Shri Rode, A.P.P. for the non-applicant/State.

CORAM : VINAY JOSHI AND BHARAT P. DESHPANDE, JJ.
DATED : 28/04/2023.

Heard.

2. This is an application seeking for suspension of execution of sentence in terms of Section 389 of the Code of Criminal Procedure and for enlargement of applicants on bail during the pendency of the appeal.

3. Both applicants/appellants were tried for the offence punishable under Section 302, 120B read with 34 of the Indian Penal Code (IPC) and Section 135 of the Maharashtra Police Act in the Sessions Trial No.404 of 2021. Learned Trial Court on appreciation of oral and documentary evidence held that, the appellants are guilty for the offence punishable under Section 302 read with 120B of the Indian Penal Code and accordingly, sentenced them to suffer imprisonment for life along with fine with default clause. Being aggrieved by the judgment and order of conviction dated 21.12.2022 passed by the Additional Sessions Judge, Nagpur, the appellants have preferred an appeal in terms of Section

374 of the Code of Criminal Procedure as well as by moving this application seeks for suspension of execution of sentence.

4. The facts of the case in brief which emerges from the police papers are that on 02.04.2021, around 5.30 pm at Vasansha Chowk behind Deepak Medical Stores in lane at Jaripatka, Nagpur, both accused have assaulted deceased Jitu @ Umesh by means of knife and thus, committed his murder. The prosecution has examined in all 17 witnesses to substantiate the charge. Besides that, the prosecution also banks on several documents, which have been referred and considered by the Trial Court while recording a finding of guilt.

5. The learned Counsel appearing for the appellants/applicants (accused) would submit that the Trial Court miserably erred in recording the finding of guilt. He would submit that the conviction is based on three circumstances i.e. evidence of sole eye-witness PW8 Harish Gargani, seizure of knife at the instance of accused no.2 Rajesh @ Raja and DNA report. He has tried to discredit these circumstances, which the Trial Court has relied. Moreover, it is the contention of the applicants that the evidence of the informant Meera (mother of the deceased), is not reliable.

6. With the assistance of both side, we have gone through the entire record and proceedings. PW1 Meera has lodged the report on the basis of which the crime has been registered and investigation commenced. It is her

evidence that on the date of occurrence, i.e. on 02.04.2021, around 4.30 pm, she was at her house along with her son Jitu (deceased) and daughter. At that time, both accused Rajesh @ raja and Rakesh @ Rahul came, gave a call to the deceased and took the deceased with them to the side of Deepak Medical store. Within short time, the informant received a telephonic call from one Pintu Bajaj informing that both accused are assaulting to the deceased. Immediately, the informant rushed to the place and found that Jitu was lying in pool of blood with several bleeding injuries all over the body. It is argued that the informant is not the eye-witness to the occurrence, but her knowledge about the assault was through Pintu Bajaj, who has not been examined. True, the prosecution has not examined Pintu Bajaj however, her evidence is relevant on the point that soon-before the occurrence, both accused took the deceased with them. The proximity of time is material on which there is no submission.

7. Contextually, we have noted that as per prosecution case, around 4.30 to 4.45 pm, deceased Jitu was taken away by both the accused. He was murdered and after demise, on the very day around 10.37 pm, FIR has been lodged. Thus, it reveals that within 3 to 4 hours from the occurrence, the report has been lodged with the Police (Exhibit 34). Suffice to say that the police report bears the specific names of accused as an assailants. Since appeal is yet to be heard on merits, we restrict ourselves to note this fact without making further

comments.

8. Learned Counsel appearing for the applicants took us through the evidence of sole eye-witness i.e. PW8 Harish, who is a maternal uncle of the deceased. It is his evidence that on the date of occurrence in the evening, he saw that both accused gave a call to the deceased Jitu, took him with them. He suspected something unusual and therefore, he followed all of them. He saw that near Deepak Medical Store both accused have thrown chilly powder at the face of the deceased, and repeatedly inflicted knife blows and as he was frightened, he returned to his house. The evidence of this witness is strongly criticized firstly by stating that his statement is recorded by the Police after 1.5 month. Secondly, he is close relative of the deceased. Thirdly, though he was confronted with the police on several occasion after the incident, still he did not discloses the things and fourthly, as per his evidence within two days, his statement was recorded but it was suppressed. We do find substance in these submissions but it is a matter of appreciation, which we do not intent to deal at the threshold. Pertinent to note, that the conviction is not based on the sole evidence of Harish, but there are other several circumstances, which we could see from the evidence and the impugned judgment.

9. The another circumstance is about seizure of knife at the instance of the accused no.2 Rajesh. The prosecution has proved memorandum and seizure panchanama by leading evidence of PW4 Laxman

Adwani, who is the panch witness. We have gone through the evidence of Panch witness, who by and large stated that accused no.2 Rajesh made a disclosure statement particularly, his desire to show the place where he has concealed the knife used in the commission of offence. In accordance with that, he led police sleuth to a specific place where he took out a knife concealed below the stones, which was consequently seized by the Police by drawing Panchanama.

10. Learned Counsel Shri D.V. Chauhan appearing for the applicants has criticized the evidence of seizure by attracting our attention to the law laid down by the Supreme Court in case of *Shahaja alias Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra 2022 SCC OnLine SC 883 and Anter Singh vs. State of Rajasthan (2004) 10 SCC 657*. It is submitted that the memorandum Panchanama was not read over to the Panchas and therefore, it cannot be relied. Moreover, it is submitted that the substantive evidence of panchwitness does not discloses the authorship. There can be no dispute about the proposition laid down in above decisions, however, on the given facts, one has to see whether the disclosure and consequential recovery is admissible and acceptable within the set parameter of law. *Prima facie* we find that PW4 has stated the authorship of knife and about the truthfulness of the contents of panchnama, and therefore, at this stage, *prima facie* we do not accede to the submission since the matter is to be left for final adjudication.

11. During the course of evidence, the cloths worn by both accused, were came to be seized. The cloths of deceased, cloths of accused and seized knife were sent for chemical analyzation. Learned Counsel Shri Chavahn would submit that seizure of panchanama does not discloses blood stains on the cloths of accused as well as CA report is inconclusive. He would submit that, though the DNA profile matches however as the CA report is inconclusive, it is a matter to raise a doubt.

12. We have gone through the CA report regarding the articles sent for analyzation. Though the result was inconclusive however, human blood was found and the inconclusiveness is to the extent of blood group. As per recommendation of CA Authority, all articles were sent for DNA profile. The report of DNA testing matches the blood group of deceased with the seized knife and cloths of accused. The said material *prima facie* connects accused with the crime. Besides that the Trial Court has relied on the evidence of the CCTV footage showing that, both accused were seen together leaving the place soon-after the occurrence. Moreover, injury was found at the hand of the accused no.1 Rakesh allegedly occurred while assaulting the deceased. Prosecution has examined PW7 sister of deceased, who has corroborated the evidence of the informant Meera to the extent of accused taking away the deceased from the residence.

13. Learned A.P.P. has submitted that entire incident discloses that within half hour from the accused taking away the deceased, he was eliminated, and thus, the

proximity itself is sufficient to fix the liability. Moreover, learned A.P.P. took us through the statement to show that there was sufficient motive for the accused to commit the crime. During trial, the accused were in jail. We have gone through the postmortem notes with special attention to the injuries found on the person of the deceased. We have noted that there were 21 incised stab wounds spread all over the body of the deceased, which *prima facie* shows the severity of the crime.

14. Having regard to the above material, we are not inclined to suspend the execution of sentence. In view of that, the application carried no merit, hence stand rejected.

(BHARAT P. DESHPANDE, J.)

(VINAY JOSHI, J.)

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