



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APPA) NO.243 OF 2023 IN
CRIMINAL APPEAL NO.355 OF 2022

Sunil S/o Gopal Yadav and others 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 S.P. Bhandarkar, Advocate for applicants.
Shri M.J. Khan, APP for respondent no.1/State.
Shri A.K. Bhangde, Advocate Assist to prosecution.

CORAM : VINAY JOSHI &M.W. CHANDWANI JJ.
DATE : DECEMBER 06, 2023.

Initially, this application seeking suspension of execution of sentence has been filed by three accused, however, learned counsel for the applicants has withdrawn the application to the extent of applicant no.1- Sunil Yadav (accused no.3) and applicant no.2 – Premlal Yadav (accused no.8) and thus application remains to the extend applicant no.3 – Malkhan Yadav (accused no.12). In all 12 persons were put on trial for committing murder of one Dhanesh on 16.07.2014 around 5 pm. The trial Court has convicted four persons whilst acquitted rest.

2. The learned counsel for applicant–Malkhan (hereinafter term ‘applicant’ is referred for Malkhan only) would submit that the trial Court seriously erred in convicting Malkhan despite cogent and reliable evidence. The trial Court has not considered the evidence of eye witnesses in proper perspective. There is no disclosure and consequential recovery at the instance of the applicant. The

trial Court failed to appreciate the evidence adduced by the applicant in support of plea of *alibi*. Moreover, it is submitted that the applicant is in jail from 12.08.2014 meaning thereby near about one decade.

3. At the instance of report lodged by the informant Smith (PW9), the crime has been registered. It is the prosecution case that on 15.07.2014 there was oral altercation between deceased Dhanesh and two persons namely Sunil Yadav and Nilu Yadav. On account of said quarrel, on 16.07.2014 around 5 pm, co-accused - Tufan came with some of the assailants including applicant to the office. At the relevant time, co-accused – Sunil initiated the quarrel by threatening the deceased. The applicant was asking co-accused – Tufan to shoot at the deceased. Co-accused Indalsing also instigated Tufan for shooting the deceased. Immediately, co-accused -Tufan fired at Dhanesh, which resulted in causing his instant death. On the basis of said report, the police have registered the crime and carried investigation.

4. Several witnesses have been examined by the prosecution. Admittedly, PW1 – Dhiraj and PW3- Ahkil though present on the spot have not supported the prosecution case on the point of presence of the applicant. The prosecution has relied on the evidence of PW8-Samir, and PW9-Smith (informant) to base the conviction of the applicant.

5. Learned counsel appearing for the applicant took us to the evidence of PW8-Samir, who has stated that the applicant-Malkhan and co-accused-Indulsing have exhorted co-accused Tufan to fire gunshot. It is submitted that though PW8-Samir stated about the applicant's role of exhortation however it was a pure improvement. For this purpose, we have been taken through the evidence of the investigating officer to prove this omission. The evidence of PW8- Samir has also been criticized on the point of test identification parade. It is pointed out that Malkhan was knowing to the witness and thus the test identification parade conducted after six months is of no significance.

6. Then we have been taken through the evidence of PW9-Smith (informant), who is an injured eye witness. He deposed that Tufan, applicant-Malkhan, Indalsing and some others had participated in the incident. He has stated that Malkhan and co-accused Indalsing have exhorted Tufan to fire at the deceased. It is submitted that out of rivalry, the applicant though not present on the spot has been falsely implicated. Rather the applicant is coming with a specific plea of alibi. Three defence witnesses have been examined to establish the presence of Malkhan elsewhere. The evidence of tower location and record from the toll check booth has been produced on record. We have been taken through their evidence alongwith the documents produced on record.

7. We have perused the observations of the trial Court on the point of evidence of alibi. Both sides have relied on some decisions to impress about the standard of proof to establish the defence of alibi. We are afraid to make an exhaustive comment on the issue but suffice to say that *prima facie* on the factual aspect we have to see whether a case is made out by defence is convincing and acceptable. Certainly, the onus on the accused is not high as the general onus lies on the prosecution to establish the case.

8. It is brought to the notice that the applicant had earlier applied for suspension of sentence however the said application was withdrawn as reflected in order dated 07.07.2022. The said order does not indicate that the Court has expressed its non-inclination to entertain the prayer of suspension. Moreover, a period of more than 1 ½ years has passed still there is no progress. Therefore, we think the said withdrawal that too with liberty to apply afresh would not come in our way to entertain this application.

9. The unfolded evidence discloses that the applicant has exhorted the main assailant to fire on the deceased. Rival submissions are made whether such an act can be construed as an offence committed in furtherance of common intention. Obviously, said exercise has to be done at the time of the final hearing, however, undisputedly the role of the applicant is about exhortation only whilst co-accused Tufan has fired on the deceased. We have considered all the submissions and gone through the

reasoning assigned by the trial Court. Our attention has been invited that similar allegations of exhortation have been leveled against co-accused Indalsing, who has been acquitted by the trial Court by according benefit of doubt. Certainly, if the role of both of them is same and the evidence is of also similar nature then it is a matter of consideration whether the applicant's conviction is sustainable. Particularly it has been weighed to us that for near about ten years the applicant is in jail. The applicant has made out arguable grounds. If the applicant succeeds in appeal then irreversible position would occur. The appeal will take its own time for disposal.

10. Considering all above facts, we are inclined to exercise our discretion to suspend the execution of sentence. In view of that, the following order :

ORDER

- i. The application is allowed and disposed of.
- ii. Execution of substantive sentence passed Sessions Trial No.137/2015 against applicant no.3 – Malkhan stands suspended till disposal of the appeal.
- iii. In the meantime, the applicant – **Malkhan S/o Asharfilal Yadav** shall be released on bail on his furnishing PR bond in the sum of Rs.50,000/- with one solvent surety in the like amount.

(M.W. CHANDWANI, J.)

(VINAY JOSHI, J.)

Wagh