



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

CRIMINAL APPLICATION (APPA) NO.682 OF 2023 IN
CRIMINAL APPEAL NO.436 OF 2023

Tayyub S/o Samsher Sheikh 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 M.V. Acharya, Advocate for applicant.
Shri S.S. Doifode, APP for non-applicant/State.

CORAM : VINAY JOSHI &M.W. CHANDWANI JJ.
DATE : DECEMBER 20, 2023.

This is an application seeking suspension of execution of sentence passed in Special Case MCOC No.12 of 2016. The applicant (accused no.7) – Tayyub has been convicted for the offence punishable under sections 363, 364-A read with section 34 of the Indian Penal Code (IPC). He has been sentenced to undergo imprisonment for life under section 364-A read with section 34 of the IPC.

2. Learned counsel for the applicant would submit that the evidence adduced by the prosecution to fix the applicant in the incident is totally inadequate and unreliable. He would submit that the trial Court erred in relying on the oral testimony of PW3 regarding the identity. It is submitted that the applicant is in jail since 09.01.2016 i.e. for near-about 7 years and therefore execution of sentence be suspended.

3. Learned Additional Public Prosecution has resisted this application by contending that the offence in which the applicant is convicted is of serious nature. The applicant alongwith co-accused have kidnapped a minor for ransom, confined him and gave life threats. It is submitted that the victim has identified the applicant in prior test identification parade as well as identified before the Court. In substance, it is submitted that the evidence is adequate and thus it is not a case of suspension.

4. The prosecution has adduced the evidence of 21 witnesses to establish leveled charges. Though accused were charged under the provisions of Maharashtra Control of Organised Crime Act (MCOC Act) as well as for criminal conspiracy, however, the trial Court acquitted them from said charges. Admittedly, said acquittal has not been challenged by the State. The informant is the father of the victim aged 14 years boy. It is his case that on the day of occurrence i.e. 07.01.2016 in the afternoon, 4 to 5 unknown persons kidnapped informant's son by a van. The informant also received a ransom call, however within 3 days the boy freed, returned unhurt.

5. Informant's evidence does not implicate the present applicant – Tayyub. The informant stated that he learnt that co-accused Pradip and Mukesh with their associates have kidnapped the minor. The only evidence available for prosecution is the evidence of victim (PW3), who has been

kidnapped. He has stated that the police have called him for identification in which he has identified those persons. Furthermore, he has identified the applicant as one of the culprit, who was present in the van at relevant time. Needless to say that this evidence of test identification parade is process of investigation. Thus, the substantive evidence is the evidence before Court. Our attention has been drawn to the aspect that the Court identification is after 7 years from the occurrence. So far as prior test identification parade is concerned, the victim has not specifically stated about the process and manner of identification in which he has identified the applicant. Since the conviction is based only on identification arguable points have been made out. Though the prosecution has also relied on the evidence of a chemist (PW8), his evidence relates that the applicant has purchased bandage from his shop. Allegedly bandage was used for tightening the mouth of the victim. It is argued that the evidence of chemist (PW8) is of no assistance since he does not state even the approximate time, date when the bandage were purchased. Moreover, it is submitted that a bandage is a common article and therefore it is risky to rely on such evidence.

6. We have noted above that the question of identity of assailants is a matter for consideration. The arguable grounds have been raised. Besides that the applicant is in jail from near about 7 years. Though it is a case of kidnapping for ransom, neither money was paid nor victim sustained

injury. The appeal will take its own time for disposal. Taking into account all above circumstances particularly the long incarceration, we are inclined to exercise our discretion. Hence, application is allowed.

7. Execution of substantive sentence passed against applicant (accused no.7) – Tayyub stands suspended till disposal of appeal.

8. In the meantime, the applicant – **Tayyub S/o Samsher Sheikh** shall be released on bail on his PR bond of Rs.50,000/- with one surety in the like amount.

9. The applicant – Tayyub shall attend the concerned Police Station on first Monday of each month between 10.00 am to 02.00 pm, till disposal of the appeal.

10. The application stands disposed of in above terms.

(M.W. CHANDWANI, J.)

(VINAY JOSHI, J.)

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