



Judgment

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

CRIMINAL APPEAL NO.500 OF 2023

Zulferkar @ Chotu s/o Jabbar Gani,
aged about 32 years, occupation:
business, r/o new Laxmi Nagar,
Gondia.
(presently in jail). **Appellant.**

:: V E R S U S ::

1. State of Maharashtra,
through Police Station Officer, PS
Ramnagar, Gondia, district Gondia.

2. Vishal s/o Murlidhar Gajbhiye,
aged about 18 years, r/o Marartoli,
Gondia, district Gondia. **Respondents.**

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Shri Anil S.Mardikar, Senior Counsel assisted by Shri
R.M.Daga, Advocate for the Appellant.
Shri Akash A.Gupta, Counsel appointed for Respondent No.2.
Shri Harshal Futane, Additional Public Prosecutor for
Respondent No.1/State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 19/12/2023

PRONOUNCED ON : 22/12/2023

JUDGMENT

1. Heard learned Senior Counsel Shri Anil S.Mardikar
for the appellant; learned counsel Shri Akash A.Gupta for
respondent No.2, and learned Additional Public Prosecutor Shri
Harshal Futane for respondent No.1/State.

2. **ADMIT.**

3. By this appeal, order dated 19.6.2023 passed by learned Ad-hoc Additional Sessions Judge-1, Gondia below Exhibit-413 in Sessions Trial 48/2013 is under challenge whereby learned Judge below rejected application for grant of bail.

4. Initially, the appellant is arrested on 4.12.2012 and rearrested on 9.9.2020 in connection with Crime No.88/2012 registered with respondent No.1/police station for offences punishable under Sections 109, 120B, 147, 148, 302, and 307 r.w 149 of the Indian Penal Code and 3, 4, 25, and 27 of the Arms Act and 3(2)(5) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocity) Act, 1989 (for short, the SC and SC Act). Since 9.9.2020 the appellant is behind bars.

5. As per report lodged against the appellant by respondent No.2 Vishal Murlidhar Gajbhiye with the police station, the complainant was acquainted with one Dharam Dawane as well as Rajendra Dawane. On 9.10.2012, at about2/-

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11:00 pm, he had been to petrol pump at Jaistambha Chowk for filling petrol in his motorcycle and was passing from over bridge towards his house. At the relevant time, he saw Dharam Dawane aged about 30 years underneath the bridge at Shakti Square communicating somebody and, therefore, he stopped there and was making enquiry with him. At the relevant time, one white colour Tata Sumo sumo came from Gondia side and gave a dash to him as well as Dharam Dawane. The car driver stopped the vehicle and from the said vehicle the appellant along with other co-accused got down. The appellant fired two rounds from his country made pistol and the other co-accused, who were along with him, assaulted Dharam Dawane by iron rods, sticks, and swords and lifted him and put him in the car. At the same time, the complainant was also assaulted by sticks and iron rods, due to which he sustained injuries on his person. Subsequently, he came to know that due to the previous dispute on account of money, Dharam Dawane was taken by the appellant and the co-accused and committed his murder and also caused injuries to the complainant.

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6. After registration of the crime, the investigating officer filed chargesheet on 6.1.2013. After completion of investigation, the appellant who was arrested on 4.12.2012, preferred an application for bail bearing Criminal Application (BA) No.598/2015 which was allowed by this court on 30.9.2015 and the appellant was released on bail on condition that he shall attend the police station on every Monday and Saturday between 3:00 pm and 6:00 pm, till culmination of the trial. As the appellant contravened the terms and conditions of the bail, his bail was cancelled by order dated 1.7.2017 passed by this court in Criminal Application (APPLN) No.27/2016. The police station officer of the said police station directed to arrest the appellant. The appellant challenged the said order before the Honourable Apex Court by preferring special leave petition which was registered as Petition for Special Leave to Appeal (Cri.) No.5882/2017 which was withdrawn. Thereafter, the appellant filed another application bearing Criminal Application (APL) No.605/2017 for restoration of the bail. The same was also rejected and the appellant was rearrested on 9.9.2020.

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7. Learned Senior Counsel Shri Anil S.Mardikar for the appellant, submitted that as far as allegation against the appellant is concerned, it is only to the extent that he has fired shots in air. He has not caused any injuries to the complainant or the deceased. The persons, who are responsible for giving deadly blows by means of deadly weapons like swords and iron rods, are already released on bail. This court observed that from postmortem report *prima facie* death cannot be attributed to injuries caused by the country made pistol. Merely because a country made pistol is used, that cannot be a ground to reject the application of the appellant and released him on bail. The bail granted to the appellant was cancelled only because he has not attended the police station, as per directions, and contravened conditions.

He further submitted that co-accused Rohit @ Golu Hariprasad Tiwari was also released on bail by this court by order dated 18.7.2014 and his bail was also cancelled by order of this court on 1.7.2017. Again, bail application of said Rohit was considered by this court and he was released on bail on 20.9.2019. The allegations against said Rohit are also of the

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similar nature as he has also not caused any injuries to the complainant or deceased.

Thus, on the ground of parity also, the appellant is entitled to be released on bail. Since last six years, he is behind bars and in view of Section 10 of the MCOC Act, the present trial is stayed as the appellant is also prosecuted for the offence punishable under the provisions of the MCOC Act in Crime No.159/2016.

He further submitted that co-accused Rohit, who is already released on bail, was also an accused in the said crime No.159/2016. Considering all these aspects, the appellant be released on bail.

8. The appeal is strongly opposed by the State on the ground that while cancelling the bail granted to the appellant, this court had considered that in crime, in which the court granted bail in favour of the appellant, the appellant used pistol which he fired on the deceased. This court further observed that the appellant has misused the liberty granted to him by indulging into the other serious crime. Thus, as the

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appellant not only contravened conditions of bail but also committed serious offence, therefore his bail was cancelled. The ground of parity is not available to the appellant as the case of the co-accused is completely on different footing as no weapon was assigned to the co-accused and there was no allegation that he assaulted either the deceased or complainant and prays for rejection of the application.

9. Learned counsel Shri Akash Gupta for respondent No.2, endorsed the same contentions and submitted that after releasing the appellant on bail, he committed three offences bearing Crime Nos.159/2016; 531/2017, and 309/2018. The allegations in all these crimes were that he used the fire arm while committing these crimes. Moreover, since the date of rejection of his application for restoration of bail, he is absconding and rearrested on 9.9.2020. If he is released on bail, he would involve in the similar type of offence and apprehension raised that he would cause e endanger to the life of the complainant and prays for rejection of the application.

10. Perusal of the record shows that there is no dispute as to fact that the appellant was arraigned as an
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accused in the present crime in question. The allegations against him were that he fired two bullets in air, as per recital of the FIR. However, statements of relevant witnesses show that due to firing of bullets, the deceased sustained injuries having entry wound on the walls, ribs, and cartilage in left side. The death is due to excessive loss of blood of brain part. The bail application of the appellant bearing Criminal Application (BA) No.598/2015 was considered by this court and the court observed that the death of the person was not caused due to injury of fire arm. However, co-accused are held responsible for giving deadly blows by means of deadly weapons like swords and iron rods etc on the head and he was released on bail on condition that he shall attend the police station on every Monday and Saturday between 3:00 pm and 6:00 pm, till culmination of the trial. As the appellant contravened terms and conditions, the bail was cancelled by observing that this court granted bail to the appellant, but he has scant respect to the order passed by this court and he is not law abiding citizen in whose favour any discretion should be exercise. It is further observed that after releasing him on bail, he had committed offences under Sections 307 and 395 vide Crime No.159/2016. He also preferred an application for

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restoration of the bail order which was also rejected by this court. The appellant claimed parity on the ground that co-accused Rohit @ Golu Hariprasad Tiwari also contravened the conditions imposed by this court and his bail was also cancelled by the order of this court. However, subsequently, his bail application bearing No.1147/2018 was considered and he was released on bail.

11. The role attributed to the appellant and the role attributed to co-accused are not similar to each other.

Insofar as allegations against co-accused Rohit are concerned, the role attributed to him is that he caused injuries which are simple in nature and an offence of minor nature is attracted against him. He had not caused death of victim Dharam, whereas, the appellant has used fire arm and caused injuries to the deceased. The other discriminating factor is that after the appellant is released on bail, he had committed three offences bearing Crime Nos.159/2016; 531/2017, and 309/2018. Thus, he has misused the liberty.

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12. Learned Senior Counsel Shri Anil S.Mardikar for the appellant, submitted that the appellant is entitled to be released on bail on the ground of parity. The principle of parity is not applicable to the present case as the role of the appellant is completely different.

13. The Honourable Apex Court in the case of **Ramesh Bhavan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) and anr, reported in (2021)6 SCC 230** has observed that grant of bail under Section 439 of the CrPC is a matter involving the exercise of judicial discretion. While considering the bail, factors need to be considered are, gravity of offence, nature of allegation and role attributed to accused. While applying the principle of parity, merely observing that another accused who was granted bail was armed with a similar weapon is not sufficient to determine whether bail can be granted on the basis of parity. In deciding aspect of parity, role attached to accused, their position, in relation to victim, are of utmost importance.

14. Considering the role of the appellant, circumstances, under which the bail granted to the accused is
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cancelled, and criminal antecedents against the appellant after he is released on bail, discretion cannot be used in his favour.

15. In the light of the above, the appeal is devoid of merits and the same is liable to be dismissed and the same is **dismissed**.

The appeal stands **disposed of**.

16. Fees of learned counsel Shri Akash A.Gupta appointed for respondent No.2 are quantified and the same be paid to him as per Rules.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!