



Crl.M.P.No.1845 of 2022
in Crl.A.No.892 of 2019

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**M.SUNDAR, J.
and
R.SAKTHIVEL, J.**

(Order of the Court was made by M.SUNDAR, J.)

Captioned 'Criminal Miscellaneous Petition' (hereinafter 'Crl.M.P.' for the sake of brevity, convenience and clarity) has been filed in this Court under Section 389(1) of 'The Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.P.C.' for the sake of brevity and clarity] with a prayer for suspension of sentence qua judgment and sentence dated 25.04.2019 in S.C.No.303 of 2017 on the file of 'III Additional Sessions Judge, Salem' (hereinafter 'Trial Court' for the sake of convenience and clarity).

2. Mr.R.Sankarasubbu, learned counsel appearing on behalf of the counsel on record for petitioner and Mr.E.Raj Thilak, learned State Additional Public Prosecutor on behalf of State (respondent in Crl.M.P.) are before us.

3. Owing to first proviso to Section 389(1) of Cr.P.C., a counter affidavit has been filed by the State and the same is also before us.



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4. Considering the legal drill on hand, short facts shorn of elaboration will suffice. Short facts are that there was an occurrence on 30.05.2017 wherein one Srinivasan died; that the case of the prosecution is that three persons are responsible for his death; that it is the further case of the prosecution that it is a case of murder; that there was a small money transaction between the deceased and one 'Kuppuraj' (hereinafter 'A1' for the sake of convenience and clarity); that the transaction is Rs.15,000/- loan; that A1 along with A2 and A3 ran into the deceased on 30.05.2017; that a wordy duel regarding the transaction got escalated to an assault and the deceased ultimately succumbed to injuries inflicted by A1 to A3; that this case of the prosecution was believed by the Trial Court as regards A1 and A2 who were handed down life sentence and Rs.1,000/- fine and in default to undergo three months simple imprisonment; that with regard to A3, the Trial Court acquitted him.

5. It may be necessary to capture some further short facts as regards the trajectory the matter has taken and those short facts are that the judgment and sentence of the Trial Court is dated 25.04.2019; that this appeal has been preferred by A2 on 05.12.2019; that A1 had preferred an independent appeal in



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Crl.A.No.383 of 2019 on 24.06.2019; that A1 prayed for suspension of sentence and the same was acceded to by the predecessor Honourable Division Bench in and by an order dated 27.11.2019; that as of 27.11.2019, the appeal of A2 was not on the file of this Court (to be noted the appeal was filed only on 05.12.2019 as already alluded to supra); that A2 thereafter moved for suspension of sentence vide Crl.M.P.No.7541 of 2021 and the same came to be dismissed by an order dated 11.08.2021.

6. Learned counsel for petitioner submitted that even according to the prosecution, the transaction was only with A1 and not with A2. Learned counsel also took us through the evidence in the Trial Court and more particularly the evidence of one Dr.Sangeetha (P.W.13) who is the doctor who performed the post mortem. Adverting to this deposition, learned counsel submits that the proximate cause of death could also be because of excessive consumption of liquor but we do not propose to re-appreciate evidence more so in the light of the recent judgment of Honourable Supreme Court in the case of *Omprakash Sahni Vs. Jai Shankar Chaudhary & Anr. Etc.* reported in 2023 SCC Online SC 551. Be that as it may, learned counsel for petitioner submitted that A1 has



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been given the benefit of suspension of sentence in and by the aforementioned order dated 27.11.2019 made by Honourable Predecessor Bench but A2 is still languishing in prison and the incarceration is for over seven years now. It is the specific case of learned counsel that A2 (petitioner before us) is incarcerated from the date of occurrence i.e., 30.05.2017 and continues to be in jail post conviction i.e., post 25.04.2019 also.

7. Learned Prosecutor while contending to the contrary pointed out that the earlier suspension of sentence petition was dismissed by the Honourable Predecessor Bench inter-alia by noticing that as many as 13 previous cases are pending against A2.

8. We carefully considered the rival submissions and we also perused the orders made by Honourable Predecessor Division Benches (A1's suspension of sentence prayer which was acceded to vide order dated 27.11.2019 as well as the order dated 11.08.2021 made in Crl.M.P.No.7541 of 2021 wherein A2's suspension of sentence prayer was negatived). Even according to the counter affidavit of the State, we find that there is not much difference as regards the overt acts qua A1 and A2. The most relevant portion of



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the counter affidavit in this regard is contained in paragraph 2 and the same reads as follows:

'2..... then A-1 again attempt to assault the deceased, which caused injury to A-2 in the sequence of the occurrence, A-3 took the iron rod which was hidden with him and assaulted on the backside head of the deceased and caused injury and while he ran away to escape he fell down and died spot itself. Thus the A-1 to A-3 did the above said acts due to previous enmity with such intention and knowledge, knowing that their act would cause the death of the deceased.....'

9. We also find that the Trial Court has completely acquitted A3 by disbelieving the evidence of P.W.1 an eye witness though P.W.1 has stated that A3 assaulted the deceased Srinivasan with an iron rod. We again reiterate that we do not propose to re-appreciate evidence in a Section 389 Cr.P.C. legal drill in the light of *Om Prakash Sahni* principle alluded to supra. We now turn to the argument of the Prosecutor regarding 13 previous cases as against A2. Learned counsel for petitioner drew our attention to the replies which have been obtained by making queries vide Right to Information Act, 2005 (RTI Act) to demonstrate that other than the conviction which is under appeal before us no case is pending



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against the petitioner i.e., A2. A careful perusal of what according to the prosecution is history sheet particulars also brings to light that no case other than the conviction which is under appeal before us is pending against A2.

10. In this view of the matter, we respectfully applied the principles laid down by the Honourable Supreme Court in *Jeetu Khatik Vs. State of Chhattisgarh* (order dated 11.04.2022 in Criminal Appeal No.603 of 2022) and *Omprakash Sahni Vs. Jai Shankar Chaudhary & Anr. Etc.* reported in 2023 SCC Online SC 551. To be noted, *Omprakash Sahni's* case was rendered by Honourable Supreme Court very recently i.e., on 02.05.2023. To be noted, as already alluded to supra, we have refrained ourselves from appreciating the evidence which the petitioner attempted to take us through. We find that in the light of the narrative thus far though the evidence of P.W.1/eye witness has been disbelieved as regards A3, A3 has been acquitted, A1 and A2 have been handed down life sentence. In this view of the matter, we find that without resorting to re-appreciation of evidence, there is a palpable prima facie case to say that it is quite possible that the conviction may not be sustainable. We hasten to add that this is only prima facie view



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for the limited purpose of disposing the captioned CrI.M.P for suspension of sentence petition under Section 389(1) of Cr.P.C. as the conviction and sentence of Trial Court will be tested in the legal drill under Section 374(2) Cr.P.C in the regular main appeal. We have also considered the age of the accused. The petitioner was about 44 years old at the time of occurrence, he is therefore now about 51 years old and he has been incarcerated for over seven years continuously now.

11. As already alluded to supra as regards overt acts there is little difference i.e., none as between A1 and A2. As regards the conviction, we have already set out our prima facie view for the limited purpose of Section 389(1) of Cr.P.C. legal drill by applying *Omprakash Sahni's* principle laid down by Honourable Supreme Court.

12. The sum sequitur is we find that Section 389(1) of Cr.P.C. legal drill tilts in favour of acceding to the prayer for suspension of sentence.



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13. Learned counsel drew our attention to a receipt dated 19.07.2019 to demonstrate that A2 has deposited the fine amount in the Trial Court.

14. In the light of the narrative thus far, the following order is made:

(i) The execution of the sentence made by learned III Additional Sessions Judge, Salem vide conviction / sentence dated 25.04.2019 in S.C.No.303 of 2017 is suspended and the petitioner who is A1 in the Trial Court shall be released on bail subject to the conditions adumbrated in sub-paragraphs infra;

(ii) The petitioner shall execute a bond for a sum of Rs.10,000/- with two sureties, one of whom should be a blood relative, to the satisfaction of III Additional Sessions Judge, Salem. To be noted Rs.10,000/- each i.e., for Rs.10,000/- likesum;

(iii) The petitioner shall appear before the Trial Court which made the order of conviction i.e, III Additional Sessions Court, Salem on the first working day of every English calendar month at 10.30 a.m., pending appeal;

(iv) We make it clear that if the petitioner moves an application under Section 317 Cr.P.C., owing to unavoidable circumstances, it is open to the learned



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*District Judge to consider the same on its own merits
and in accordance with law;*

*(v) The petitioner shall furnish his residential
address to the Trial Court with Government
authenticated proof.*

15. Captioned Crl. M.P. is disposed of in the aforesaid
manner with the aforesaid directives.

[M.S.J.,] [R.S.V.J.,]
01.06.2023

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**P.S: Registry to forthwith communicate this order to Jail
authorities in Central Prison, Salem.**



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