



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.175 OF 2024

IN
CRIMINAL APPEAL NO.42 OF 2024

Mahendrasing s/o Vikramsing Chauhan

... APPLICANT

VERSUS

1. The Central Bureau of Investigation (C.B.I)
Special Crime – 1, CBI Building, 5-B
CGO Complex, Lodhi Road, New Delhi – 110 003
Phone No.(011) 24368634
through the Investigating Officer,
Shri M.K. Pathak,
Dy. S.P, CBI, SC-1, New Delhi
2. The State of Maharashtra
through, the Investigating Officer,
Latur MIDC Police Station, Latur,
Dist. Latur

... RESPONDENTS

...
Advocate for applicant : Mr. Shirish Gupte, Senior advocate i/b. Mr.
Abhaykumar Ostwal
Standing counsel for Respondent/CBI : Mr. Bhushan Kulkarni
A.P.P. for respondent/State : Mrs. Kalpalata Patil Bharaswadkar

...

WITH

CRIMINAL APPLICATION NO.331 OF 2024

IN
CRIMINAL APPEAL NO.67 OF 2024

Samir s/o Noormiya Killarikar

... APPLICANT

VERSUS

The State of Maharashtra
through, the Officer Incharge

M.I.D.C. Police Station, Latur,
Taluka and District Latur/
Central Bureau of Investigation

... **RESPONDENTS**

...
Advocate for applicant : Mr. R.S. Deshmukh, Senior advocate i/b.
Mr. Vishal Chavan and Mr. Kunal Kale
Standing counsel for Respondent/CBI : Mr. Bhushan Kulkarni
A.P.P. for respondent/State : Mrs. Kalpalata Patil Bharaswadkar
...

**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.**

**RESERVED ON : 29.07.2024
PRONOUNCED ON: 06.09.2024**

ORDER (MANGESH S. PATIL, J.) :

These are the applications under Section 389 of the Code of Criminal Procedure by the original accused Nos.1 and 2, respectively, who have been convicted for the offences punishable under Section 302 read with Section 34, Sections 201 and 203 both read with Section 120-B of the Indian Penal Code and have been sentenced to suffer life imprisonment and to pay a fine of Rs.5000/- each for the offence punishable under Section 302, for a period of three years RI and fine of Rs.2000/- each for the offence punishable under Section 201 and RI of two years and fine of Rs.1000/- each for the offence punishable under Section 203 of the Indian Penal Code.

2. We have heard the learned Senior advocates Mr. Gupte and Mr. Deshmukh and learned advocate Mr Ostwal and also the learned A.P.P. We have also heard the learned advocate Mr. Kale for the

informant. Learned senior advocates would submit that admittedly, there is no eye witness account of the incident. It was, therefore, imperative that the prosecution should have proved the circumstances to complete a chain of events ruling out even a slightest possibility of appellants' innocence. However, there are several missing links and no complete chain can be established, even accepting all the circumstances being taken together. They would submit that the trial court has failed to notice these missing links. Rather, it has resorted to inadmissible pieces of evidence. The inferences have been based on surmises and conjectures which do not have any place in criminal law. These appellants have already suffered long incarceration. Shortly appellant No.1 is to complete five years and the appellant No.2 would complete ten years. There is no likelihood of the appeals coming for hearing. There are appeals against acquittal as well, whereby, the decision of the trial court acquitting both these appellants of the offences punishable under Section 364 read with Section 120-B/34 and Section 376-D read with Section 34 of the Indian Penal Code. Considering the voluminous evidence led by the prosecution which has examined 125 witnesses it is unlikely that the appeals would be heard finally in the forcible future and in the light of the trite legal position evolved over a period of time, both the appellants are entitled to suspension of sentence and release on bail. They would cite following decisions :

- i. **Kashmira Singh Vs. State of Punjab; (1977) 4 SCC 291**

- ii. **Babu Singh Vs. State of U.P; (1978) 1 SCC 579**
- iii. **Gudikanti Narasimhulu Vs. Public Prosecutor, High Court of A.P; (1978) 1 SCC 240**
- iv. **Kiran Kumar Vs. State of M.P; (2001) 9 SCC 211**
- v. **Akhtari Bi Vs. State of M.P; (2001) 4 SCC 355**
- vi. **Saudan Singh Vs. State of U.P; (2022) 2 CRIMES 21**
- vii. **Dinesh Kumar Sinha Vs. State of Jharkhand ; (2009) 6 SCC 628**
- viii. **Angana Vs. State of Rajasthan ; (2009) 3 SCC 767**
- ix. **Hussain Vs. Union of India ; (2017) 5 SCC 702**
- x. **M. Radha Hari Seshu Vs. State of Telangana; (2020) 8 SCC 114**

3. Additionally, the learned Senior advocates would submit that the appellant No.1 was on bail during trial. There are no allegations about he having misused the liberty muchless of having pressurized the witnesses. There will not be any occasion for him to tamper the evidence now. Both the appellants are ready to abide even stringent terms and conditions and may be released on bail by suspending the sentence.

4. Mr. Gupte and Mr. Deshmukh would submit that the prosecution is essentially founding its case on the theory of 'last seen together' even when no clinching evidence was available for the trial court. The witnesses who were alleged to have seen the deceased in the company of the appellants turned hostile. There was no clear and visible CCTV footage to identify both of them in the company of the deceased while passing through Kakramba Toll Naka. Even the witness who is alleged to have identified the deceased from photograph even while it is alleged that these appellants together with the deceased had barely halted near Ashirwad bar for some time.

5. The learned advocates would further submit that a got up witness Vivekanand Pundalikrao Sarkale (PW-51) also turned hostile and still, the trial court believed him and on the basis of which a fragile story was built up regarding subsequent conduct of the appellants and the co-accused regarding concealing with the evidence and misleading the prosecution.

6. The learned senior advocates would further emphasize that while the trial court was convicting the appellants for the other offences, it chose not to rely upon the prosecution to the extent of offence of abduction and rape, which offences also were based on the same set of evidence, regarding last seen together and matching of the appellants' DNA profiles with the deep vaginal swab sample of the deceased. Such inference was self-contradictory, convicting the appellants for the offence of murder but simultaneously acquitting them of abduction and rape.

7. Learned APP would strongly oppose both these applications. He would remind us of the inherent limitations on the powers of this Court under Section 389 of the Code of Criminal Procedure to suspend the sentence and release on bail the convicts of a serious crime. He would submit that the exercise is not to find fault with the conclusions drawn by the trial court at this juncture, muchless by undertaking a threadbare scrutiny of the evidence led before the trial court. It is a matter of murder. The appellants have been convicted and sentenced to life imprisonment.

The conduct of appellant No.1 during the course of trial when he was on bail is not relevant once he is convicted. The parameters are different. Though they have suffered incarceration for a period as mentioned, that would have no bearing when both of them have been sentenced to suffer life imprisonment. He would submit that the parameters laid down in the matter of **Saudan Singh** (supra) are not applicable to the fact situation of the matters in hand.

8. The learned APP would further submit that the very conduct of the defence of planting a dummy accused Sarkale (PW-51) coupled with the attending circumstances revealing involvement of all the accused in hatching a conspiracy to mislead the investigating machinery is a fact which would substantiate the inference drawn by the trial court regarding involvement of the appellants.

9. He would submit that there is no dispute about the deceased having died due to drowning at a lonely place. There is ample evidence and circumstances to demonstrate that she was in the company of the appellants. The conduct of the appellants in taking a de tour to reach back to Latur instead of returning through the Kakramba Toll Naka being a conduct relevant under Sections 8 and to introduce the relevant facts under Section 9 of the Evidence Act, at this juncture, it cannot be inferred that the appellants have been convicted without any substance and evidence.

The learned AGP would place reliance on the following

decisions :

- i. **Omprakash Sahani Vs. Jai Shankar Chaudhary & Anr.; 2023 LiveLaw (SC) 389**
- ii. **Preet Pal Singh Vs. The State of Uttar Pradesh & Anr.; (Criminal Appeal No.520/2020 arising out of SLP (Crl.) No.2102/2019)**
- iii. **Pappu @ Suresh Budharmal Kalani Vs. State of Maharashtra; 2015(4) Mh.L.J. (Cri.) 211.**

10. One need not devote any time to embark upon the aspect of powers of the appellate court under Section 389 of the Code of Criminal Procedure, particularly in the matter of convictions in serious crimes. One also need not delve into the parameters which are applicable at this stage for considering the request for suspension of sentence and release on bail during pendency of the appeals against conviction. It is trite that this is not a stage to find out fault with every inference drawn by the trial court. It can happen only at a full-fledged hearing of the appeal against conviction. Minor errors here and there in the process of appreciation of evidence can seldom have any impact. It is only if the circumstances are such that there is a likelihood of the appellants being acquitted ultimately that alone should be the consideration for entertaining a request for suspension of sentence and grant of bail. Having borne in mind these limitations on the powers of this Court under Section 389 of the Code of Criminal Procedure in the facts and circumstances of the case, we shall proceed to consider the requests objectively on their own merits.

11. Admittedly, there are no eye witnesses to the alleged homicidal drowning of the deceased and the prosecution has been heavily

relying upon the attending circumstances based on the theory of 'last seen together'.

12. The chain of events which seem to have been accepted by the trial court demonstrates that indeed the deceased was in the company with her friends in the early morning of 21.03.2014. After returning home for a while, she again left home on her bike, parked it at Ekmat Bhavan office. She then waited at the PVR Chowk on Latur-Barshi road. Both these appellants allegedly arrived there in a white Ford Figo Car bearing No.KA-51-MA-3657. She boarded the car and three of them then proceeded along Latur-Ausa-Tuljapur road. The CCTV footage of Kakramba Toll Naka revealed passing of the vehicle through it at around 12.00 noon. The footage was collected from the DVR machine. On the way the three of them seem to have alighted near Ashirwad Bar. There are witnesses who had seen the two individuals near the Pachunda pond where the dead body was recovered. Though these witnesses Dhulappa Ramchandra Kolekar (PW-54) and Sanjay Baliram Patil (PW-99) turned hostile and denied to have seen the two persons near Pachunda pond at the material time, the evidence of one advocate Nilkanth Prabhakar Whatte (PW-55) stating that on the relevant day and time he received a telephonic call from these witnesses, Dhulappa Kolekar (PW-54) and Sanjay Patil (PW-99) about having seen two persons making noise while they were returning from Tuljapur to Kakramba near Pachunda pond and they having seen a white coloured Ford Figo Car bearing No.KA-51-MA-

3657. They also told him about a girl having fallen in the pond.

13. Assuming that the passengers in the car cannot actually be seen with sufficient clarity in the CCTV footage while passing through Kakramba Toll Naka, the fact that the vehicle passed through it coupled with evidence regarding the subsequent incident in this form, wherein, these witnesses Dhulappa Kolikar and Sanjay Patil who turned hostile would be corroborated through their immediate reaction in making a telephone call to the advocate Whatte and even their information about having seen the girl in the pond is indeed a clear set of evidence in support of the theory of 'last seen together' which is subsequently corroborated by the test identification parades. It would also be relevant under Sections 8 and 9 of the Evidence Act.

14. The subsequent conduct of the appellants returning Latur by taking a de tour rather than straight way coming back through Kakramba Toll Naka coupled with the subsequent attempt at screening the offenders by hatching a conspiracy and even to set up a dummy who was ready to take on the blame Sarkale (PW-51) in our considered view, demonstrates involvement of the appellants in commission of the crime.

15. Coupled with the above state of affairs, even there are certain other corroborating circumstances like discovery of the deceased's mobile handset from a well of village Warwanti pursuant to a discovery made by appellant No.1 under Section 27 of the Evidence Act, tallying it with the receipt issued by a mobile shop owner Mukesh Dineshchandra

Brijbasi (PW-47), corroboration of the telephonic conversation amongst all the accused of the relevant time, are the circumstances which were enough for the trial court to convict the appellant.

16. It cannot be said that in all probability, the appellants are likely to be acquitted.

17. Even if it is a matter of record that appellant Nos.1 and 2 are behind the bars for almost five and ten years respectively, the parameters laid down in the matter of **Saudan Singh** (supra) are not applicable to their cases when they have been convicted for murder and sentenced to life imprisonment.

18. True it is that the appellants have been acquitted of the offences of abduction and rape, however, we need not enter into that aspect while considering the request for suspension of sentence under Section 389 of the Code of Criminal Procedure.

19. Both the criminal applications are rejected.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE