

....Applicant

The State of Maharashtra

.....Respondent

.....

: Shri. Nilesch Ghanekar
h/f. Shri. Joydeep Chatterji

Addl. P. P. for Respondent / State :

: Shri. S. D. Ghayal

Advocate for Assist to PP

: Shri. Mukul Kulkarni

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**CORAM : R. G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Dated : May 09, 2024

This is the Second Application for suspension of substantive sentence imposed by the learned Additional Sessions Judge, Dhule in Sessions Case No.79 of 2016 *vide* Judgment and Order dated 08.11.2023 convicting and sentencing the Applicant and Co-convicts as follows:

Sr. No.	Under Section	Sentence
(1)	302 r/w. 149 IPC	Imprisonment for Life and fine of Rs.5,000/- each, in default, simple imprisonment for period of six months each.
(2)	324 r/w. 149 IPC	Rigorous Imprisonment for One Year each
(3)	341 r/w. 149 IPC	Simple Imprisonment for One Month each.
(4)	143 r/w. 149 IPC	Simple Imprisonment for Three Months each.
(5)	147 r/w. 149 IPC	Simple Imprisonment for Six Months each.
(6)	148 r/w. 149 IPC	Simple Imprisonment for Six Months each.

2. The case of Prosecution as seen from the relevant evidence of PW8-Pruthviraj Pitambar Chavhan, who is also the Informant, which is reproduced below:

“03. On 18-05-2016 at about 09:30 p.m. I and my father took dinner and proceeded double seat on the motorcycle towards out agricultural land. There is agricultural land of one Pravin Babulal Kshirsagar on our way. When we were proceeding by the side of said agricultural land, one tractor approached from opposite side. Pandurang Kautik Khile was driving the tractor. He obstructed way of our motorcycle by his tractor and stopped it in front of us. Accused Nandu Govind Khile alighted from the tractor holding an axe. Accused Dipak Govind Khile and Sharad Govind Khile approached behind him holding scythes (कोयता). All of them started to beat my father Pitambar. I got frightened and started to run leaving motorcycle there. At that time accused Pandurang Kautik Khile, Vinayak Kautik Khile and Kautik Chintaman Khile approached holding iron rod and sticks and started to beat me. At that time accused Pravin Amrut Kshirsagar, Dhananjay Rohidas More, Sagar Karbhari Khile, Hilal Narayan More and Ganesh Mahadu More also beat me with sticks. Accused Nimba Shivaji Khile dealt fist blows to me. The accused beat me on all over body so I sustained injuries on arms, legs, back and stomach. Accused Ramesh Waman Nimbalkar approached with a stick. He also beat me.

04. Accused Nandu Govind Khile dealt blow of axe to my father on head and caused injury to him. Accused Bhatu Waman Nimbalkar and Karbhari Chintaman Khile assaulted my father using screw-drivers. As we were shouting for help Karbhari Pratap Khsirsagar, Dattu Bhavrao Khsirsagar, Anna Shravan Sarode, Bapu Bhavrao Kshirsagar and Bapu Bhavrao Sonawane approached to the spot. When accused saw them approaching to the spot, they fled away on their tractor towards our village. The aforesaid persons gathered on the spot, made phone calls to villagers and called them on the spot. They called ambulance and brought us to Dhule for medical treatment. I can identify accused persons who beat us at the time of incident.”

3. It is submitted by the learned Advocate for the Applicant that the First Application for suspension of sentence was not pressed as the transcript of the CCTV footages showing the presence of Applicant elsewhere was not available. He submits that as the transcript is now available, this Application is preferred. He submits that though the

Informant claims to have witnessed the Applicant in the assault as one of the assaulter, at the relevant time the Applicant was in the hotel at the distance of 7 kms from the spot of incident, which is evident from the CCTV footage collected by the Investigating Machinery. He further submits that, except the evidence of the Informant who claims to have witnessed the incident, there is no evidence to connect the Applicant with the aforementioned incident. He submits that the Applicant was on bail during Trial based on very material which was relied upon by the High Court for granting him bail. He submits that the learned Trial Court has misinterpreted the evidence available on record though the waiter (Mahendra Mahadu Sonawane) from the very hotel who was examined as PW5 identified the Applicant as the one who was present in the hotel at the relevant time. He submits that the Application be allowed.

4. The Application is vehemently opposed by the Addl. P. P. and the learned Advocate for the Informant. They submit that the learned Trial Court has appreciated the entire evidence available on record including the CCTV footages and found that the faces of the persons seen in the DVD were not visible. They submit that there is no evidence as to who collected the CCTV footages from the hotel. They further submit that though the collection of the CCTV footages from the hotel was immediate, handing it over in Pen Drive to the concerned Police Station

was after a period of Three (03) Month. They submit that in view of the appreciation of the evidence by the learned Trial Court, the Application deserves to be rejected. They adverted our attention to the paragraphs No.39 and 56 of impugned Judgment, which read as under:

“39) It is significant to note that the said DVD Article-14 was being played of the time 20:33:08 and 21:38:21 dated 18.05.2016. The witness D.W.1 Valvi has clearly stated that the persons appearing on the screen are not visible, hence, he is unable to identify them and this happened in case of prosecution witnesses including the informant that the persons appearing on the screen are no clearly visible. Suffice to say that this Court has seen the CCTV footage shown to the witness after playing the DVD. This Court as well as learned predecessor of this Court has taken judicial note and observed that in the CCTV footage shown to the witness, the faces of the persons are not clearly visible and with all certainty, it cannot be ascertained who is and are the persons appearing on the screen. Admittedly, Arvind Valvi was not the Investigating Officer in this Crime and Shri. Ratnaparkhi was the Investigating Officer. For sometimes, he was under suspension, however, admittedly, neither the Superintendent of Police nor Shri. Ratnaparkhi had handed over the investigation in this crime of D.W.1 Arvind Valvi. He has admitted that they use to give written letter for seizure of CD/DVD or CCTV footage and he has not given any such letter to Shekhar Agrawal nor he knows whether Shri. Ratnaparkhi has given any such letter to Shekhar Agrawal, however, Shekhar Agrawal has produced the DVD of CCTV footage which he has filed in the charge-sheet of this case. No such letter is appearing on record that Shri. Ratnaparkhi has asked Shekhar Agrawal to prepare such DVD. Surprisingly, he knows accused No.1 Nandu Khile and identified him in the Court, however, he maintained that the person appearing on the screen on playing the DVD is not the accused No.1 Nandu Khile. Certainly, the testimony of this witness is not supporting to the plea of alibi taken by the accused.

56) At the cost of repetition, according to D.W.4 Shekhar Babulal Agrawal, he had been to Hotel Gitesh on 21.05.2016 and has taken the CCTV footage in pen-drive and not in the CD or DVD and handed over the pen-drive to police station. In the chief-examination itself, he contradicts himself that the pen-drive was given on the spot i.e. at Hotel Gitesh. Thus, as is rightly pointed out by the learned PP, it remains

a mystery as to who transferred CCTV footage from pen-drive to CD or DVD, to whom really pen-drive was handed over and where, i.e. at police station or at Hotel Gitesh. Further, the evidence of this witness is silent on the point that on which date the pen-drive was handed over to the police and when it was seized. The accused has not led any evidence that for 80 days and more i.e. from 21.05.2016 till 11.08.2016, who was having custody of the pen-drive, CD, DVD and nobody has tampered it. If really the CCTV footage were obtained on 21.05.2016, that too in pen-drive and not in CD, DVD, the panchanama Article-A-1 was dated 31.01.2017, according to the prosecution obviously not the part of charge-sheet and police-papers and the charge-sheet was filed in the month of August 2016. The transcript of the CCTV footage was prepared post filing of charge-sheet on 31.01.2017. Admittedly, no hash-value certificate under Section 65(B) of the CCTV footage which is a secondary evidence is brought on record so as to make it admissible in evidence. Thus, the plea of alibi though taken, is not sufficiently established by the defence.”

5. They submit that the case is based on the testimony of the eye witnesses, therefore, the Application be rejected.

6. We have heard both the sides at length. There cannot be any dispute on the aspect that from day one the Applicant has taken the defence of “**alibi**”. There is also no dispute that after the criminal law was set in motion, the Applicant approached this Court for bail. The orders passed by this Court, at the relevant time, in Criminal Applications No.30 of 2017 dated 19/01/2017, 09/02/2017 and 20/02/2017 reads as follows:

“Order dated 19th January, 2017 :

. At the request of learned Additional Public Prosecutor, stand over to 2nd February, 2017. He shall place on record the copy of transcribed of compact disk which was seized vide panchnama dated 11th August, 2016 from one Shekhar Babulal Agrawal, who was working as technician in the office

of Superintendent of Police, Dhule.

* * *

Order dated 9th February, 2017 :

Learned Public Prosecutor to place on record the complete set of charge sheet with advanced copy to learned Counsel for the applicant. The said process be completed within period of one week from today.

2. Post this matter for further consideration on 20th February, 2017.

Order dated 20th February, 2017 :

“Heard.

2. The applicant is seeking regular bail in C.R. No.145/2016, registered at Dhule Taluka Police Station, District Dhule, for the offences punishable under Sections 302, 307, 341, 143, 147, 148, 149 of the Indian Penal Code.

3. The role attributed to the present applicant, as could be noticed from the first information report is, the applicant along with other twelve co-accused assaulted Pitambar, complainant with sickle, axe, stick etc.

4. The applicant has specifically come out with a case that the applicant was not present at the place of incident, as at the relevant time, he was at hotel Gitesh consuming liquor, which could be confirmed from the CCTV footage.

5. Along with charge-sheet, the prosecution has placed on record the recovery of CCTV footage and its transcript. Perusal of the recovered CCTV footage that up to 21.40 hours, the applicant was Hotel Gitesh and from there, he traveled to the place of incident i.e. Anakwadi, which distance is about 7 to 10 kms.

6. Apart from above, it is claimed that the applicant has participated in the crime in question, as he assaulted Pitambar with an axe.

7. The axe and other weapons are recovered from the other co-accused, whereas the present applicant who surrendered immediately i.e. on next day of incident, nothing is recovered.

8. Apart from above, the CCTV footage depicts that till 21.40 hours the applicant was at Hotel Gitesh and even if presumed that he has traveled to village Anakwadi, which is at a distance of about 7 to 10 kms. from the Hotel Gitesh, it is difficult to infer that he was present on the spot of incident at 21.30 hours. Though an issue of alibi is required to be appreciated, the prosecution has produced the CCTV footage along with charge-sheet and as such, same is considered for the purpose of dealing with the bail application.

9. In view of the aforesaid observations, i.e. (a) the serious doubt as regards the physical presence of the applicant at the spot of incident and (b) nothing is recovered from the applicant including the weapon, which is claimed to have been used in commission of crime in question, in my opinion, the applicant deserves to be released on bail.

10. The applicant be released on bail in C.R. No.145/2016, registered at Dhule Taluka Police Station, District Dhule, for the offences punishable under Sections 302, 307, 341, 143, 147, 148, 149 of the Indian Penal Code, upon furnishing P.R. bond of Rs.25,000/- with one or two sureties in the like amount.

11. The applicant shall not enter the jurisdiction of Taluka Police Station, Dhule for a period of six months from today.

12. The applicant shall not influence the prosecution witnesses and shall not tamper with the prosecution evidence.

13. Criminal Application stands allowed in above terms.”

* * *

7. The Applicant / defence examined in all Six (6) witnesses. The evidence of DW5 – Subhash Jawarsing Chavan, who was working as Waiter in Hotel Gitesh, Arvi, Tal. & Dist. Dhule, show that he was shown CCTV footages of the said hotel dated 18/05/2016 and he identified the Applicant present in the hotel. The CCTV footages copied in Pen Drive was played before the Court. Following appears in the same :-

Sr. No.	Video Time	CCTV Times	Sequence of events
1)	50 Sec.	20:58:53	Applicant comes at the Bar
2)	1 Min 19 Sec.		Sits on the corner table
3)	40 Min. 24 Sec.	21:38:25	Applicant gets up from the table
4)	40 Min. 37 Sec.	21:38:37	Applicant can be seen leaving
5)	40 Min. 52 Sec.	21:38:52	CCTV footage of the Bar Counter
6)	42 Minutes	21:40:17	Applicant leaves the Premises.

8. Though, Prosecution is placing heavy reliance on the observations made by the learned Trial Court in Paragraphs No.39 and 56, reproduced above, they *prima facie* appear to be preverse. The impugned Judgment is under challenge. The entire evidence will have to be re-appreciated and the veracity of the said observations of learned Trial Court will have to be scrutinized. The observations in the Judgment show that the place of incident was Seven (7) kilometers away from the said hotel. The assailants came by Tractor. Time of incident as per Prosecution was around 09:30 p.m., whereas the aforesaid CCTV footages show that till 09:40 p.m. the Applicant was in the said hotel. This *prima facie* creates dent to the testimony of the eye witnesses. Except the evidence of the eye witnesses, there is no evidence against the Applicant. The Applicant was on bail during Trial. The Appeal would not come up for final hearing in the near future. In view of above, we proceed to pass the following order :-

ORDER

(i) The Application is allowed.

(ii) The substantive sentence imposed by the learned Additional Sessions Judge, Dhule in Sessions Case No.79 of 2016 *vide* Judgment and Order dated 08.11.2023 on the Applicant - Nandu Govind Khile, is suspended during the pendency of the present Appeal.

(iii) Applicant be released on bail on furnishing P. R. Bond of Rs.15,000/- (Rupees Fifteen Thousand Only), with one surety in the like amount.

(iv) Bail before the Trial Court.

9. Criminal Application stands disposed of accordingly.

10. Learned Advocate for the Informant / Assist to PP submits that the effect and operation of this order be stayed for approaching Hon'ble Apex Court. In view of the observations made in the order, the said prayer is rejected.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)

GGP