



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3228 OF 2023
IN
CRIMINAL APPEAL NO. 841 OF 2023

Imrankhan Hussein Khan

...Applicant

Versus

The State of Maharashtra

...Respondent

....

Mr. Satej S. Jadhav – Advocate for the Applicant

Mrs. V. S. Chaudhari – APP for respondent/State

.....

AND

CRIMINAL APPLICATION NO. 3295 OF 2023
IN
CRIMINAL APPEAL NO. 842 OF 2023

Usman Khan Ismail Khan

...Applicant

Versus

The State of Maharashtra

...Respondent

....

Mr. Satej S. Jadhav – Advocate for the Applicant

Mrs. V. S. Chaudhari – APP for respondent/State

.....

CORAM : R. G. AVACHAT

AND

NEERAJ P. DHOTE, JJ.

DATED : 08TH FEBRUARY, 2024

PER COURT : -

1. By these applications, the applicants pray for suspension of substantive sentence awarded to them by the learned Additional

Sessions Judge, Aurangabad, vide Judgment and Order dated 26.05.2023 passed in Sessions Case No. 1 of 2020, convicting them for the offence punishable under Section 302 r/w 34 of the Indian Penal Code and sentencing to suffer imprisonment for life and pay fine of Rs.50,000/- each, in default, rigorous imprisonment for six months.

2. Heard learned advocate for the applicants/appellants, learned APP for the State and the learned advocate for the informant.

3. It is the case of the prosecution that deceased Firoj Khan was assaulted by accused no. 1 – Hussein Khan @ Bali s/o Ibrahimkha and the other co-accused on 19.08.2019, out of previous enmity.

4. *Learned advocate for the applicants submits that there has been delay in lodging the FIR.* He places reliance on the judgment in the case of **Ganesh Bhavan Patel and another v. State of Maharashtra** reported in **AIR 1979 SC 135**, wherein the delay of four hours in recording the statement of witnesses was held to be fatal.

5. Learned advocate for the informant/respondent no. 2 relied upon the recent judgment of the Hon'ble Supreme Court in the case of **Omprakash Sahni Versus Jai Shankar Chaudhary and Another** reported in **2023 AIR (SC) 2202**, wherein it has been observed as follows : -

33. *Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not re-appreciate the evidence at the stage of Section 389 of the CrPC and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.*

6. In the case in hand, the prosecution's case is mainly based on the testimony of PW1 – Afsar Khan, brother of deceased, PW5 – Shaikh Kalim Sk. Alim, PW12 – Imran Babulal Qureshi, who are examined as eye-witnesses to the incident and PW7-Sk. Imran Sk. Yusuf to whom the deceased made oral Dying Declaration.

7. We have been taken through the paper-book by the learned advocate for the applicants, advocate for the informant and the learned APP. The copy of Station Diary Entry show that the informant on the day of incident i.e. 19.08.2019 went to the Jinsi Police Station,

Aurangabad, at around 01:30 p.m. and reported that the deceased was his brother and accused no. 1 – Hussein and 8 to 10 other persons assaulted him. It is not in dispute that the informant was knowing the Appellants/accused by their first name, however, he did not name the said accused in his report registered with the police. The incident in question had taken place in the morning at around 10:30 a.m., and the FIR has been lodged around 05:00 p.m.

8. So far as PW5 – Shaikh Kalim Sk. Alim is concerned, it is seen that he was present at the time of spot panchanama which was conducted by the Police, however, his statement was recorded on the next day. We find merit in the submission of the learned advocate for the applicants that, had PW5 really been the witness to the incident in question, he would have reported the Police about the incident at the same time when the spot panchanama was conducted.

9. Insofar as PW12 – Imran Babulal Qureshi is concerned, he is reported to be the chance witness. It is seen that he was very much present in the hospital where the deceased was hospitalized, however, he did not report anything about the incident to anybody. Admittedly, his statement was recorded on the next day.

10. So far as PW7- Sk. Imran Sk. Yusuf is concerned before

whom the deceased has given oral dying declaration in which the applicants and the other accused have been named, would be a weak piece of evidence.

11. As far as the evidence in the nature of forensic report is concerned, the blood stains found on the pant of the applicant – Usman Khan are stated to be inconclusive.

12. Considering above discussed evidence available on record, at this stage, it *prima facie* appears that the applicants have a good case on merits. The applicants are behind the bars for more than four and half years and that there is no possibility that the Appeal would come up for final hearing in the next six years by its turn. In this view of the matter, we proceed to pass the following order.

ORDER

- (i) Criminal Applications are allowed.
- (ii) The substantive sentence awarded to the applicants by the learned Additional Sessions Judge, Aurangabad, vide Judgment and Order dated 26.05.2023 passed in Sessions Case No. 1 of 2020, convicting the applicants for the offence punishable under Section 302 r/w 34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and pay fine of Rs. 50,000/- each, in default, rigorous imprisonment for six months, is suspended during the pendency of the Appeals.

- (iii) The Applicants be released on bail on their furnishing P. R. Bond of Rs.15,000/- (Rupees Fifteen Thousand Only), each.
- (iv) Bail before the Trial Court.
- (v) The Applicants shall not change their residential address without intimation to the concerned Police Station.

13. Criminal Applications are accordingly disposed of.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde