

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPLICATION NO.654 OF 2023
IN
CRIMINAL APPEAL NO.216 OF 2022

Rajabhau Harischandra Nimbalkar

Age : 37 years, Occu : Agri,

R/o. Mangwadgaon, Tq. Kaij,

Dist. Beed

.. Applicant

Versus

The State of Maharashtra

.. Respondent

...
WITH

CRIMINAL APPLICATION NO.3551 OF 2023
IN
CRIMINAL APPEAL NO.216 OF 2022

Balasaheb Baburao Nimbalkar

Age : 57 years, Occu : Agri,

R/o. Mangwadgaon, Tq. Kaij,

Dist. Beed.

.. Applicant

Versus

The State of Maharashtra

.. Respondent

In both the matters:

Advocate for the Applicant : Shri. Satej S. Jadhav

APP for the Respondent / State : Smt. V . S. Chaudhari

...

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

Dated : February 27, 2024

PER COURT :-

. Heard learned Advocate for the Applicants / Appellants
and learned APP for the State. Perused the papers.

2. The Applicants / Appellants are convicted by learned Special Judge, Ambajogai in Special Case No.43 of 2020 for the offence punishable under Sections 302, 326, 143, 147, 148, 427, 435 r/w. 149 of the Indian Penal Code and for the offence punishable under Section 4 r/w. Section 25 of the Indian Arms Act.

3. The Prosecution's case, in brief, is that, the incident of assault by the Applicants / Appellants, co-convicts and acquitted accused took place due to the land dispute in the night of 13.05.2020 in the village Mangwadgaon, Tal. Kaij, Dist. Beed. In the assault, Prakash, Sanjay and Babu succumbed to the injuries. The weapons like axe, sickle and scythe were used in the assault and Prakash was run over by the Tractor. During the course of the Trial, the Prosecution examined five (05) eye witnesses i.e. PW No.1 – Dhanraj Babu Pawar, PW No.2 - Shivaji Babu Pawar, PW No.3 – Santosh Sanjay Pawar, PW No.4 - Suresh Shivaji Pawar and PW No. 6 – Dadoli Prakash Pawar.

4. PW No.1 is also the Informant. The Applicants are not named in the FIR, though they were named in the supplementary statement given by the Informant on the same day. It is not in dispute

that in the Charge-sheet there were two (02) accused by name Rajabhau and two accused (02) by name Balasaheb, having the same surname except difference in their fathers' name. During the Trial, one Rajabhau died. One Balasaheb has been acquitted by the Trial Court. There were in all fourteen (14) accused persons who were charge-sheeted, out of which the learned Trial Court acquitted seven (07). It is seen from the Judgment and the evidence on record that the accused persons who were identified in the Test Identification Parade (hereinafter, for short, 'TIP') as well as in the Court were acquitted by the learned Trial Court.

5. The witness PW No.2 - Shivaji Babu Pawar did not name the Applicants and deposed that the persons from Nimbalkar family were the assaulters. As far as the evidence of PW No.3 – Santosh Sanjay Pawar is concerned, he also did not name the Applicants and attributed the role of assault to 30 to 35 persons and named accused Pintu, Sachin, Dilip and Balasaheb. It is not clear as to which Balsasaheb PW No.3 - Santosh Pawar had referred to. As far as the evidence of PW No.4 – Suresh Shivaji Pawar is concerned, he attributed the role to all the accused who were present in the Court at the time of recording his evidence including the accused, who are acquitted. As far as PW No.6 – Dadoli Prakash Pawar is concerned,

she named Balu, Pappya, Rajabhau and Balu. Again it is not clear as to which Balu and which Rajabhau the said witness has referred to. The cross-examination of PW No.6 - Dadoli show that the portion from her supplementary statement is exhibited wherein she has stated the name of the Applicant - Balasaheb was told to her by her brother-in-law.

6. The observations made by learned Trial Court in respect of the present applicants are reproduced below:

“121. As regards the involvement of accused no. 5 Balasaheb Baburao Nimbalkar is concern, his name is shown in supplementary statement of complainant, PW-1 Dhanraj Pawar deposed that Balasaheb Nimbalkar was also accompanied with other accused persons alongwith Tukaram Nimbalkar. However, Tukaram Nimbalkar is not accused in this case. Balasaheb Nimbalkar are two accused persons in this case i.e. accused no. 14 is Balasaheb Ramling Nimbalkar. So, no any witness specifically deposed the full name of accused no. 5 as Balasaheb Baburao Nimbalkar. However, as per test identification parade, present accused no. 5 is identified and touched by witness Dhanraj Pawar as well as witness Shivaji Pawar during test identification parade, identified and touched to the accused no.5. As well as witness Santosh Pawar during test identification parade touched and identified to accused no.5. Not only this, witness Daduli Pawar during test identification parade also identified and touched to accused no.5 Balasaheb Baburao Nimbalkar.

122. Further as per CDR reports below Exh. 346 location of accused no.5 is also found near the spot of incident and he also made calls and received calls from accused Hanumant Nimbalkar and Sachin Nimbalkar. So, in view of oral evidence of the prosecution eye witnesses and corroborative evidence of test identification parade and CDR, accused no. 5 Balasaheb Nimbalkar was present on spot and he also assaulted to deceased. Call details, his locations and in test identification parade most of the witnesses identified

and touched to him and he is also one of the party in civil litigations. So, the prosecution has proved presence of accused no.5 Balasaheb Bhaurao Nimbalkar on the spot at the relevant date, time and place of incident and he is one of the member of an unlawful assembly.

123. As the presence of accused no.6 Rajabhau Harischandra Nimbalkar on spot of incident at the relevant date, time and place is concern and whether he was the member of an unlawful assembly or not is concern, his name is in supplementary statement. PW-1 Dhanraj Pawar deposed that Rajabhau Nimbalkar was present on spot alongwith other accused persons. They also assaulted to deceased PW No.2 only deposed that persons of Nimbalkar family had came on spot and assaulted to Babu, Sanjay and Prakash. PW-4 Suresh Pawar deposed that all accused persons assaulted to Prakash, Babu and Sanjay and Daduli. PW-6 Daduli deposed that Rajabhau was also accompanied with other accused persons and he assaulted to Babu by means of axe. Further as per test identification parade witness Dhanraj Pawar identified and touched to accused no.6 Rajabhau Harischandra Nimbalkar. Not only this, PW-2 Shivaji Pawar, he also identified and touched to accused no.6 Rajabhau Harischandra Nimbalkar. As well as witness Santosh Pawar also identified and touched to accused no.6 Rajabhau Harischandra Nimbalkar. PW-6 Daduli Pawar also identified and touched to accused no.6 – Rajabhau Harischandra Nimbalkar.”

7. The aforesaid observations of the learned Trial Court show that the Identification of the Applicants in the Test Identification Parade has weighed in the mind of the learned Trial Court. It is not in dispute that the Accused persons, who were identified in the TIP, are also acquitted. The TIP was conducted after a period of One (1) month and Five (05) days from the date of arrest of the Applicants. It is brought to our notice that the TIP was conducted in utter violation of the relevant guidelines. It is also seen from the evidence of the Executive Magistrate i.e. PW No.8 – Asha

Dayaram Wagh, who conducted the TIP, that the police had played role in the said TIP. Therefore, *prima facie* the TIP is required to be discarded, though not substantive piece of evidence.

8. The Applicants have an arguable case on merits. The Applicants are behind the bars for a period of three (03) years and ten (10) months. There is no possibility that the Appeal would come up for hearing in the near future. The State has not preferred the Appeal against the acquitted accused persons, who were identified in the TIP as well as in the Trial Court. Hence, the following order.

ORDER

- (i) Criminal Applications are allowed.
- (ii) The substantive sentence imposed by the learned Special Judge, Ambajogai in Special Case No.43 of 2020 vide Judgment and Order dated 02.02.2022 convicting the Applicants by name Balasaheb Baburao Nimbalkar and Rajabhau Harischandra Nimbalkar for the offence punishable under Sections 302, 326, 143, 147, 148, 427, 435 r/w. 149 of the Indian Penal Code and for the offence punishable under Section 4 r/w. Section 25 of the Indian Arms Act, is suspended during the pendency of the present Appeal.

(iii) Applicants by name Balasaheb Baburao Nimbalkar and Rajabhau Harischandra Nimbalkar be released on bail on furnishing P. R. Bond of Rs.15,000/- (Rupees Fifteen Thousand Only) each, with one surety in the like amount each.

(iv) Bail before the Trial Court.

9. Criminal Applications stand disposed of accordingly.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)

GGP