

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 1728 OF 2024
IN
APPEAL NO. 474 OF 2018

Sunil Zumbarya Kale Alias Babu Ashok Kale ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Rahul Arote, with *Tanvi Mahadik & Riya Mane*, for the
Applicant in IA/1728/2024.
Ms. Gauri S. Rao, APP, for the *Respondent-State.*

CORAM **M.S. Sonak &
Kamal Khata, JJ.**
DATED: **19th August 2024**

PC:-

1. Heard Mr. Rahul Arote, learned counsel for the Applicant and Ms. Gauri Rao, learned APP for the State.
2. This application seeks suspension of sentence and the Applicant's release on bail pending the Applicant's Criminal Appeal No. 474 of 2018 challenging his conviction under Sections 302, 506 read with 34 of the Indian Penal Code ("IPC").

3. By an order made on 2nd May 2018, a Division Bench comprising (Smt V. K.Tahilramani, Acting CJ and M. S. Sonak, J) rejected the application for suspension of sentence and release on bail. Accordingly, this second application seeking the same relief is now being considered before the present bench.

4. Mr. Arote, the learned counsel for the Applicant, submits that there is no reasonable possibility of the appeal being taken up for final disposal given the pendency in the Court taking up regular Criminal Appeals. He submits that several grievous injuries were noticed on the Applicant's person. However, the only alleged eye witness that is the mother of the victim, did not depose to any scuffle or injuries. He submitted that even the prosecution has not explained or tried to explain the injuries on the Applicant's person. He submitted that the applicant had lead defence evidence, and even the doctor examined in the defence had deposed to the serious nature of the injuries on the Applicant's person.

5. Mr. Arote, without prejudice, submitted that if the evidence on record is perused, at the highest, a case under Section 304 part (i) is made out. He submitted that since the Applicant has already suffered incarceration for about eight years and one month, applying the principle in ***Saudan Singh v State of Uttar Pradesh***¹ and several other decisions that he relied upon, the Applicant should be released on bail pending the disposal of the Appeal.

¹ Criminal Appeal No. 308/2022 @ SLP(Cri) No. 4633/2021.

6. Ms. Rao, the learned APP, opposed the grant of any reliefs in this Application. She submitted that this is a case where the Applicant, with pre-mediation, went into the victim's house and assaulted the victim with an axe on the head. She submitted that even the co-accused, Chetan, struck the victim's neck with a knife. She submitted that two of the accused persons had already absconded. She, therefore, submitted that the Applicant may not be released on bail.

7. Ms Rao submitted that the so-called injuries suffered by the Applicant and the co-accused could not be styled as grievous because the Applicant was not admitted to the hospital for more than 20 days, as was the requirement under Section 320 of the IPC. She submitted that no case to bring the offence under Section 304, either part (I) or (II), was made out, given the evidence on record. She submitted that the victim's mother was a natural witness, so her evidence could not be discarded because she was interested. She submitted that since the Applicant had not completed ten years of incarceration, the precedent in *Saudan Singh (Supra)* did not apply.

8. For all the above reasons, Ms Rao submitted that this Application should be dismissed. She submitted that there was no remotest possibility of an acquittal, and the offence could not be classified as one under Section 304 of the IPC.

9. We have considered the rival contentions and perused the evidence on record.

10. The Applicant has been convicted under Section 302 of IPC and sentenced to life imprisonment. Admittedly, the Applicant has already suffered incarceration for more than eight years and one month. There is no serious dispute that the Applicant's Criminal Appeal No. 474 of 2018 is not likely to be taken up for the next few years, given the pendency position before the Bench taking up regular Criminal Appeals.

11. In *Saudan Singh* (supra), the Appellant had been in custody for more than eight years and was granted bail on terms and conditions to the satisfaction of the Trial Court. The Appellant was also directed to report to the local police station on the first Monday of every month in the forenoon. The Hon'ble Supreme Court had held that when there is no reasonable likelihood of an Appeal being decided at an early date, the Courts must consider the release of the Appellants on bail after prima facie examining whether the Appellant has made out a case for acquittal or reduction of sentence. This is not the only consideration; the Court must also consider whether the Appellant is a flight risk, may interfere with the victim's family, or otherwise repeat any offences if enlarged on bail.

12. This Court and the Division Benches of Rajasthan High Court followed the decision in *Saudan Singh* (supra) in the cases of *Kartik Pratap Kaunder v State of Maharashtra*², *Yusuf Khwaja*

² Interim Application No. 4045 of 2022 in Criminal Appeal No. 938 of 2019, decided on 02.07.2024.

Usen Sayyed & Salman v State of Maharashtra & Anr³, Ramswaroop Alias Radheyshyam Alias Kailash Alias Surajmal Alias Prahlad v State of Rajasthan⁴, and Jhammansingh v State of Rajasthan & Anr⁵. In all these cases, it was not as if the Applicants had completed ten years of incarceration.

13. In the *Ranjeet Raut V State of GNCT Delhi*,⁶, the Applicant was convicted under Section 302 of IPC and sentenced to life imprisonment. After completing seven years and four months, the Hon'ble Supreme Court suspended the sentence and released him on bail after noticing that there was no likelihood of the Appeal being decided soon.

14. In the present case, the evidence indeed suggests that the Applicant, his co-accused and two other accused persons who had evaded arrest thus far went to the victim's house and assaulted him. The victim died as a result of the assault. His mother was only the eyewitness and has deposed to the present Applicant, striking the victim with an axe on his head.

15. At the same time, there is also evidence about the Applicant and three others being aggrieved by the victim allegedly burning their hut. The victim's mother disclosed nothing about the scuffle at the time when the crime was allegedly committed, and even the prosecution did not bother to

³ Interim Application No. 3389 of 2022 in Criminal Appeal No. 278 of 2023.

⁴ Application (Appeal) No. 1120 of 2023 in Criminal Appeal No. 206 of 2023, dated 15.02.2024.

⁵ Application (Appeal) No. 2064 of 2023 in Criminal Appeal No. 240 of 2020, dated 20.02.2024.

⁶ IA No. 109959 of 2020, decided on 23.07.2021.

explain any of the injuries suffered by the Applicant and other co-accused persons. Therefore, the Applicant and the co-accused in this case had led defence evidence in the matter. Mr Arote had also relied upon the evidence of PW3, Rajaram Vishnu Patil, who deposed, finding the Applicant and co-accused lying on Pachava mile in an injured condition.

16. Apart from the explanations of the Applicant and the co-accused, Chetan, what is crucial in this matter, at least to decide this Application, is the deposition of Dr Appasaheb Ingale (Defence Witness No.3). This witness was attached to Government Medical College and examined the Applicant and the co-accused when they were brought to the hospital after being found lying almost one mile away from the scene of the offence.

17. Dr Ingale, his examination-in-chief, deposed the following.

1. *I am attached to Government Medical College since year 2000. On 26-4-2016 I was on duty. On that day I firstly examined Chetan Durgya Pawar and found following injuries on his person:*

1) *Stab injury over the eipgastrional with exteriorization of omentum having 3 x 1.5 cm deep in abdominal cavity.*

2) *Stab injury over left chest lateral aspect having size 2 cm length x 1 cm depth.*

3) *Stab injury over the Left thigh posterior aspect having size 3 x 1 x 1 cm.*

4) *Stab injury over right forearm having size 2 x 1 x 1 cm*

5) *Stab injury over left side of the back having size 1 x 0.5 x 0.5 cm.*

2. *All these injuries were grievous in nature and caused by means of sharp weapon. I am now shown Article No.4 knife. I say that the injuries are possible by means of knife. He was discharged on 17-5-2016. I am now shown discharge card. It bears my signature. Contents therein are true and correct. It is at Exh. 58.*

3. *Similarly, I also examined Bapu Ashok Kale @ Sunil Zumarya Kale. I found following injuries on his person:*

(1) Stab injury over right side of abdomen having size 1 cm x 0.5 cm deep. It was grievous injury caused by means of sharp weapon. He was discharged on 7-5-2016. I am now shown the discharge card. It bears my signature. Contents therein are true and correct. It is at Exh.59. The injury noted by me is possible by means of article no.4 i.e., knife.”

18. Ms Gauri Rao, however, pointed out that this Doctor, in his cross-examination, admitted both the accused persons were conscious and well-oriented at the time of their admission. In

our opinion, this admission is prima facie and does not render the injuries suffered by the accused persons simple and not grievous as deposed by this Doctor in his examination-in-chief.

19. Insofar as the Applicant is concerned, he suffered a stab injury over the right side of his abdomen, having a size of 1cm x 0.5cm deep. The Doctor deposed the grievous injury caused by a sharp weapon. The Applicant was brought to the hospital in an injured condition on 26/04/2016 and discharged on 07/05/2016. Though the period of admission may not have exceeded 20 days still, considering the nature of the injury caused by a sharp weapon, at least, prima facie, we cannot say this was not a grievous injury. The evidence also suggests that the co-accused, Chetan, suffered more than five stab injuries, which were described as grievous injuries caused by a sharp weapon by Dr Ingale.

20. *In Takhaji Hiraji vs Thakore Kubersing Chamansingh & Ors⁷*, the Hon'ble Supreme Court has explained that it is not an invariable rule that whenever the accused sustained an injury in the same procurance, the prosecution was obliged to explain the injury, and on the failure of the prosecution to do so, the prosecution case must be disbelieved. However, the Hon'ble Supreme Court has added that before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, *the Court has to be satisfied of the existence of the two conditions: (i) that*

⁷ (2001) 6 SCC 145

the injuries on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of occurrence in question. The Court also held that non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses for defense gives a version which competes in probability with that of the prosecution.

21. Applying the above test to the evidence on record of the present case, at least prima facie, we must say that the prosecution was bound to explain the injuries on the person, the Applicant and his co-accused. This is because such injuries were serious, as deposed to Dr. Ingale, the Government Doctor who examined the two accused persons. Secondly, the only eyewitness to the incident is the victim's mother. In these circumstances, the defence version cannot at least prima facie be rejected as entirely improbable.

22. Therefore, although a case for complete acquittal appears improbable, at least the Applicant can reasonably endeavour to bring his offence under Section 304 of IPC, which is a culpable homicide not amounting to murder. Such circumstances, coupled with the fact that the Applicant has already undergone incarceration for more than eight years, are sufficient to enlarge the Applicant on bail after suspending the sentence. As it is, there is no reasonable likelihood that the Appeal will be heard soon.

23. On cumulative consideration of all the above circumstances, we suspend the sentence insofar as this Applicant is concerned and order his enlargement on bail subject to the following conditions:-

A. The Applicant must report to the Tasgaon Police Station, Taluka Tasgaon, Dist Sangli, on the first Monday of each month and mark his presence;

B. The Applicant must not even attempt to interfere with any of the victim's family members or otherwise exert any pressures on them or indulge in any criminal activities;

C. The Applicant must file an undertaking to attend the Court when the Appeal is taken up for hearing.

D. In addition to the above, the Applicant will have to furnish a PR Bond of Rs. 25,000/- along with one surety in the like amount to the satisfaction of the concerned Sessions Court.

24. This Application is disposed of in the above terms without order for costs. All concerned to act on an authenticated copy of this order.

(Kamal Khata, J)

(M.S. Sonak, J)