

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 1079 OF 2024
IN
CRIMINAL APPEAL NO. 286 OF 2024

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Madansingh Joharsingh Kharwad

...Applicant

Versus

The State of Maharashtra and Anr.

...Respondents

Ms. B. Sharda, for Applicant.

Mr. Akshay Bhosale & Mr. Ninad Bhabal i/b. Mr. Bharat Kothari, for
Respondent No.2.

Ms. P.N. Dabholkar, APP for Respondent No.1/State.

Ms. Priyanka Kharatmal, Kamothe Police Station, New Mumbai.

CORAM : M.M. SATHAYE, J.

DATE : 19th DECEMBER, 2024

P.C. :

1. Learned counsel for the Applicant and learned APP for Respondent Nos.1/State duly assisted by learned counsel for Respondent No.2/Complainant were heard on 05.12.2024 and the matter is placed today for passing order.

2. This is an application for suspension of sentence and interim bail during the pendency of the appeal. By the impugned Judgment and Order dated 16.01.2024 passed by Additional Sessions Judge, Panvel-Raigad, in Sessions Trial No. 423/2019, the Applicant/Accused No.2 is convicted for the offences punishable u/s.

394, 452, 342 r/w. Section 34 of the Indian Penal Code, 1860 ('I.P.C.' for short) and is sentenced to suffer 10 years of rigorous imprisonment and fine.

3. The appeal is already admitted on 22.03.2024 and is pending for final hearing.

4. The case of the prosecution in short, is as under. That the Informant/PW-1 is a Jeweler, who has a shop called 'New Balaji Jewelers'. That on 17.05.2018 at about 9.20 p.m., when the Informant was at his shop, Accused No.1 and present Applicant/Accused No.2 came to the shop posing as customers to purchase a ring. On the earlier day i.e. on 16.05.2018 at 9.20 p.m. one of the Accused had visited his shop to purchase ring. On the date and time of the incident, the Accused closed the shutter of the shop, switched off the light, disconnected the C.C.T.V camera and Digital Video Recorder (DVR). When the Informant was about blow siren, the accused pointed a sharp weapon (Sattoor) and inflicted injury to the Informant on his left hand. The Informant was then wrapped with cello tape and thereafter, both the Accused have stolen gold articles and cash from the shop. That total worth of stolen property was Rs.66 lakhs.

5. The incident was reported on the same day at about 10.00 p.m. and thereafter, investigation took place resulting into the trial and conviction.

6. Learned counsel for the Applicant submitted as under. That the Applicant has already suffered detention of 6 years and 6 months out

of 10 years awarded. That the Accused has no antecedent. That the Applicant's father is not well. That the Applicant/Accused No.2 has not used the weapon. That the identification parade has not taken place properly. That the Applicant was already arrested and then the Informant was called for identification. That the recovery of Santro car is not sufficient to connect the Applicant to the crime. She submitted that the evidence of PW-3 panch witness indicates that Santro car was already parked at the place. That the Executive Magistrate has not been examined to prove identification parade and simply placing report of identification parade on record is not sufficient and in this respect, the provisions of Section 291-A of Criminal Procedure Code, 1973 ('Cr.PC.' for short) is not properly applied. That the testimony of the Informant is silent about use of Santro car and therefore, there is no reason to seize the said car.

7. On the other hand, learned APP for Respondent No.1/State duly assisted by learned counsel for Respondent No.2/victim contended that within 8 days from the incident, 600 grams gold was recovered from the Applicant's house. Also molten gold (ingot) was recovered from the shop of the Applicant's brother. That according to the disclosure statement by the Applicant himself, the Santro car was recovered. It is submitted that the offence is of serious nature where weapon was used and this is obviously a robbery with common intention at a jewelry shop and therefore, there is no prima facie case to even remotely support acquittal.

8. I have considered the submissions carefully and perused the record.

9. It has come on record that pursuant to the Applicant's disclosure statement, a recovery of molten gold (ingot) is made weighing 1 k.g. 64 grams. The disclosure statement was made in presence of the panchas. The panch witnesses are duly examined. Record shows that identification parade was conducted on 15.06.2018 by Executive Magistrate and the Informant has identified both the Accused Nos.1 & 2 including the Applicant, during course of identification parade. The report of identification parade is duly exhibited (Exh. 61) and is part of the record. The argument about Section 291-A of Cr.P.C. about examining the Magistrate, is a matter of consideration at the time of final hearing of the appeal.

10. Perusal of the evidence of PW-3 panch indicates that the Applicant has taken the police and panchas towards Chittah camp where the Applicant asked to halt in one open ground near Chittah Camp and the Applicant has shown one Santro car which was parked in the said ground and informed that said car was used in commission of crime. The Informant PW-1 has withstood the cross-examination stating that he has identified the Applicant. The testimony of the PW No.3 Panch and I.O. PW-7 has been found consistent in respect of recovery articles under four panchnamas.

11. The first panchnama dated 25.05.2018 was at the instance of the Applicant when gold ornaments were seized from Applicant's house. The third panchnama dated 27.05.2018 is also at the instance of the Applicant when Santro car was seized. The fourth panchnama dated 28.05.2018 is also at the instance of the Applicant when

molten gold (ingot) was seized from the shop of the Applicant's brother.

12. Evidence of PW 5 – doctor indicates injuries of Informant to inner cheek measuring 1cm x 0.5 cm, C.L.W. over left palm spaced 6 cm x 2 cm and left little finger measuring 4 cm x 0.5 cm.

13. The arguments about disclosure by the Applicant/Accused No.2 vis-a-vis Section 27 of the Indian Evidence Act, 1872, is once again, a matter of consideration at the time of final hearing.

14. In a recent case of **Omprakash Sahni Vs. Jai Shankar Choudhary**¹, while considering the case of a convict in a serious offence, has held as under :

“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

¹ (2023) 6 SCC 123

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 Cr.PC. 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.”

[Emphasis supplied]

15. In the facts and circumstances narrated above, in my considered view, the said threshold is not crossed.

16. This is a case of robbery with use of weapon and with preparation where one of the Accused had gone to the Informant's shop earlier and the next day robbery was conducted. C.C.T.V. camera, DVR were disconnected before robbery. This *prima facie* shows the level of preparation.

17. Considering the matter overall, I am not inclined to grant bail. The application is rejected.

18. Considering the detention suffered, hearing of the appeal is expedited.

(M.M. SATHAYE, J.)