



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION [APPA] NO. 126/2024  
IN CRIMINAL APPEAL NO.60/2024.

Nikhil Omprakash Khirekar

-VERSUS-

State of Maharashtra.

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Office notes, Office Memoranda of  
Coram, appearances, Court's orders  
or directions and Registrar's orders.

Court's or Judge's Orders

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Shri R.M. Daga, Advocate for the Appellant/Applicant.

Shri A.M. Joshi, A.P.P. for the Respondent.

CORAM : VINAY JOSHI AND  
VRUSHALI V. JOSHI, JJ.

DATE : SEPTEMBER 09, 2024.

Heard.

2. This is an application in terms of Section 389 of the Code of Criminal Procedure seeking suspension of the execution of the sentence passed in Sessions Case No.83/2021 on 29.12.2023 by the Adhoc Additional Sessions Judge-1, Gondia, whereby the appellant/applicant Nikhil has been convicted for the offence punishable under Section

302 of the Indian Penal Code.

3. The applicant is seeking suspension on various grounds. It is submitted that the trial Court miserably erred in appreciating the evidence. It is contended that the evidence against all the accused was one and the same, however, the trial Court has acquitted two accused, whilst convicted the applicant only. It is argued that the evidence of PW-1 informant is not reliable since during cross examination, she gave certain admissions which would disturb the credibility of her version. It is argued that in oral dying declaration made to several persons, reference is made about involvement of all the three accused, however, the trial Court has convicted the applicant only. According to the applicant, though blood stain clothes and knife having blood of deceased was found with the applicant/accused, however, the explanation of accused on said point has not been obtained during the course of statement under Section 313 of the Code. Precisely it is contended

that the applicant has made out an arguable case and thus, it is a fit case for suspension.

4. The learned A.P.P. resisted this application by contending that there is ample material to figure out the role of the applicant – Nikhil. The prosecution has led evidence of one eye witness, as well as 4 witnesses in whose presence the deceased gave oral dying declaration about involvement of the applicant. It is submitted that the impugned judgment is well reasoned, the applicant is the main culprit. The prosecution has examined witnesses on the point of motive, and thus, the application does not deserve for suspension of sentence.

5. The deceased Sushil was younger brother of the informant lady. It is her contention that there was a rivalry between the deceased and particularly with the applicant – Nikhil at the instance of love affair of applicant Nikhil with some girl. The informant stated that on 26.04.2021 i.e. on the date of occurrence, she went for washing

clothes and returned in the afternoon. The deceased Sushil has gone to graze she goats and she also followed him in the afternoon. The informant has stated that she saw that the applicant Nikhil was holding a knife and thus committed his murder.

6. As per the first information report, the informant Sunita is the eye witness to the occurrence. Moreover, the prosecution has examined Sunita in the capacity of informant as well as sole eye witness to the occurrence. In that context, we have gone through the evidence of PW 1 Sunita, wherein she stated that on the relevant day, she went to the field to collect dried clothes. She saw that Nikhil was assaulting her brother Sushil by means of knife, while both the accused Rohit and Sagar were standing thereby. The informant further stated that on asking, the deceased disclosed that all three accused assaulted him by means of knife. The learned Counsel for the applicant has invited our attention to some of the admissions given by this witness wherein she

admits that when she reached to the place of occurrence, the deceased was lying in the pool of blood. On the basis of this admission, it has been argued that the informant is not an eye witness, since she went after the incident.

7. The learned Counsel has relied on the decision of Supreme Court in case of **Khema @ Khem Chandra etc. .vrs. State of Uttar Pradesh – Criminal Appeal No.1200-2202 of 2022 decided on 10.08.2022**, to contend that if the witness reaches to the spot where the injured/deceased was lying, then he cannot be termed as an eye witness. To our mind that would always be a factual observation depending on case to case basis. Certainly if we rely on the story that the informant has reached the spot after the incident, the above observations would assist. Herein, the first information report bears a specific reference that when the informant reached to the place of occurrence, she saw Nikhil holding knife and the same followed by assault. During chief examination,

she stated that when she reached, she saw Nikhil inflicted knife blows to the deceased. In the circumstances, rather on prima facie basis, it cannot be said that the witness reached on the spot after everything was over. True, there is admission given by the witness, however, the entire evidence is to be appreciated as a whole. We cannot pluck out one of the admission discarding the evidence of the witness, which is otherwise found to be creditworthy.

8. There are three other witnesses namely PW 3, 15 and 16 to whom the deceased has orally stated about the assault made by three persons. The evidence of these witnesses on the point of oral dying declaration supports the prosecution case. However, the defence lays its hand on the eye witness specifically in respect of role of the applicant Nikhil in particular. Besides that the prosecution led evidence about disclosure and consequential recovery of blood stained knife at the instance of the applicant Nikhil only. Moreover,

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clothes of Nikhil was seized and the chemical analyzer report indicates that blood of the deceased i.e. Group "A" was found on the weapon as well as on the clothes. The arguments in this regard is that no specific question was framed by the trial Court seeking explanation of the accused on the matching of the blood.

9. True no such specific question was framed, however, question no.153, is in general form which gives an idea to the accused about chemical analyzer's report. At this stage we cannot say that the accused was not aware about the result of analysis, and thus, this ground cannot be entertained at least at this stage.

10. On prima facie assessment, the role of the applicant Nikhil appears to be prime. The sole eye witness has particularly stated against the applicant in assaulting the deceased. The applicant has raised challenge to the oral dying declaration, however, the specific evidence of the eye witness specifies the role of the applicant. Besides that,

blood stained knife is also seized from the applicant, thus, it cannot be said that all the accused were sailing in the same boat, meaning thereby, the applicant also deserves acquittal.

11. The learned Counsel for the applicant has relied on the decision of Supreme Court in case of **Javed Shaukat Ali Qureshi .vrs. State of Gujarat – 2023 LiveLaw [SC] 782**, to contend that if there is similar iota of evidence against all the accused then logically everyone has to be dealt similarly. There can be no dispute regarding the said proposition, however, herein on facts prima facie we note that there is distinct evidence of the informant in the shape of eye witness, as well as seizure of blood stained clothes. Moreover, it emerges from the evidence that motive directs finger to applicant only.

12. By relying on the decision of Supreme Court in case of **Mustkeem @ Sirajudeen .vrs. State of Rajasthan – AIR 2011 SC 2769**, it has been argued that solely on the basis of disclosure and

seizure of weapon, conviction cannot be recorded. Herein the seizure is not in isolation, but, it is coupled with direct evidence of eye witness, hence, the facts are distinguishable.

13. The trial Court has convicted the applicant on the basis of aforesaid material. On preliminary assessment, there appears to be evidence about involvement of the applicant. The offence is of serious nature, hence, we are not inclined to exercise our discretion to suspend the sentence and release the applicant on bail. In view of above, Criminal Application stands rejected.

JUDGE

JUDGE