



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

CRIMINAL APPLICATION (APPA) NO. 939 OF 2023
IN
CRIMINAL APPEAL NO. 576 OF 2023

GANESH @ GOLU SHIVBARAN SHAHU

...Vs...

THE STATE OF MAHARASHTRA THR. P.S.O., P.S. HUDKESHWAR, TAH. & DIST. NAGPUR

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 A.M. Chandekar, Advocate for appellant.
Shri S.S.Doifode, APP for respondent/State.
Shri R.M. Daga, Advocate for Asst to Prosecution.

CORAM: SMT. M.S.JAWALKAR AND
M.W. CHANDWANI, JJ.

RESERVED ON : 27th NOVEMBER, 2024.
PRONOUNCED ON : 11th DECEMBER, 2024.

The present application is filed for suspension of sentence and grant of bail.

2. The case of the prosecution is that, on 17.02.2018, Sou. Ushabai Kamble along her grand-daughter Rashi, aged about 1½ years left her house at about 6.00 p.m. for going to jeweler's shop to prepare silver anklet for Rashi. Thereafter, late night, the said Ushabai did not return to home and when she was called on her mobile phone, it was switched off. A report was lodged by her husband Sevakdas at around 4.00 a.m. on 18.02.2018 that Sou. Ushabai Kamble and her grand-daughter Rashi had left the house in

the evening on 17.02.2018 and had not returned home. During the enquiry, it transpired that, Sou. Ushabai had been to the grocery shop of the accused and when the accused was questioned by the Investigating Officer, he admitted that she had visited the shop for taking Bhis amount of Rs. 7,000/-.

3. On 18.02.2018, one Pravin, resident of Vihirgaon, Nagpur informed the police about two dead bodies which were found in the gunny bag in Vihirgaon Naka. The son of the deceased Ushabai was called on the spot and he identified the dead bodies of Ushabai and Rashi. Therefore, vide Crime No. 130/18, the offence under Sections 302 and 201 of the Indian Penal Code was registered against unknown persons on a report lodged by the son of the deceased Ushabai viz. Ravikant. The investigation was started and after completion of investigation, a charge-sheet came to be filed and the trial was conducted. The learned Trial Court convicted the present appellants for the offences punishable U/s. 302, 201 read with 34 of the Indian Penal Code vide judgment dated 14.07.2023. Hence, the present application.

4. It is the contention of the learned counsel for the appellant that, The learned trial Court has erred in convicting the appellants when in fact, there is absolutely no evidence to show that the appellants had actually murdered the deceased. The whole

prosecution case rests on circumstantial evidence. On perusal of the evidence of the prosecution witnesses would show that the prosecution has miserably failed to bring on record a complete chain of circumstances which would unerringly point to the guilt of the accused.

5. It is further contended that the learned Trial Court has also not considered the fact that the prosecution witnesses have refrained from giving an immediate disclosure and in fact, there is a huge delay in recording the statements of the prosecution witnesses, which creates a doubt over their willingness and their credibility. Accordingly, prayed for the suspension of sentence.

6. On the contrary, it is the contention of the learned APP for the state that the Investigation Officer has recorded the statement of witnesses immediately, wherein they have made specific allegation against the accused persons and there is no any delay on the part of the Investigating Officer for recording the statement of the witnesses. Even otherwise, there is no any cross-examination to the Investigating Officer and the prosecution witness on the point that there is delay for recording statement.

7. It is further contended that, the prosecution has also proved that, the accused persons Ganesh,

Ankit and Gudiya were present in their house where deceased Ushabai along with her grand-daughter was seen by the witnesses, and went on the first floor where the accused persons had killed both deceased. Blood stain found on the first floor and in the car of the accused as well as prosecution have also proved other circumstantial evidence against the accused persons. Hence, the order passed by the learned Trial Court needs no interference and needs to be confirmed.

8. Shri S.S. Doifode, learned APP for the respondents/State relied on the following citation:-

1) Omprakash Sahni V/s. Jai Shankar Chaudhary and anr. [AIR 2023 SC 2202]

9. After going through the contention of the parties, evidence on record and judgment, it appears that the accused persons were lastly seen along with deceased in between 6.00 to 9.00 p.m. on 17/2/2018. The learned Trial Court considered the circumstantial evidence. *Prima facie*, we are satisfied that, there was motive to kill the deceased Sou. Ushabai Kamble as she was demanding the amount of Bhisi. There are 5 to 6 witnesses deposed that, they had lastly seen the deceased persons along with accused. The accused persons namely Ganesh and Ankit are identified by the witness while throwing gunny bag containing dead bodies at Vihirgaon Naka. The medical evidence shows

that, the death of both deceased were caused by cutting throat. There was blood stain at the house of the accused as well as in the car which matches with the blood group of deceased Ushabai Kamble and Rashi. There is recovery of weapon at the instance of accused Ganesh. Considering all these evidences, *prima facie*, we are not inclined to suspend the sentence in respect of accused/appellant no. 1 Ganesh.

10. So far as accused/appellant nos. 2 Gudiya and accused/appellant no. 3 Ankit are concerned, the learned Trial Court though recorded finding, Section 120-B of I.P.C. has not been proved against the accused persons. It is also observed that, there is no evidence of meeting of mind prior to commission of offence. As such, *prima facie* there is scope to accused/appellant no. 2 Gudiya W/o. Ganesh Shahu and accused/appellant no. 3 Ankit S/o. Shivbaran Shahu to succeed in the appeal on the ground that, there was no common intention to kill the deceased. The material against Ankit is that he had been seen while taking away gunny bag along with co-accused. Thus, his role appears, to be in causing disappearance of evidence of offence. Except last seen, nothing is recovered from Gudiya. True it is that, the appeal may not be heard finally in near future. Ankit and Gudiya are in jail since more than 6 years. In case of succeeding in appeal by Ankit and Gudiya, the

position with regard to incarceration would be irreversible. However, benefit of suspension of sentence can only be granted in favour of accused/appellant nos. 2 and 3.

11. Shri S.S. Doifode, learned APP for the respondent/State relied on ***Omprakash Sahni*** (supra), wherein it is held as under:-

“While granting relief under S.389 the Court is required to see 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 fair chances of acquittal. If the answer to the said question is in the affirmative, then convict should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually takes 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 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 reappreciate the evidence at the stage of Section 389 of the CrPC.”

12. Considering overall evidence, we are declined to suspend the sentence in respect of accused No.1. As such, we proceed to pass the following order:-

ORDER

- 1) The application (APPA) is **partly allowed**.
- 2) The substantive sentence in respect of

appellant no. 2 Gudiya W/o. Ganesh Shahu and appellant no. 3 Ankit S/o. Shivbaran Shahu is hereby suspended during the pendency of appeal.

3) The appellant no. 2 Gudiya W/o. Ganesh Shahu and appellant no. 3 Ankit S/o. Shivbaran Shahu be released on bail on furnishing P.R. bond in the amount of Rs. 50,000/- each and one solvent surety each in the like amount before the learned Special Judge Designated under the S.C. & S.T. (Prevention of Atrocities) Act & Additional Sessions Judge, Nagpur

4) The application of applicant no. 1 is hereby rejected.

(M.W. CHANDWANI, J.)

(SMT. M.S.JAWALKAR, J.)