



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

CRIMINAL APPLICATION (APPA) NO.1254/2023

IN

CRIMINAL APPEAL NO.783/2023

(Swapnil S/o Mulchand Deshbhratar Vs. State of Maharashtra)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A.C. Jaltare, Advocate for the applicant/appellant.
Mr. S.S. Doifode, A.P.P. for non-applicant/respondent.

CORAM: SMT. VIBHA KANKANWADI & MRS.VRUSHALI V. JOSHI, JJ.
DATED: 1.7.2024.

Present application has been filed under Section 389 of the Code of Criminal Procedure for suspension of sentence pending appeal and for grant of bail by original accused No.2.

2. Heard learned Advocate for the applicant and learned A.P.P. Perused the record.

3. It has been vehemently submitted on behalf of the applicant that the trial Judge erred in appreciating the evidence. P.W.1 Vandana is the informant. It is stated that the incident had taken place on 13.7.2014 as per the F.I.R. as well as in the deposition of P.W.1 but her F.I.R. has been registered on 15.7.2014, the said delay has not been explained by the prosecution. P.W.1 Vandana and P.W.4 Chandrakala are the eye witnesses who have stated that the accused persons came with bomboo sticks and had beaten deceased Akash. Akash collapsed due to injuries and then was taken to hospital on the same day, however, he succumbed to those injuries two days later.

4. Learned Advocate for the applicant points out the difference between medical evidence and ocular evidence by

pointing out testimony of P.W.9 Dr. Barde and the medical report Exh.200 wherein there is mention of ligature mark with other multiple injuries. However, nobody has stated about the ligature mark how occurred and by what means. He further submits that as per the prosecution story and the testimony of P.W.1 Vandana marriage of Akash was settled with another girl but according to the them Akash got married to his cousin though P.W.1 Vandana stated that she has resisted them from performing the marriage yet the said marriage was performed, she has tried to give understanding to Akash and he had even tried to commit suicide on two to three occasions. She submits that thereafter she herself and her elder brother-in-law decided that Akash and the girl would get divorce and then around 7 p.m. she returned back but the incident took place at 11 p.m. According to the applicant, he has been roped due to the relationship between the accused No.1 and deceased. Further applicant had entered witness box as a defence witness and had given the true account of the incident. As per the defence Aakash was assaulted at Pardi Naka where the girl with whom he was earlier engaged resided. According to learned Advocate of the applicant all these aspects have not been considered and, therefore, a wrong conclusion has been arrived at by the learned trial Judge. The said sentence needs to be suspended pending appeal.

5. Learned A.P.P. strenuously supported the reasons given by the learned trial Judge. He submits that the testimony of P.W.1 Vandana stands supported by another eye witness P.W.4 Chandrakala. The incident occurred as the deceased had married to the girl in relation and the accused

No.1 is the said relative of the deceased. Both the eye witnesses have stated that deceased was assaulted with sticks and thus injuries stood corroborated in the testimony of P.W.9 Dr. Barde as well as P.W.10 Dr. Borkar who conducted the autopsy. As regards the ligature mark is concerned not a single question has been asked in defence on behalf of the accused. Further as regards the point of delay is concerned, he explains that there was absolutely no delay. P.W.1 Vandana had gone to police station on 14.7.2014 and informed the incident orally. P.W.8 A.P.I. Shubhangi Thorat had taken station diary entry about the same and thereafter went to the spot to carry out the spot panchanama. If there was any mistake on the part of the Police Officer, it cannot be said that there was delay in lodging the F.I.R. After churning the entire evidence the learned trial Judge has come to conclusion that the offence under Section 302 of Indian Penal Code has been proved that too which has been committed in furtherance of common intention, the sentence need not be suspended.

6. The point which is in favour of the applicant is that he was on bail under the orders passed by this Court. No doubt it appears that he was in jail for about 1 year 3 months and 8 days but thereafter till the pronouncement of the judgment he is on bail and it is not reported that he has misused the terms of bail.

7. We are constrained to take a note of the relationship of the parties. Akash was the real cousin brother of the original accused No.1 and it is alleged that Akash got married to the real sister of the accused No.1. Present applicant is said to be the son of paternal aunt of the girl and

accused No.1. That means he is cousin brother of deceased also. At this stage, a cursory note is taken of the fact that there is no evidence adduced regarding the alleged marriage that had taken place on 15.5.2014 between Akash and the cousin sister of the applicant. Even if that fact is taken note of, yet the alleged incident had taken place about two months after the date of alleged marriage and on the same day earlier i.e. prior to the incident as per the testimony of P.W.1 Vandana she herself and her elder brother-in-law i.e. father of the accused No.1 had decided that Akash and the girl would take divorce. Therefore, it is then required to be seen as to whether the mens rea has been proved or not. Of course, we are aware of the fact that when there is direct evidence mens rea loses its importance. The second question, therefore, would be that the assault is stated to be by means of bamboo sticks which are stated to be seized from the spot and they were blood stained and C.A. Report then supports. It is also then required to be seen that as to whether, when there is a difference between the ocular evidence and the medical evidence which would prevail and whether any explanation is required. The point of delay is also required to be considered thoroughly taking into consideration the cross-examination of the witnesses.

8. At this stage, taking into consideration the points involved to be considered and the fact that the applicant was on bail we find that this is a fit case where pending appeal by suspending the sentence the applicant needs to be released on bail. Hence the following order:-

(i) The Criminal Application stands allowed and disposed of.

(ii) The substantive sentence awarded against the applicant /appellant in Sessions Trial Case No.5 of 2015 to the applicant by learned Additional Sessions Judge-12, Nagpur on 18.9.2023 stands suspended till the final hearing and disposal of the Criminal Appeal No.783 of 2023. Till then, he be released on bail on executing P.R bond of Rs.50,000/- (Rs. Fifty thousand only) with two solvent sureties of Rs.25,000/-(Rs. Twenty five thousand only) each.

(iii) The applicant shall not commit any criminal activity.

(iv) The applicant shall remain present before the learned Trial Judge once in six months, till final hearing and disposal of the appeals, commencing from the date he tenders bail papers and thereafter, the Trial Judge to fix dates for his subsequent appearances.

(v) In case of two consecutive defaults on the part of the applicant to remain present before the Trial Court, the Trial Court to inform this Court about the same and in that eventuality, the prosecution would be at liberty to file an application for cancellation of the bail granted to the applicant.

(vi) Bail to be furnished before the trial Court.

(MRS.VRUSHALI V.JOSHI, J.)

(SMT. VIBHA KANKANWADI, J.)