

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 543 of 2024

**With
CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO.
1 of 2024
In R/CRIMINAL APPEAL NO. 543 of 2024**

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DHIRUBHAI PANCHABHAI CHAUHAN & ORS.
Versus
STATE OF GUJARAT
=====

Appearance:
MR VIRAT G POPAT(3710) for the Appellant(s) No. 1,2,3,4,5
MR. TIRTHRAJ PANDYA, APP for the Opponent(s)/Respondent(s) No. 1
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**CORAM:HONOURABLE MR. JUSTICE A.S. SUPEHIA
and
HONOURABLE MR. JUSTICE VIMAL K. VYAS**

Date : 11/03/2024

**ORAL ORDER
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)**

ORDER IN APPEAL

Admit. Learned APP waives service of notice of admission for and on behalf of the respondent-State. R & P along with Paper -Book to be called for from the concerned Court.

ORDER IN APPLICATION

1. **RULE.** Learned APP waives service of rule for the respondent-State.

2. This present application has been preferred by the applicants - accused under the provision of Section 389 of the Code of Criminal

Procedure for suspension of sentence imposed upon him vide judgment and order dated 9.1.2024 passed in Sessions Case No.6 of 2021 by the Additional Sessions Judge, Rajula, District - Amreli.

3. Learned advocate Mr. Virat Popat for the applicants has submitted that the applicants have been convicted for the offences punishable under Sections 302, 323, 324, 143, 147, 148, 149 read with Section 34 of the Indian Penal Code, 1860 (for short, "the IPC"). He further submitted that the applicants have been substantially sentenced for the offence punishable under Section 302 of the IPC for life imprisonment and Rs.10,000/- to be paid by each of the applicants as fine and in default of payment of fine, further simple imprisonment of six months has been imposed. The applicants are also ordered to undergo two years rigorous imprisonment for the offence punishable under Section 324 of the IPC with fine of Rs.2,000/- and in default of payment of fine, to undergo further simple imprisonment for 3 months. The applicants have also been convicted for the offence under Section 323 of the IPC and sentenced to undergo rigorous imprisonment for a period of one year. That, for the offence under Section 143 of the IPC, the applicants have been sentenced to undergo rigorous imprisonment for three years. That, for the offence under Section 147 of the IPC, the applicants have been sentenced to undergo rigorous imprisonment for six months. That, for the offence under Section 147 of the IPC, the applicants have been sentenced to undergo rigorous imprisonment for two years. He also submitted that the learned Trial Court further ordered that all the sentences imposed upon the applicants shall run concurrently.

4. The case of the prosecution as per the charge at Exh. 20 is

that on 15.11.2020, due to dispute arisen from bursting of crackers all the accused had beaten the deceased with fist, kick and stick blows. Ultimately the deceased succumbed to the injuries.

5. Learned advocate Mr. Popat has submitted that even if the entire case of the prosecution is taken on its face value and evidence is admitted to be true then also the evidence would suggest that the offence will not fall under Section 302 of the IPC and the same would fall under Section 304 part - II of the IPC as there was no prior enmity between the accused and deceased and the incident has occurred on trivial issue for bursting of crackers. He has submitted that prima- facie the evidence does not reveal the use of stick and assault with kick and fist blows by the accused. He has further referred to the evidence of doctor - Ganpatbhai Bavaliya PW -15 at Exh.67, who has undertaken the post mortem of the deceased and post mortem report at Exh.72 and submitted that the medical evidence suggests that the deceased died on account of aphasia and due to manual strangulation.

6. Learned advocate Mr. Popat has referred to the testimony of eye witness PW - 2 Karan Bhupatbhai Makwana at Exh.32 and has submitted that his evidence does not reveal that the deceased was strangled. He has also submitted that neither the charge nor the FIR reveals that the deceased was strangled by any of the accused.

7. Learned advocate Mr. Popat has submitted that in fact the trial Court has placed reliance on the statement under Section 164 of the Criminal Procedure Code (for short, "the Cr.PC") of PW -2, wherein PW - 2 has made a reference that the accused

Lakhamanbhai and Ashokbhai were sitting on the chest of the deceased and thereafter they strangulated his neck. Learned advocate Mr. Popat has submitted that other witnesses have also not remotely even suggested that any of the accused has strangulated the deceased. Thus, learned advocate urged that the sentence of the applicants - accused may be suspended as they have undergone more than 2 years of incarceration.

8. Vehemently opposing the present application seeking suspension of sentence, learned APP Mr. Pandya has submitted that all the accused have formed unlawful assembly and have assaulted the deceased brutally and due to the injuries suffered by him and he ultimately passed away.

9. Learned APP has submitted that even the evidence of PW - 2 and the incident narrated by this witness reveals that initially some dispute had occurred with the accused - Lakhamanbhai and thereafter he called his family members, who have brutally assaulted the deceased by kick, fist and stick blows, which resulted into serious injuries. He has referred to the post mortem report and evidence of the doctor and submitted that this case falls under Section 302 of the IPC for murder and the same is precisely recorded by the trial court.

10. We have heard the learned advocates appearing for the respective parties. As narrated herein above the case of the prosecution as per the charge at Exh.20 is that on 15.11.2020 there was some quarrel between the accused and deceased for bursting of crackers and it is alleged that all the accused have given kick, fist and stick blows to the deceased and ultimately he succumbed to the

injuries. Prima-facie on a perusal of the evidence we do not find any blow given by the stick. The charge does not even remotely suggest that any of the accused had strangled or even attempted to strangle the deceased. The contents of the FIR also do not so reveal. However, the medical evidence i.e. evidence of PW -15 at Exh.67 and the post mortem report at Exh.72 form the opinion that the deceased died on account of asphyxia due to strangulation. Thus, the medical evidence does not reconcile with the charge. Moreover, PW - 2 who is the eye witness of the incident, who has been examined at Exh. 32 also does not refer that the accused had strangled the deceased. It appears that the overall prima facie appreciation of the evidence, the incident had occurred at the spur of moment due to bursting of crackers. There is no premeditation or prior enmity between the accused and the deceased.

11. Thus, in the considered opinion of this Court, prima facie, the trial Court has committed an error in convicting the accused under Section 302 of the IPC and failed to appreciate the evidence under Section 304 of the IPC while convicting the accused. It is also a harsh reality that the present appeal is filed in the year 2024 and is not likely to be decided in the near future.

12. For the aforementioned reasons, the sentence imposed vide judgment and order dated 9.1.2024 passed in Sessions Case No.6 of 2021 by the Additional Sessions Judge, Rajula, District - Amreli is hereby suspended pending hearing and final disposal of the Criminal Appeal.

13. The applicants shall be released on bail by executing a fresh bond of **Rs.10,000/- (Each)** (Rupees Ten Thousand Only) with one

surety of the like amount to the satisfaction of the trial Court, on the following conditions that:-

- “(a) They shall not take undue advantage of liberty or misuse liberty;
- (b) They shall not leave India without prior permission of this Court;
- (c) They shall furnish the present address of their residence to the Court concerned at the time of execution of the bond and shall not change the residence without the prior permission of this Court.
- (d) They shall proceed with the Criminal Appeal as and when it may be listed.”

Rule is made absolute to the aforesaid extent. Direct service is permitted.

(A. S. SUPEHIA, J)

(VIMAL K. VYAS, J)

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