

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 2000 OF 2015

Ashraf Khan s/o. Kadir Khan
Pathan & Anr.

....Applicant

Versus

The State of Maharashtra

....Respondents.

Mr. J.V. Deshpande, Advocate for applicants.

Mr. P.N. Mule, APP for State.

CORAM : T.V. NALAWADE, J.

DATED : 12th June, 2015.

ORDER :

1. The application is filed for bail. Both the sides are heard. The papers of investigation were made available.

2. The previous application bearing No. 5112/2014 was disposed of as withdrawn by this Court by order dated 30.9.2014. When this Court expressed that this Court is not inclined to grant the relief, the application came to be withdrawn. Thus, the previous withdrawal needs to be treated as rejected on merits. In view of these circumstances, it was necessary for the applicant to show that there has been change in circumstances and due the change in circumstances, the

applicants are now entitled to bail. The learned counsel for applicant has produced copy of order made by the other Hon'ble Judge of this Court on 20.12.2014. The other Hon'ble Judge of this Court has not referred the order made by undersigned in September 2014 and the case of Kadir Khan is not distinguished. As the argument was advanced for grant of bail on the ground of parity in the present matter, this Court is now required to discuss the material available as against the applicants and the position of law.

3. Deceased Sayyed Azim was son of complainant Sayyed Salim. Sayyed Salim had married with one Shamim, daughter of Kadir Khan, who was residing in adjacent field of complainant. There was no consent from the family of the complainant and they had not remained present at the time of marriage. However, after the marriage, they had accepted Shamim as daughter-in-law in the house. At the time of one festival, Ayub Khan, a relative of Shamim had taken Shamim to the her parents house and had said that for four months they would not sent Shamim to matrimonial house. After that dispute started. Due to this dispute, even report was given against the complainant and his family members that they had forcibly taken away Shamim from the house of her parents. Again

attempt was made to settle the dispute, but Shamim did not return to the house of complainant to resume cohabitation with the son of complainant.

4. On 19.1.2014 Shamim gave birth to a female child. Shamim and her parents did not allow Azim to see the child and they gave threat of life to him if he tried to visit their house again. Thus, there was tension between the two families. On 23.2.2014 after 9.30 a.m. when the complainant was returning to home from the village and when he reached near the house of parents of Shamim, he heard hug and cry. Shamim was shouting at Azim. He noticed that Azim was assaulted and blood was coming through his nostrils and mouth. He noticed that Kadir Khan and relatives of Kadir Khan including the present applicants were present there. They were holding weapons like sticks and axe and they were assaulting Azim. When complainant went there to intervene, present applicant assaulted the complainant with axe on his head and caused injuries to him.

5. There are statements of witnesses like Gopinath Gaikwad showing that they had seen both the applicants assaulting, particularly, the deceased by using axe. They were not afraid of the intervention and when they saw that only

Gopinath was trying to intervene, they again picked up the axes and they assaulted the complainant and his son. There is statement of one Kalabai showing that it is Musharraf Khan, who had started the quarrel first by giving slap and she had seen that Musharraf Khan had assaulted Sayyed Azim on his head, though she has described the weapon as stick.

6. The learned counsel for the applicants submitted that there is statement of Sayyed Shakeel showing that the deceased was assaulted by one Juhur Khan by using wooden log on his head. The learned counsel submitted that there was fracture to base of skull and so, it cannot be said that present applicants had assaulted the deceased by using weapons like axe. The record shows that blunt portion of axes were used by the applicants and there are specific allegations made against the accused by the witnesses that they assaulted the deceased and the complainant.

7. The injury certificate in respect of complainant shows that he sustained three injuries which included two C.L.Ws. and one contusion over head portion. Though these injuries are described as simple and caused by hard and blunt object, the fact remains that assault was made mainly on the head portion.

The P.M. report in respect of dead body of Azim shows that visible injuries were there like contusion over back and contusion over left side of chest near 4th and 5th ribs. There was fracture to base of skull and there was contusions on the aforesaid ribs. The injuries on the chest had caused injury to lung. The death took place due to injury to lung and fracture of skull base. The aforesaid material is sufficient to make out prima facie case for the offence punishable under section 302 of I.P.C. against both the applicants. The incident took place in a broad day light and the applicants were not afraid to use weapon like axe in broad day light and even when the persons tried to intervene in the incident like complainant. Some witnesses are relatives of the applicants and considering the injuries sustained by the complainant, it can be said that there will be danger to the life of complainant and he will be the main witness for prosecution in future. In view of these circumstances, this Court was not inclined to grant bail to the applicants in the past.

8. On the principle of 'parity' this Court has made some observations in **Criminal Application Nos. 2222/2015 and 2242/2015 [Shaikh Anwar Shaikh Babar Vs. The State of Maharashtra] decided on 8th June 2015**, which are as under :-

"13) When application for bail is made by one accused and that is brought before other Hon'ble Judge when bail to other accused from the same case is rejected by the first Hon'ble Judge of the Court it is the duty of both the sides to bring this circumstance to the notice of the second Hon'ble Judge. If the ground of parity is to be considered then every Judge is expected to consider the nature of evidence available as against the applicant who has come before him and against the accused to whom bail is granted or refused.

14) When one Judge has considered an application of one of the accused from the same crime, in view of the principle of parity, the discussion of material available against both the accused needs to be made in subsequently instituted application. Though granting of bail is within the discretion, in subsequent application filed by other accused, the Judge dealing with the matter needs to distinguish the case before him from the previous case, if the accused before him needs to be granted bail even when to other accused bail is already refused. This is the requirement of discipline.

15) If the aforesaid procedure is not followed, there cannot be consistency in the orders made by different Judges of the same Court. If the matter of the accused to whom bail is refused comes before the Judge who had refused the bail in the past and submission is made that to other accused, other Hon'ble Judge has granted bail, the Judge dealing with successive bail application is entitled to see

whether aforesaid procedure is followed. If after going through the order made by other Hon'ble Judge, the Judge dealing with successive application of accused finds that aforesaid procedure was not followed, the Judge dealing with successive application of accused need not grant bail on the ground of parity. Anybody can commit mistake. The Judge who has refused bail to the accused who had first come to the Court may stick to the opinion formed in the past. In such a case, it is advisable for the accused to whom bail is already refused, to approach Higher Court."

9. In the present case, the material available as against the present applicants is different from the material available as against Kadir Khan, to whom bail is granted by the other Hon'ble Judge of this Court. Thus, apparently principle of 'parity' is not applicable in this case. To one accused namely Shaikh Javed Shaikh Ayyub alias Tanya bail was granted by undersigned by the order dated 2.9.2014 in Criminal Application No. 4337/2014. Thus, the application of Shaikh Javed was allowed by this Court prior to rejection of application made by the present applicants. The material discussed already shows the role played by the present applicants and material distinguishes their case from the case of Shaikh Javed also. Thus, it cannot be said that

applicants are entitled to get released on bail if the case of Shaikh Javed is compared with their case.

10. The learned counsel for the applicants submitted that the case is not making progress. It appears that more Additional Sessions Judges are posted in Aurangabad Sessions division and this Court is sure that the case can be expeditiously disposed of. Direction in that regard can be given.

11. In the result, the application is rejected. The Trial Court is hereby directed to dispose of the case expeditiously and in any case, within six months from the date of receipt of this order. The observations are for the purpose of present proceeding only.

[T.V. NALAWADE, J.]

ssc/