

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**Criminal Application No.2222 of 2015**

Shaikh Anwar Shaikh Babar. .. **Applicant.**

**Versus**

The State of Maharashtra. .. **Respondent.**

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**With**

**Criminal Application No.2242 of 2015**

Akbar Khan Yusuf Khan. .. **Applicant.**

**Versus**

The State of Maharashtra. .. **Respondent.**

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Shri. Sudarshan J. Salunke, Advocate, for applicants.

Shri. U.H. Bhogle, Additional Public Prosecutor, for respondent.

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**CORAM: T.V. NALAWADE, J.**

**DATE : 8<sup>th</sup> JUNE 2015**

**ORDER:**

1) Both the applications are filed under section 439 of Criminal Procedure Code for bail. Both the sides are heard. This Court has perused the papers of investigation.

2) Previous application filed for bail by the applicants from both the proceedings bearing Criminal Application No.5007/2014 is decided by this Court, the undersigned, on 23-9-2014. The application is moved mainly on the ground that the other Hon'ble Judges have granted bail to the main accused and one more accused in subsequently filed applications. Main accused Sunil is granted bail by other Hon'ble Judge in Criminal Application No.1659 of 2015 by order dated 16-4-2015 and Nitin, another main accused who can be called as accused No.2 of the case was granted bail by the third Hon'ble Judge in Criminal Application No.6814/2014 by order dated 20-12-2014. Learned counsel for the applicants submitted that as the other two accused, who can be called as accused Nos.1 and 2, have got bail, present applicants also need to be granted bail. He submitted that the circumstance that bail was refused to the present applicant was brought to the notice of the other Hon'ble Judge in Sunil's matter and even after that the Hon'ble Judge granted bail to Sunil need to be considered. He placed reliance on a reported case of Allahabad High Court in **1993 Cri.L.J. 938 (Nanha S/o**

**Nabhan Kha v. State of U.P.).**

3) The material collected by police shows that crime came to be registered on the basis of report given by eye witness Kailas Shinde. He is resident of the locality where the murder was committed. One Vitthalsingh Rajput is murdered and the charge sheet is filed against four persons. There is allegation that Vitthalsingh had illicit relation with the mother of Sunil. Allegations are made that on the night between 22-5-2014 and 23-5-2014 he saw Vitthalsingh in his house with his mother. After that Sunil started quarreling with Vitthalsingh and Vitthalsingh went out of Sunil's house out of fear of Sunil. He some how entered his own room which is adjacent to the room of Sunil and he closed the door from inside of that room.

4) There are allegations that Sunil and his associates then entered the room of Vitthalsingh. They virtually dragged Vitthalsingh by using force from his room and he was taken to the ground floor. Vitthalsingh some how escaped and started running. Vitthalsingh

came towards the house of Kailas, the first informant. Vitthalsingh requested Kailas to give shelter and also clothes. Sunil and remaining three persons gave chase to Vitthalsingh and they also came there. Then the accused gave threat to Kailas to finish him also if he wanted to interfere. Then they took Vitthalsingh, but Vitthalsingh again started running. The accused gave chase. Kailas witnessed that one person having beard face, one of the applicants, was having a knife in his hand and some were having sticks. In presence of Kailas, Nitin, accused No.2, gave blow of knife to Vitthalsingh. Then the remaining accused also assaulted Vitthalsingh by using weapons. In the FIR Kailas mentioned that there were as many as five persons who were assaulting Vitthalsingh and one accused used iron bar also. Iron bar was in the hands of Sunil. According to Kailas so many blows were given to Vitthalsingh and Vitthalsingh died on the spot in the incident. FIR was given immediately after the incident.

5) Test Identification parade was held and in the T.I. parade Kailas identified present applicants as the two assailants who had taken part in the incident. The other

witnesses who came before police they gave statements that the present applicants were seen by them in the company of Sunil.

6) The material collected against the applicants show that in thickly populated area, in the presence of many witnesses these assailants showed courage. They dragged Vitthalsingh out of his room, they gave chase to him. They gave threats to Kailas not to interfere and probably due to such threats other persons also did not dare to interfere. On the road, murder was committed when persons of the locality were present on the spot. Very few persons showed courage to come forward to give statements to police.

7) In view of these circumstances and the material on record, this Court refused to grant bail to the present applicants when their application came before this Court first time in September 2014.

8) Subsequent to giving of the decision by this Court on the application filed by present applicants, Nitin

moved application bearing Criminal Application No.6814 of 2014 and that was placed before other Hon'ble Judge this Court. The material as against Nitin is mentioned. The other Hon'ble Judge did not refer to the order made by this Court of rejection of bail to the present applicants. Nitin was granted bail. Then Sunil filed Criminal Application No.1659 of 2015 which came be placed before third Hon'ble Judge of this Court and the third Hon'ble Judge granted bail to Sunil, the main accused, on 16-4-2015. Learned counsel for the applicants submitted that in the application of Sunil the fact of rejection of bail to the present applicants by this Court was mentioned. The third Hon'ble Judge also did not refer to order made by this Court on 23-9-2014.

9) As the learned counsel for the applicants mainly argued on the ground of parity, some observations need to be made. By order dated 8-5-2015 this Court directed the learned counsel for the applicants to show the law developed including the law laid down by the Hon'ble Apex Court with regard to the situation like the present one. Learned counsel for the applicants submitted

that there is no such case, squarely on the point involved from the Supreme Court. However, he submitted that a Division Bench of the Allahabad High Court has made some observations in the case of Nanha (cited supra). This Court has gone through the observations made by the Division Bench of the Allahabad High Court. In this case the Division Bench has observed that parity can be used even if previous application is rejected. The facts do not specifically show that the matter was again brought before the same Hon'ble Judge who had rejected previous bail application.

10) The learned counsel for the applicants has placed reliance on another judgment of the Apex Court reported as **(2009) 5 SCC 283 (Izharul Haq Abdul Hamid Shaikh v. State of Gujarat)**. The Apex Court has discussed the principles of parity. There cannot be dispute over the proposition that the subsequent Court is expected to consider previous orders. When the accused who came subsequent to the other accused who has got bail and their cases are similar, the other accused from the same crime are also entitled for bail.

11) The aforesaid principle is evolved mainly for two reasons like consistency and discipline. These reasons can be used when every subsequent matter comes before other Hon'ble Judge. In the present matter there is direct evidence as against the present applicants like Accused Shaikh Anwar Shaikh Babar and accused Akbar Khan Yusuf Khan. The other evidence and circumstances are already discussed. In addition to the aforesaid evidence there is more evidence and specific allegations from the complainant as against Nitin that he had seen Nitin giving specific blow to Vitthalsingh. As against main accused Sunil there are four more pieces of circumstances like (i) motive; (ii) recovery of weapon on the basis of statement given by him under section 27 of the Evidence Act; (iii) recovery of blood stained clothes from him; and, (iv) Sunil was known to the witnesses and they had seen Sunil giving chase with the weapon and Sunil's name is mentioned in the FIR.

12) The post mortem report shows that there were injuries like three stab wounds and other injuries like abrasions showing that the deceased was virtually

dragged and assaulted. Stab wounds had caused injuries to internal organs. The death took place due to those stab injuries and the injuries caused to vital organs.

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.

16) In a case like present one, when the accused who is on better footing but has not got the bail, needs to approach Higher Court like Apex Court. The Apex Court can consider and decide whether bail needs to be granted to such accused. If such procedure is not followed the first Court will be indirectly compelled to grant bail to accused who is not entitled to get released on bail on merits. Thus, the accused who are not entitled to get released on bail will get bail if principle of parity is not properly considered and used in such cases.

17) The successive bail application can be considered only if there has been change in circumstances. The aforesaid circumstance thus cannot become a new circumstance. If aforesaid procedure is not followed, there will be no end to such successive proceedings.

18) On merits the applicants are not entitled to bail and the applicants have failed to show that there has been

such change in circumstances that applicants are entitled to get released on bail. In the result, both the applications are rejected.

Sd/-  
**(T.V. NALAWADE, J. )**

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