

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

Criminal Application No. 5362 of 2016

District : Aurangabad

1. Hanif s/o. Ibrahim Pathan,
Age : 29 years,
Occupation : Business,
R/o. Gade-Jalgaon,
Taluka & District Aurangabad.

2. Mohsin s/o. Ibrahim Pathan,
Age : 25 years,
Occupation : Business,
R/o. As above.

.. Applicants.

versus

The State of Maharashtra.

.. Respondent.

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*Mr. S.G. Ladda, Advocate, holding for
Mr. S.S. Ladda & Mr. S.J. Rahate, Advocates, for
applicants.*

*Mr. S.B. Yawalkar, Addl. Public Prosecutor, for
the respondent.*

*Mr. A.A. Mukhedkar, Advocate, for the original
Informant.*

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With

Criminal Application No. 5790 of 2016

District : Aurangabad

1. Atik Abdul Razzak Pathan,
Age : 26 years,
Occupation : Agriculture.

2. Mohd. Ibrahim Pathan,
Age : 60 years,
Occupation : Agriculture.

Both R/o. Gade-Jalgaon,
Taluka & Dist. : Aurangabad. .. Applicants

versus

The State of Maharashtra,
Through Karmad Police Station,
Dist. Aurangabad. .. Respondent.

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Mr. S.H. Jagiasi, Advocate, for applicants.

*Mr. S.B. Yawalkar, Addl. Public Prosecutor, for
the respondent.*

*Ms. Almas Abdul Qader, Advocate, with Mr. Bora,
Advocate, for the original Informant.*

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CORAM : A.M. BADAR, J.

DATE : 19TH OCTOBER 2016

ORAL ORDER:

Applicants Hanif s/o. Ibrahim Pathan and Mohsin s/o. Ibrahim Pathan in Criminal Application No. 5362 of 2016 and applicants Atik Abdul Razzak Pathan and Mohd. Ibrahim Pathan in Criminal Application No. 5790 of 2016, are accused in Crime No. 82/2016 registered with Karmad Police Station, District Aurangabad, for offences punishable under Sections 302, 307, 143, 147, 148, 149, 323, 324, 504,

506 and 120B of the Indian Penal Code. By these applications, they are seeking their release on bail after filing of the charge-sheet.

2. Heard the learned Counsel appearing for applicants / accused. By taking me through the entire charge-sheet, learned Counsel argued that entire evidence of the prosecution is inconsistent. According to them, co-accused with similar role in the alleged unlawful assembly with common object have already been granted bail by this Court. It was further argued that accused nos.8 to 23 are granted anticipatory bail, as seen from the charge-sheet. Learned Counsel further argued that role attributed to present applicants does not entail deprivation of their liberty during pendency of the trial as the incident in question was a result of free fight between two groups leading to registration of cross FIR at the instance of applicant Atik Abdul Razzak Pathan. Therefore considering the role attributed to present applicants in the crime in question, offence punishable under Section 302 of the IPC is not made out against them.

3. I have also heard the learned Addl. Public Prosecutor appearing for the State. By drawing my attention to the FIR as well as supplementary statement of informant Aayanul Haq Abdul Haq Patel, the learned Addl. Public Prosecutor argued that all

applicants before this Court have played active role in unlawful assembly with common object of murdering Abdul Haq Kamal Patel and in attempt to commit murder of members of prosecuting party. The learned Addl. Public Prosecutor drew my attention to statement of Saberabi Abdul Haq Patel pointing out role of applicants so also to statements of child witnesses and that of Ismail Abdul Haq Patel and Shaikh Rustum Abdul Haq Patel.

4. I have also heard the learned Counsel appearing for the informant, for assisting the prosecution opposing Criminal Application No. 5362 of 2016 preferred by applicant Hanif s/o. Ibrahim Pathan and another co-accused. He argued that mischief is played by applicants in Criminal Application No. 5790 of 2016 by showing name of applicant no.2 as Mohd. Ibrahim Pathan, whereas his actual name is Ibrahim Abdul Salam Pathan. This, according to the learned Counsel for the informant, was done in order to show that the charge-sheet does not contain any overt act on behalf of applicant Mohd. Ibrahim Pathan. The learned Counsel for the informant further argued that witnesses namely, Ismail Abdul Haq Patel and Shaikh Rustum Abdul Haq Patel are specifically stating that applicant Hanif s/o. Ibrahim Pathan had given blow of axe on head of deceased Abdul Haq Kamal Patel causing his death. The learned Counsel reiterated that all applicants have taken role in murdering deceased

Abdul Haq Kamal Patel and injuring seven prosecution witnesses who are relatives of deceased Abdul Haq Patel. The learned Counsel further argued that co-accused, who have been released on bail by this Court, have not taken any part in the incident and no overt act was attributed to them in the crime in question.

5. I have also heard the learned Counsel appearing for the informant, for assisting the prosecution opposing Criminal Application No. 5790 of 2016 preferred by applicant Atik Abdul Razzak Pathan and another co-accused. She argued that several accused persons in this crime are already absconding. In all there are 34 accused persons. They may tamper the prosecution evidence in future. The learned Counsel drew my attention to report of Non-cognizable Case bearing No. 500/2016 registered at the instance of Karim Kamal Patel against Abdul Rahim Abdul Salam Pathan (Absconding accused no.24). In that report, it is averred by the complainant that absconding accused Abdul Rahim Pathan threatened to kill said Karim Kamal Patel. The learned Counsel further argued that FIR of Aayanul Haq Patel is first in point of time and assault was at the house of the informant.

6. I have carefully considered the rival submissions. I have also gone through annexures to

applications as well as the charge-sheet in the crime in question.

7. The submission that the crime in question took place at the house of the informant appears to be devoid of substance because FIR lodged by Aayanul Haq Patel goes to show that the incident took place when they had gone to the site of their cattle shed where the desilted material was to be stacked. Be that as it may, perusal of the post mortem report shows that in the incident in question, Abdul Haq Shaikh Kamal Patel died homicidal death. Post mortem report shows that he had suffered split lacerated wound over right parietal region close to midline which was cause of his death. Apart from this injury, the deceased has suffered minor injuries in the nature of contused abrasions Tram like contusion.

8. It is not in dispute that incident which took place in village Gadhe-Jalgaon on 16.05.2016 has resulted in registration of two crimes. In applications at hand, we are dealing with the crime registered on the basis of report lodged by Aayanul Haq Patel on 16.05.2016 which has resulted in registration of Crime No. 82/2016 against in all 34 accused persons including present applicants. The incident which took place on 16.05.2016 has also resulted in lodgment of the FIR by applicant no.1 Atik Abdul Razzak Pathan in Criminal Application No.

5790 of 2016, which resulted in registration of Crime No. 84/2016 with the very same Police Station. Suffice to state that the prosecuting party in these applicants are accused in said Crime No. 84/2016 registered at the instance of applicant Atik Abdul Razzak Pathan in Criminal Application No. 5790 of 2016.

9. The FIR lodged by informant Aayanul Haq Patel, who is son of deceased Abdul Haq Patel shows the prosecution case as under :-

At about 09.00 a.m. of 16.05.2016 work of desilting the lake was going on at village Gadhe-Jalgaon. Aaynul Haq Patel asked the concerned to stack 5 - 6 tractor load of rubble / silt at the site of his cattle shed. One Abdul Rahim Pathan took exception to this request. Then there was wordy duel between informant Aaynul Haq Patel and Rafiq Pathan as well as Shafiq Abdul Razzak. Then at about 03.30 p.m. to 04.00 p.m., Abdul Rahim Pathan indulged in wordy duel and scuffled with informant Aaynul Haq Patel. Then his father Abdul Haq Patel (since deceased) and two of his brothers came on the spot. Father of the informant then threatened to kill Abdul Rahim Pathan. After 15 to 20 minutes, Atik Abdul Razzak Pathan (applicant herein) as well as six named and 5 - 10 unnamed persons from the village came. Informant Aaynul Haq and his family members then

armed themselves with wooden logs and therefore the persons who came left the spot. Father of Aaynul Haq, his mother and brother then went to the Police Station to lodge report but returned without lodging the report. After some time, informant Aaynul Haq Patel and his family members then went to the spot where rubble / silt was to be deposited. At that time, accused persons came there. As per averments in the FIR, applicant Atik Abdul Razzak Pathan and co-accused Mustafa Pathan assaulted informant Aaynul Haq Patel with iron rod and handle of axe. His brother Ismail was assaulted by applicant Mohsin Pathan by wooden log. His father Abdul Haq Patel is stated to have been assaulted by Abdul Rahim Salam Pathan by iron pipe. It is further averred in the FIR that when the informant and his family members tried to save Abdul Haq Patel, co-accused Shafiq, Mohsin (applicant) and Mustafa assaulted them. This is the prosecution story as per the FIR.

10. On the next day i.e. 17.05.2016, supplementary statement of informant Aaynul Haq Patel came to be recorded. Careful perusal of that supplementary statement of Aaynul Haq Patel goes to show that he has given go by to his original version and came up with a fresh version in which he has implicated in all 29 accused persons attributing specific role to them. So far as applicants are concerned, in this supplementary statement, informant

Aaynul Haq Patel has stated that applicant Hanif Ibrahim Pathan has assaulted his sister Bismillabi by means of axe on her thigh. Corresponding injury on Basmillabi found in injury certificate is blunt trauma on her thigh. Supplementary statement of informant Aaynul Haq Patel, so far as applicants are concerned, is stating that applicant Mohsin s/o. Ibrahim Pathan has assaulted Abdul Haq Patel (since deceased) by means of '*Tambi*' on arm. No corresponding injury is seen on arm of dead body of Abdul Haq Patel (since deceased). In supplementary statement, informant Aaynul Haq Patel had not mentioned names of applicant Atik Abdul Razzak Pathan as well as that of applicant Mohd. Ibrahim Pathan. He had named one Ibrahim Abdul Salam Pathan as one of the assailants who used pipe in the assault. To whom he had assault, is not mentioned. The applicant before this Court is not Ibrahim Abdul Salam Pathan but Mohd. Ibrahim Pathan. In the charge-sheet, name of the accused is mentioned as Mohd. Ibrahim Pathan and therefore no substance is found in argument of the learned Counsel for the informant that some mischief is played by applicants by moving the application. The application is in tune with the names of accused persons mentioned in the charge-sheet.

11. If we go by statements of witnesses, then it is seen that evidence of prosecution in respect of

the assault is not consistent. Though witnesses Ismail Abdul Haq Patel and Shaikh Rustum Abdul Haq Patel are attributing injury by axe on the deceased to applicant Hanif s/o. Ibrahim Pathan in Criminal Application No. 5362 of 2016, other injured witnesses including Saberabi are stating that accused Shafiq Abdul Razzak Pathan had given a blow of axe on head of deceased Abdul Haq Patel. Post mortem report shows that this head injury had caused death of Abdul Haq.

12. The prosecution is invoking Section 149 of the IPC in this case to contend that accused persons have formed an unlawful assembly with a common object of murdering members of the prosecuting party including deceased Abdul Haq Patel. It is well settled that once membership of an unlawful assembly is established, it is not incumbent to establish whether any specific overt act has been done by any accused. Mere membership of unlawful assembly is sufficient and every member of unlawful assembly is vicariously liable for acts done by others either in prosecution of common object of the unlawful assembly or such which the members of unlawful assembly knew were likely to be committed. Thus, offence must be connected immediately with the common object of the unlawful assembly. In the case in hand, 34 accused persons are stated to have formed an unlawful assembly with common object, as stated above.

13. On this backdrop, claim of parity is made by present applicants with three co-accused who are granted regular bail by this Court. They are, Sayeed Khan s/o. Dilawar Khan Pathan, Shoeb s/o. Dilawar Pathan and Jabbar s/o. Anwar Khan (Pathan) i.e. accused nos.5 to 7. These accused persons have filed applications for releasing them on bail vide Criminal Application No. 3566 of 2016 and Criminal Application No. 3639 of 2016 and on 2nd August 2016, said applications were allowed by this Court [Coram : N.W. Sambre, J.]. Perusal of that order placed on record at page 73 of Criminal Application No. 5362 of 2016 shows that while passing the said order, the Court was very much alive to the fact that according to the prosecution case, accused persons had formed an unlawful assembly and have murdered the father of the informant. These recitals are found in para 2 of the said order dated 2nd August 2016. By observing this, while granting those applications, this Court made following observations in paras 7 to 10 of that order which needs re-production and reads thus :-

"7. In my opinion, having regard to the nature of allegations against the applicants, particularly as regards their participation in the crime in question, at the most the offence that could be constituted against them, could considered to be one punishable under Section 326 of the Indian Penal code. It is

then noted that the other two accused are claimed to have used stones in commission of the c in question. The cause of death is head injury.

8. There is use of sword in the commission of crime by the other accused.

9. In my opinion, as the applicants' custodial interrogation is already over and there are no criminal antecedents, no fruitful purpose will be served in detaining them more.

10. In view thereof, in my opinion, it will be appropriate to order release of the applicants on bail. I, therefore, pass following order :-

The applicants be released on bail, in connection with C.R. No. 82 of 2016, registered with Police Station, Karmad, Taluka & District Aurangabad, for offences punishable under Sections 302, 307, 143, 147, 148, 149, 323, 504, 506 and 120B of the Indian Penal Code, on each of them furnishing P.R. Bond of Rs. 25,000/- with one surety in the like amount.

The applicants shall remain outside the jurisdiction of the concerned Police Station till filing of the charge-sheet.

The applicants shall not tamper with prosecution evidence or influence the witnesses.

Criminal Applications stand allowed in above terms. "

14. Thus, this Court has observed that considering the nature of offence, at the most, offence which could be made out against accused persons is one punishable under Section 326 of the IPC. Further observation is in respect of use of sword in commission of crime in question by other accused persons. Applicants before this Court are not accused who were holding sword, as observed in the order dated 2nd August 2016. Applicants therein were also members of this unlawful assembly. Considering the position of law on this aspect, as stated above, there seems to be no reason to refuse similar treatment to applicants before this Court and as such on ground of parity, applicants before this Court are also entitled for their release on bail on completion of investigation and on filing of the charge-sheet.

15. Apart from this, even if statements of prosecution witnesses are considered, then also it is seen that role attributed to applicant Atik Abdul Razzak Pathan is assault by iron rod and handle of axe. Applicant Mohsin s/o. Ibrahim Pathan is attributed with role of assault by rod. Applicant Hanif s/o. Ibrahim Pathan is stated to have assaulted

Bismillabi by means of axe, causing blunt trauma. Applicant Mohsin s/o. Ibrahim Pathan is stated to have assaulted Aaynul Haq Patel by means of rod. This applicant is also stated to have assaulted Ismail Abdul Haq Patel. Applicant Atik Abdul Razzak Pathan is stated to have assaulted Najmu but no weapon is specified. Hasinabi Khalil Ahmadkha Patel is stating that Shafiq Abdul Razzak Pathan had assaulted deceased Abdul Haq Patel by means of an axe. Similar is the statement of Saberbi Abdul Haq Patel attributing role to co-accused Shafiq Abdul Razzak Pathan in causing injury on head of the deceased by means of an axe. This evidence will have to be kept in mind while assessing veracity of statements of Ismail Abdul Haq Patel and Shaikh Rustum Abdul Haq Patel who are attributing this role to applicant Hanif s/o. Ibrahim Pathan. It is worthwhile to note that there is only one head injury of the deceased causing his death.

16. Then there is cross FIR by applicant Atik Abdul Razzak Pathan lodged on 17.05.2016 which has resulted in registration of Crime No. 84/2016 against members of the prosecuting party including informant herein namely, Aaynul Haq Patel. Story of applicant Atik Abdul Razzak Pathan in his FIR is to the effect that members of prosecuting party, including informant Aaynul Haq Patel in the present crime, had assaulted him as well as applicant Hanif s/o. Ibrahim

Pathan and applicant Mohsin s/o. Ibrahim Pathan. Injury certificates of applicant Hanif s/o. Ibrahim Pathan and applicant Mohsin s/o. Ibrahim Pathan placed on record shows that in the very same incident, they had suffered several injuries resulting in their treatment at M.G.M. Medical College & Hospital at Aurangabad. Applicant Atik Abdul Razzak Pathan is stated to have suffered fracture injury in this incident. If both FIRs are read together, then prima facie it appears that there was melee or free fight between two groups and in this context, application of Section 149 of the IPC will have to be considered. At this stage, same appears to be highly doubtful in view of free fight between two parties. There is possibility of applicants attempting to save themselves in the incident.

17. In view of foregoing reasons, considering the nature of evidence against applicants and the fact that co-accused, who are similarly situated, are already released on bail by this Court vide order dated 2nd August 2016 in Criminal Application No. 3566 of 2016 and Criminal Application No. 3639 of 2016 and that other accused are granted anticipatory bail by the Courts, as reflected from the charge-sheet, further pre-trial detention of applicants before this Court is not warranted.

18. So far as contention of the learned Counsel for the informant, that there is threat to life of the informant and other members of the prosecuting party are concerned, it will have to be noted that all applicants are behind bar since long and charge-sheet is also filed against them on 12th August 2016. Report of Non-Cognizable Case shows that an absconding accused has allegedly given threat to Karim Kamal Patel. By imposing necessary condition on these applicants, they can be restrained from tampering the prosecution evidence, as apprehended by the learned Counsel for the informant.

19. Hence, I pass the following order :-

(a) Both Applications are allowed.

(b) Applicants in both applications are directed to be released on bail, in connection with the above crime, on their executing P.R. Bond in the sum of Rs. 25,000/- each and on furnishing one or more solvent sureties of the like amount by each of them.

(c) As conditions of this order, all applicants in these applications shall abide by the following directives :-

(i) Applicants shall not, directly or indirectly, make any inducement, threat or

promise to any persons acquainted with the facts of the case so as to dissuade them from disclosing such facts either to the Court or to any police officer.

(ii) Applicants shall not tamper with the prosecution evidence in any manner.

(iii) Applicants shall not contact in any manner, either the informant or prosecution witnesses during pendency of trial against them.

(iv) Applicants shall cooperate the trial Court in expeditious disposal of the trial against them.

(v) Applicants shall not repeat commission of similar type of offences in future.

(d) Applications stand disposed of in the above terms.

(A.M. BADAR)
JUDGE

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