

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.74 OF 2019

DURGESH VILAS PATIL)...APPELLANT

V/s.

1) THE STATE OF MAHARASHTRA)
2) SHAHAJI SOPAN SONAWANE)...RESPONDENT

WITH

CRIMINAL APPEAL NO.113 OF 2019

ASHISH BABURAO THAKUR)...APPELLANT

V/s.

1) THE STATE OF MAHARASHTRA)
2) SHAHAJI SOPAN SONAWANE)...RESPONDENT

Mr.Rajendra Sorankar, Advocate for the Appellant in Criminal Appeal No.74 of 2019.

Ms.Manish Devkar a/w. Mr.Shankar Katkar, Advocate for the Appellant in Criminal Appeal No.113 of 2019.

Ms.Mamata Jadhav, Advocate for the Respondent No.2.

Mrs.M.M.Deshmukh, APP for the Respondent - State.

**CORAM : INDRAJIT MAHANTY &
A. M. BADAR, JJ.**

**DATE : RESERVED ON 22nd APRIL 2019
PRONOUNCED ON 2nd MAY 2019**

JUDGMENT : (PER : A .M. BADAR, J.)

1 By these appeals under Section 14A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, appellant/accused no.5 Durgesh Patil and appellant/accused no.4 Ashish Thakur are challenging orders below Bail Application Exhibit 107 and Bail Application Exhibit 149 in Sessions Case No.391 of 2016, both passed on 24th December 2018, thereby rejecting both applications under Section 439 of the Code of Criminal Procedure filed by the both appellants/accused persons. As both bail applications are arising out of the same crime, being tried in same sessions case i.e. Sessions Case No.391 of 2016 and as with the same reasons bail applications filed by the both appellants/accused persons came to be rejected, the appeals are being decided by a common judgment.

Admit. Heard forthwith, by consent of parties.

2 Facts, in brief, leading to the institution of the present appeals, can be summarized thus :

- (a) It is case of prosecution that Swapnil Shahaji Sonawane (since deceased) was residing along with his parents i.e. Shahaji Sonawane (First Informant/father) and Gauri – mother, as well as sister, at the SBI Colony, Nerul, Navi Mumbai. After passing 10th Standard examination, deceased Swapnil had taken admission in 11th Standard at D.Y.Patil College, CBD Belapur. It is case of prosecution that deceased Swapnil had love relations with the juvenile in conflict with law, who happens to be sister of accused no.1 Sagar Naik and daughter of accused no.2 Rajendra Naik. Accused no.1 Sagar Naik found some photographs of his sister i.e. the juvenile in conflict with law in cell phone of deceased Swapnil Sonawane. This resulted in kidnapping of Swapnil Sonawane by accused no.1 Sagar Naik and his friends in the evening hours of 18th July 2016, and thereafter, taking him to Nerul Police Station. With a

warning, deceased Swapnil Sonawane was let off by the police.

- (b) The incident in question took place in the evening hours of 19th July 2016. In the evening hours of that day, daughter of First Informant Shahaji called him and told him that accused no.1 Sagar Naik and his friends have come to their house at SBI Colony, Nerul, and they are asking the whereabouts of deceased Swapnil. When First Informant Shahaji reached at his apartment, he found group of young boys including accused no.1 Sagar Naik standing there. Accused no.1 Sagar Naik insisted First Informant Shahaji that Shahaji should come to his house. First Informant Shahaji refused. Then accused no.1 Sagar Naik and his friends took First Informant Shahaji to the terrace of the building where Shahaji along with his son deceased Swapnil and other family members used to reside. At the terrace of that building, accused no.1 Sagar Naik started showing photographs of his sister i.e. the juvenile in conflict with law

taken by deceased Swapnil. At that time, Gauri – wife of First Informant Shahaji also came on the terrace. Accused no.1 Sagar Naik and his friends, thereafter, started threatening the First Informant and his wife. Thereafter, witnesses Vishal Rane and Suraj Rane came on the terrace. In their presence, the First Informant and his wife were threatened by the accused persons that they will be thrown from the terrace. Ultimately, First Informant Shahaji and his wife Gauri agreed to apologize to the father and uncle of accused no.1 Sagar Naik.

- (c) According to the prosecution case, thereafter, First Informant Shahaji Sonawane and his wife Gauri came down. By a motorcycle they, accompanied by deceased Swapnil, went to the house of accused no.1 Sagar Naik. Accused no.1 Sagar Naik and his friends followed them. Accused no.2 Rajendra Naik – father of accused no.1 Sagar Naik also came there. Casteist abuses were hurled by accused persons at the First Informant and his family members at that place.

The juvenile in conflict with law as well as her mother were summoned at that place. She as well as deceased Swapnil were questioned as to whether they were having any love relations. Thereafter, according to the prosecution case, accused no.1 Sagar Naik, accused no.2 Rajendra Naik and other accused persons, who happen to be friends of accused no.1 Sagar Naik, started assaulting First Informant Shahaji, his wife Gauri and deceased Swapnil by means of fists and kick blows. Accused no.1 Sagar Naik gave a fist blow on head of deceased Swapnil causing fall of deceased Swapnil. Then, First Informant Shahaji and his wife Gauri took their son deceased Swapnil to D.Y.Patil Hospital where he was declared dead on arrival.

- (d) First Informant Shahaji then lodged report with Police Station Nerul on 20th July 2016 which has resulted in registration of Crime No.266 of 2016 for offences punishable under Sections 143, 147, 149, 302, 364, 323, 504 and 506 of the Indian Penal Code as well as under

Sections 3(1)(r)(s) and 3(2)(v)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, against accused persons. Immediately, accused persons including appellant/accused no.5 Durgesh Patil and appellant/accused no.4 Ashish Thakur came to be arrested. On completion of investigation, they came to be charge-sheeted along with other accused persons.

- (e) During pendency of the sessions case for the offences alleged against them, both of them filed bail applications at Exhibits 107 and 149 respectively, which came to be rejected on 24th December 2018 by the learned Special Judge with an observation that main accused Sagar Naik along with appellants/accused, took deceased Swapnil to the terrace of the building, threatened him and forcibly dragged First Informant Shahaji and Swapnil to Village Dharave. It is further observed by the learned Special Judge that both appellants/accused assaulted the First Informant, his wife as well as deceased Swapnil and killed Swapnil.

With these observations, both bail applications were decided separately vide orders dated 24th December 2018 which are ad-verbatim same.

3 We have heard the learned counsel appearing for appellants/accused persons. They vehemently argued that eye witnesses namely Vishal Rane and Suraj Rane have categorically stated that when First Informant Shahaji agreed to apologize, parents of accused no.1 Sagar Naik and the appellants/accused left the terrace. They, further, argued that, accused persons having similar role namely accused no.3 Sanjesh Naik, accused no.7 Malati Naik, accused no.8 Imad Thakur, accused no.9 Ibrahim Mukadam and accused no.10 Vikram Thakur are released on bail by this court by allowing their appeals bearing nos.817 of 2018, 782 of 2017, 807 of 2017, 214 of 2018 and 388 of 2018. Similar role is attributed to the appellants/accused and therefore, they are entitled for being released on bail, on the principle of parity. It is further averred that fatal blow was dealt by accused

no.1 Sagar Naik and even if prosecution case is accepted, then also, there is no evidence against the appellants/accused for the offence punishable under Section 302 of the Indian Penal Code.

4 As against this, the learned APP opposed the appeals by contending that statements of Vishal Rane and Suraj Rane show that appellant/accused no.5 Durgesh Patil had threatened deceased Swapnil and his father Shahaji. He, along with other accused persons including accused no.1 Sagar Naik, had assaulted family members of deceased Swapnil, so also the deceased. Our attention was drawn to the supplementary statement of First Informant Shahaji by the learned APP. He, further, argued that, motorcycle used in the crime in question came to be recovered at the instance of appellant/accused no.5 Durgesh Patil. Call Detail Records (CDR) are collected to show that Durgesh Patil had called other accused persons. The learned APP further contended that in the Test Identification Parade, both appellants/accused persons came to be identified by parents of the deceased so also by Vishal Rane. The learned APP further urged that appellant/accused no.4

Ashish Thakur had also threatened deceased Swapnil and his family members apart from assaulting them and he was described as a boy having tattoo on both hands, in papers of investigation.

5 It was argued on behalf of respondent no.2/First Informant that even a day earlier to the incident, deceased Swapnil was kidnapped by accused persons and he was tortured. The learned counsel for the respondent no.2/First Informant adopted the arguments of the learned APP.

6 We have considered the rival submissions and also perused the charge-sheet. Undisputedly, the appeals under Section 14A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, filed by co-accused namely accused no.3 Sanjesh Naik, accused no.7 Malati Naik, accused no.8 Imad Thakur, accused no.9 Ibrahim Mukadam and accused no.10 Vikram Thakur came to be allowed by this court and these accused persons are released on bail. While allowing the appeals filed by accused no.7 Malati Naik, the learned Division Bench of

this court, after going through the statements of eye witnesses including Sabira Sayyed and Vishal Rane observed that appellant/accused Malati Naik was present on the spot but fatal blow on head of the deceased was not attributed to her. No specific role was attributed to her. So far as appellant/accused no.8 Imad Thakur is concerned, it is observed by the learned Division Bench of this court that First Informant Shahaji and witness Vishal Rane had not disclosed his name. Though he was identified in the Test Identification Parade, no specific role is attributed to him and the cause of death is head injury which is not attributed to this accused. Appellant/accused no.3 Sanjesh Naik, appellant/accused no.9 Ibrahim Mukadam and appellant/accused no.10 Vikram Thakur are also directed to be released on bail by allowing their appeals by the learned Division Bench of this court with an observation that head injury is attributed to accused no.1 Sagar Naik and role attributed to these accused persons is similar to the one attributed to accused Imad Thakur and Malati Naik, who are released on bail. It is further observed by the learned Division Bench of this court that the

charge-sheet shows that accused no.1 Sagar Naik and his father accused no.2 Rajendra Naik assaulted the deceased.

7 Now let us examine whether case of both the appellants/accused is standing on the same footing as that of the accused persons who are released on bail. The prosecution is invoking Section 149 of the Indian Penal Code in the case in hand. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 of the Indian Penal Code. The expression “in prosecution of common object” as appearing in Section 149 of the Indian Penal Code has to be strictly construed as equivalent to “in order to attain the common object”. It must be immediately connected with the common object by virtue of the nature of the object. First part of the Section 149 of the Indian Penal Code provides that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. Second part of this section makes

it clear that even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be held that the offence was such as the members knew was likely to be committed.

8 Cause of death of Swapnil Sonawane (since deceased) is stated to be head injury by the Autopsy Surgeon. Though the skull of the dead body was found to be intact, there was hemorrhage under scalp. Subdural hematoma was found at the base of the brain.

9 Papers of investigation do not reveal that either Swapnil (since deceased) or his parents were assaulted at the terrace of the building where they were staying. Material collected by the Investigator shows that at the terrace of their building, accused no.1 Sagar Naik and his associates were threatening Swapnil Sonawane (since deceased) as well as his parents and accused no.1 Sagar Naik was stating First Informant Shahaji Sonawane and his wife Gauri that photographs of his

sister are still in the computer of Swapnil Sonawane (since deceased). Casteist abuses were being hurled at the victims apart from insulting them intentionally. With this, family members of the deceased were pressurized to seek apology from parents and uncle of accused no.1 Sagar Naik. So far as appellant/accused no.5 Durgesh Patil is concerned, it is averred in the First Information Report (FIR) that he was accompanying accused no.1 Sagar Naik at the time of this incident. Statement of Gauri Sonawane is not reflecting his name. Suraj and Vishal Rane are cousins residing in the building where the deceased along with his family members was residing. Their statements show that appellant/accused no.5 Durgesh Patil was present at the terrace of the building along with accused no.1 Sagar Naik and he was threatening the victims. Their statements further show that appellant/accused no.4 Ashish Thakur was also present at the terrace and was threatening the victims. He is described as a boy with tattoos over hands.

10 Congruous statements of First Informant Shahaji and his wife Gauri show that they decided to tender apology to the parents and uncle of accused no.1 Sagar Naik. By a motorcycle, First Informant Shahaji, accompanied by his wife Gauri and son Swapnil (since deceased) then proceeded to Village Dharave for meeting parents of accused no.1 Sagar Naik. In front of house of accused no.1 Sagar Naik, they were beaten by accused persons including accused no.1 Sagar Naik and his father accused no.2 Rajendra Naik. Role attributed to friends of accused no.1 Sagar Naik is to the effect that they assaulted deceased Swapnil and his parents by means of fists and kick blows. So far as fatal blow is concerned, FIR as well as statements of Shahaji and his wife Gauri show that it was accused no.1 Sagar Naik who gave a fist blow on head of Swapnil (since deceased) causing his fall and accused no.1 Sagar Naik had also assaulted Swapnil by means of his elbows. It is, thus, clear from the evidence collected by the Investigator that internal injury noticed on head of deceased Swapnil was attributed to accused no.1 Sagar Naik.

11 We have also perused statements of eye witnesses such as Sabira Sayyed, Atik Khan, Suraj Mhatre and others. They have not named the appellants/accused persons but their statements show that group of young boys was assaulting the deceased by means of fists and kick blows.

12 In the Test Identification Parade conducted by the prosecution, both the appellants/accused persons were identified by the identifying witnesses but no specific role is attributed to them. Prima facie, it reveals that, they had assaulted the victims by means of fists and kick blows.

13 The “common object” of an assembly is to be ascertained from the acts and language of the members comprising it. Arms carried by such members and behaviour of the members at the scene of the incident gives a clue regarding the common object. The Investigator has recorded statement of Madhumeeta Das and Sandeepa @ Sunny who are friends of accused no.1 Sagar Naik. Statements of both these witnesses

show that soon before the incident, accused no.1 Sagar Naik, appellant/accused no.5 Durgesh Patil, Samir, witness Sandeepa as well as witness Madhumeeta had a party at the house of Madhumeeta Das. In that wet party, accused no.1 Sagar Naik had stated that a boy is teasing his younger sister and he needs to be taught a lesson. Then, the incident in question took place in which accused no.1 Sagar Naik gave a fatal blow to the deceased. Both the appellants/accused persons appear to have been with accused no.1 Sagar Naik but fatal blow is not attributed to them. During the course of the trial it will have to be examined whether the prosecution establishes common object of commission of murder of deceased Swapnil in the light of facts stated in the foregoing paragraphs. It will have to be decided whether there was a plan or there was no plan to commit murder and suddenly assault on the victim started without sharing common object by the assailants. Suffice to state that case of both appellants are at par with other co-accused who are already directed to be released on bail.

14 In the light of this discussion, recovery of motorcycle as well as CDR will have to be considered. Release of other co-accused on bail and parity with those accused certainly constitutes change in circumstances, even though earlier bail application of appellant/accused no.5 Durgesh Patil was rejected by the learned Single Judge of this court vide order dated 5th January 2017.

15 We have perused the impugned orders passed by the learned Special Judge which are exactly identical. The learned trial court has failed to appreciate the facts as well as law applicable to the case in hand. It has erred in holding that accused no.1 Sagar Naik and the appellants/accused persons took the victims to the terrace, threatened them and then forcibly dragged the deceased as well as the First Informant to Village Dharave and there murder of Swapnil was committed. Such findings are certainly erroneous and could not have been recorded at the pre-trial stage. Apart from this, it is also noted that the appellants/accused persons are behind bars from July 2016.

Considering the nature of evidence available against them, their further pre-trial detention is not warranted, and as such, the order:

ORDER

- i) The appeals are allowed.
- ii) Impugned orders dated 24th December 2018 passed below Exhibits 107 and 149 i.e. bail applications filed by appellants/accused persons Durgesh Patil and Ashish Thakur respectively are quashed and set aside.
- iii) Bail applications of appellants/accused persons are allowed.
- iv) Appellants/accused persons Durgesh Patil and Ashish Thakur be released on bail on their executing P.R.Bond in the sum of Rs.30,000/- each and by furnishing one or two sureties in like amount by each of them.

- v) As a condition of this order, both appellants/accused persons should not tamper evidence collected by the prosecution and they should not extend any threat, promise or inducement to the witnesses cited by the prosecution.
- vi) They should not contact parents of deceased Swapnil Sonawane in any manner.
- vii) The appellants/accused persons should attend Police Station Nerul on first Monday of every month in between 11.00 a.m. to 2.00 p.m.
- viii) The appeals stand disposed off accordingly.

(A. M. BADAR, J.)

(INDRAJIT MAHANTY, J.)