

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

916 BAIL APPLICATION NO.30 OF 2021

VISHAL @ MADDYA KISHOR PHATE
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. Joydeep Chatterji h/f Mr Bhosle A. K.
APP for Respondent-State : Ms. D. S. Jape.
Advocate for Assit to APP : Mr. I. D. Maniyar.

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WITH
CRIMINAL APPLICATION NO.392 OF 2021.
IN BA/30/2021.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 10-02-2021.

ORAL ORDER :

1. Criminal Application No.392 of 2021 has been filed for assist to learned Additional Public Prosecutor.
2. The said application is allowed and disposed of accordingly.
3. The Bail Application No.30 of 2021 has been filed by accused No.3 who has been arrested on 19-05-2020 in connection with Crime No.257 of 2020 dated 17-05-2020, for the offences punishable under section 302 and 120-B of the Indian Penal Code. He prays for bail under Section 439 of Code of Criminal Procedure.

4. Heard learned Advocate Mr. Joydeep Chatterji holding for Mr Bhosle A. K. for applicant and learned Additional Public Prosecutor for respondent-State well assisted by learned Advocate Mr. I. D. Maniyar.

5. It has been vehemently submitted on behalf of the applicant that perusal of the charge-sheet would show that no specific role is attributed to the applicant by the alleged eye-witness though it has been tried to be assigned by the informant. Even in the Closed-circuit Television (CCTV) footage which has been collected and of which the transcription has been produced on record would show that the present applicant was not present at the spot. Another witness who came to spot immediately after the incident and to whom the oral dying declaration is stated to have been given i.e. witness Ajay Pradhan does not disclose that in oral dying declaration specific role was attributed to the present applicant though it is stated that at the instance of the present applicant he was called and murdered. Co-accused Karan Sale has been released on bail by this Court, and therefore, on the ground of parity also the applicant deserves to be released. Though there are criminal antecedents of the applicant, yet in major cases he has been acquitted. Only the

cases which are filed in 2018-2019 are pending as on today, they are under Section 394 of Indian Penal Code. Mere criminal antecedents cannot be the ground for rejecting the bail application. Learned Advocate for the applicant, therefore, strongly canvassed for releasing the applicant on bail.

6. Learned Additional Public Prosecutor well assisted by learned Advocate Mr. I. D. Maniyar for the original informant strongly opposed the application on the ground that as per the First Information Report it was the present applicant who had come to meet deceased, asked him to make a phone call to accused No.1 with whom the deceased was already having enmity. Thereafter, other two accused persons came to the spot and all the accused persons took deceased to Annabhau Sathe Chowk. The informant says that he had raised suspicion and, therefore, asked his friend Mahesh Shingote to keep a watch on Yogesh and the informant was also nearby to the spot. Mahesh informed him about the assaults that had started and then when the informant and his cousin brother Sachin were proceeding towards Annabhau Sathe Chowk, they found that accused Vikas Gaikwad had caught hold of Yogesh and accused Jitu Dahatonde was assaulting Yogesh with some weapon.

Thereafter, all the four accused persons started pelting stones on the head and legs of Yogesh. All of them had, thereafter, fled away after they witnessed that people had started gathering. That means, the entire incident can be said that has been witnessed by the informant himself. Further, statement of Mahesh Shingote taken under Section 161 and 164 of Code of Criminal Procedure, would show that there was dispute between deceased and present applicant. The oral dying declaration also states about assault by accused No.1 and 2 and it was at the instance of present applicant. When he states that, "योगेश मला रडत रडत म्हणाला की, मड्ड्या (present applicant) व करण साळे यांनी माझा गेम केला, मला जित्या व विकास गायकवाड ने वार केले." Learned Additional Public Prosecutor further submitted that statement of another witness by name Pooja Would show that the present applicant had used her Scooty at the time of committing offence, and at the time of returning he has stated that, he has watched the same and had given extrajudicial confession to her. The post mortem report shows that deceased Yogesh has sustained severe injuries and his death is homicidal in nature. The other evidence that has been collected would show about the murder as well as the reason for conspiracy between the accused persons to

commit the crime. Further it has been pointed out that the present applicant is involved in eight cases including one case under Section 302 of Indian Penal Code. Therefore, taking into consideration the criminal antecedents of the applicant also, he does not deserve to be released on bail.

7. At the outset, it can be seen that the charge-sheet is filed, that means investigation is over and the further physical custody of the applicant is no longer required for the purpose of investigation. Under such circumstance, we are required to consider the evidence that has been collected by the investigating agency. Information has been lodged by the real brother of the deceased. He states about the enmity between deceased Yogesh and accused No.1. There is no whisper about enmity between deceased and present applicant. Further it can be seen from the contents of the First Information Report that, he states that at about 03.00 p.m. on 17-05-2020 when he himself and brother Yogesh were at home, at that time the present applicant went to his house and asked Yogesh to give a phone call to accused No.1. Thereafter, Yogesh gave phone call and there was quarrel between them on phone. Thereafter, accused No.1 Vikas Gaikwad and accused No.2 Jitu Dahatonde came

to the house of the informant on motorcycle. They called Yogesh outside the house and told him that they would go to Annabhau Sathe Chowk and would have talks. Yogesh went on his Moped along with Vikas and Jitu. Here the informant has not clarified as to what happened with the applicant, whether he went along with Yogesh or prior to that, is not clear. But then the informant says that, he became suspicious that those persons would do something with his brother and, therefore, he asked his friend Mahesh Shingote to keep a watch on Yogesh. Mahesh Shingote informed after a while running towards the house of the informant that all the four accused were assaulting Yogesh. Therefore, the informant and his cousin brother Sachin went towards the Chowk, and at that time they saw while they were running towards the Chowk that, Vikas was holding Yogesh and Jitu was assaulting Yogesh with some weapon and, thereafter, all the four accused had started pelting stones on head and legs of Yogesh. When these persons went near the spot, the assailants fled away. Thus, it can be seen that Mahesh Shingote has been posed as eye-witness. Statement of witness Mahesh under Section 161 of Code of Criminal Procedure gives a different story. No doubt this Court is not required to go into the details at this stage which would amount to scanning of the evidence, yet the

difference is required to be considered. Mahesh Shingote states about witnessing Yogesh consuming liquor in the shed of one Balu Sale. Yogesh was along with one Balu Patole and Rahul Kirtikar, and then he says that, thereafter Yogesh went to his house. But then his statement gives an impression that after the present applicant came near him, at that time Yogesh was present and there was discussion between him and the present applicant in respect of offering liquor to present applicant. Further when informant told Mahesh to keep a watch on Yogesh, it gives a picture that Yogesh was not at home at that time and whatever the phone call was given by deceased to accused No.1 was in front of this witness and not in presence of informant, and then the witness Mahesh Shingote states that the present applicant went towards the hutments at the back side. Thereafter, he gives the account of the assault on Yogesh, but he does not speak about the presence of the present applicant at the spot. Even in his statement under Section 164 of Code of Criminal Procedure, he has not stated about the presence of the present applicant.

8. As regards the oral dying declaration and extrajudicial confession is concerned, it is for the prosecution to prove it at the

time of trial. The entire account of direct as well as circumstantial evidence is then required to be taken even while considering the present application for bail.

9. This Court has granted bail to another accused Kiran Sale on 13-10-2020, however if we consider the entire story then the role attributed is different and, therefore, that cannot be the only ground for the applicant to be released on bail. In the order passed by the learned Additional Sessions Judge on the bail application of the present applicant which came to be rejected on 18-12-2020, list of eight offences has been given in which the present applicant is involved. However, it is stated by the learned Advocate for the applicant that six offences out of them up to 2016 have resulted in acquittal. It appears that the said fact was not brought to the notice of the learned Additional Sessions Judge. Two offences under Section 394 of Indian Penal Code are still pending. Now taking into consideration the evidence that is collected and the fact in the Closed-circuit Television footage transcript panchanama drawn on 01-06-2020 in which help was taken of the witnesses to identify the persons seen in the Closed-circuit Television footage. It is stated that only two persons are seen. That Closed-circuit Television

footage is from 15.17.50 hours to 15.19.48 hours. Only two persons have been shown on 17-05-2020. Though the learned Additional Public Prosecutor would also bring to notice of this Court that the same panchanama further states that from camera No.16 it can be seen that the present applicant was seen at the spot, but the time that is given is 12.48.44 to 12.52.06 hours. Therefore, even if we consider that at around 01.00 p.m. the present applicant had met deceased Yogesh but then the Closed-circuit Television Footage of 03.00 p.m. does not show the present applicant to be present at the spot. Therefore, taking into consideration the evidence that is collected, he deserves to be released on bail. Hence, following order.

ORDER

- 1) The application is hereby allowed.
- 2) Applicant Vishal @ Maddy Kishor Phate, in Regular Criminal Case No.1346 of 2020, pending before learned Judicial Magistrate First Class Court, Aurangabad, be released on P.R. of Rs.25,000/- (Twenty-five thousand) with one solvent sureties of like amount.
- 3) He shall not tamper with the evidence of the prosecution in any manner.

- 4) He shall not indulge in any criminal activity.
- 5) In addition to that, the applicant should provide his address where he would reside till the conclusion of the trial to the learned Trial Judge as well as to the Investigating Officer by leaving his mobile numbers at both the places. So also he should comply with the requirements under paragraphs No.12 (1) to (6) of Chapter I of Criminal Manual, whichever are applicable.
- 6) Bail before Trial Court.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-