

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

**945 CRIMINAL APPLICATION NO.2363 OF 2021
IN APEAL/502/2021**

1. Samadkhan Yusufkhan,
Age : 60 years, Occu.: Buisiness,
R/o.: Bundelpura, Beed,
Tq. and District : Beed.
2. Raju @ Ferozkhan Yusufkhan,
Age : 32 years, Occu.: Business,
R/o.: Bundelpura Beed,
Tq. and District : Beed.

VERSUS

The State of Maharashtra

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Advocate for Applicants : Mr. Nilesh S. Ghanekar
APP for Respondent-State: Mr. R. V. Dasalkar
Senior Advocate Assisting APP : Mr. R. S. Deshmukh
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CORAM : V. K. JADHAV AND

SANDIPKUMAR C. MORE, JJ.

DATED : 4th DECEMBER, 2021.

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PER COURT :

1. Heard both sides.
2. Pending Criminal Appeal No. 502 of 2021 preferred against the judgment and order of conviction passed by Additional Sessions

Judge, Beed dated 21/09/2021 in Sessions Case No. 159 of 2017 convicting thereby the applicants / accused and one more co-accused for the offence punishable under Section 302 read with 34 of IPC and sentencing them to suffer life imprisonment and to pay a fine of Rs.1,000/-, in default, rigorous imprisonment for 10 days, the applicants have preferred this application for suspension of the substantive part of the sentence and for bail.

3. The applicants and co-accused Kalu @ Arbaj in furtherance of their common intention have committed the murder of deceased Shahabaz Khan, who was a body builder. He was the owner and running one gymnasium. The incident had taken place for the reason that though the sons of applicant Samad Khan used to go to the said gym however, they were not paying the charges regularly. Thus, the deceased Shahabaz Khan had questioned about it and accordingly, they have committed the murder of the deceased Shahabaz Khan in furtherance of their common intention.

4. Learned counsel for the applicants submits that PW-1 / informant is not an eye witness to the incident and he was informed about participation of the present applicants in the alleged crime by someone else. He has simply witnessed that the applicants and other co-accused persons running away from the spot when he

reached there. Learned counsel for the applicant submits that as per the prosecution story, PW-2 Yunus Khan and PW-3 Ayub Khan are the eye witnesses to the incident and they have made the allegations against the applicants, who are the original accused Nos.2 and 3, and also against co-accused Nos. 4 to 6, that they caught hold the deceased at the time of the alleged incident and co-accused Kalu @ Arbaj Khan has given a blow of knife on the chest of the deceased. Learned counsel submits that however, on the same set of allegations the trial court has acquitted the original co-accused Nos.4 to 6, who allegedly caught hold the deceased along with the present applicants. Learned counsel submits that so far as co-accused no.7 Wajid Khan is concerned, who has allegedly instigated the other accused persons to kill the deceased Shahabaz Khan, the trial court has acquitted the said accused. Further more, PW-3 has materially improved the story by deposing before the court that the present applicants along with the other co-accused persons caught hold the deceased at the time of alleged incident. However, said omission in his police statement was confronted to him and it has also been proved through the Investigating Officer. Learned counsel submits that both the applicants / accused were on bail during the trial and they never tried to jump the conditions of the bail.

5. Learned APP assisted by learned Senior Counsel Mr. R. S. Deshmukh, submits that the prosecution case rests upon the ocular evidence. PW-2 Yunus and PW-3 Ayub Khan are the eye witnesses to the incident. Learned APP submits that the evidence of both these witnesses is reliable, trustworthy and consistent. Learned APP has pointed out the observations made by the learned Judge of the trial court in para 47 of the judgment and submits that the trial court has rightly distinguished the case of the co-accused nos. 4 to 7 and accordingly acquitted them. So far as the present applicants are concerned, as per the prosecution story and as deposed by PW-1 Dastgir Khan that on 15/05/2017 i.e. 2 days prior to the incident both these applicants went to his house and threatened him about the dire consequences, if they would claim gym charges to their siblings. Learned APP submits that at the instance of co-accused Kalu @ Arbaj, the weapon- knife and his T-shirt having blood stains came to be recovered. So far as the weapon knife is concerned, it was recovered from the place which is the a *gutter* in front of house of the applicant no.1 Samad Khan and further, T-shirt of co-accused Kalu @ Arbaj came to be seized at his instance from the washing machine of the applicant no.1 Samad Khan. The human blood was detected on the said T-shirt belonging to co-accused Kalu @ Arbaj. Learned APP submits that the incident had taken place in the city at about 7.00 to 7.30 p.m. Learned APP submits that the trial court

has granted set off to the present applicants and thus, it appears from the said order that these applicants were not on bail during the trial. However, learned counsel for the applicants and the learned APP both have gone through the record and proceedings and thus agree that these two applicants were on bail during the trial.

6. We have carefully gone through the notes of evidence, particularly the evidence of PW-1 Dastagir, PW-2 Yunus Khan and PW-3 Ayub Khan. It appears that the incident had taken place on 17/05/2017 at about 7.00 to 7.30 p.m. So far as the role attributed to the present applicants is concerned, PW-2 Yunus an eye witness and PW-3 Ayub have deposed that these applicants along with co-accused nos. 4 to 6 have caught hold the deceased and co-accused Kalu @ Arbaj has given a blow of knife on the chest of the deceased. So far as PW-3 Ayub Khan is concerned, he has improved the story to the extent of the allegations as made against the present applicants. He was confronted with his police statement. However, he could not assign any reason as to why the allegations as made against the present applicants do not find any place in his police statement. So far as PW-2 Yunus Khan is concerned, he has taken the names of co-accused nos. 4 to 6 along with the present applicants alleging that they all caught hold the

deceased. However, on the same set of allegations, the trial court has given them benefit of doubt. So far as recovery of the weapon knife at the instance of co-accused Kalu @ Arbaj is concerned, it was recovered from the Guttur in front of the house of the applicant Samad Khan as shown by co-accused Kalu @ Arbaj. Though T-shirt of Kalu @ Arbaj shown to have been recovered from washing machine of the applicant Samad Khan and the human blood was detected on it, however, it is to be noted here that the said T-shirt has been recovered at the instance of co-accused Kalu @ Arbaj and not at the instance of applicant Samad Khan. Both the applicants were on bail during the course of trial. We are thus inclined to release the applicants on bail by imposing certain conditions.

7. Learned APP assisted by learned Senior Counsel Mr. Deshmukh, at this stage submits that strict conditions may be imposed against the present applicants such as attending concerned police station once in a week. Hence, we proceed to pass following order

O R D E R

I. Criminal application is hereby allowed.

II. Pending the Criminal Appeal No. 502 of 2021 preferred against the judgment and order of conviction passed by the Additional Sessions Judge, Beed, dated 21/09/2021 in Sessions Case No. 159 of 2017, the substantive part of sentence is hereby suspended and till then applicants no.1) Samadkhan YusufKhan and no.2) Raju @ Ferozkhan Yusufkhan, be released on bail on furnishing P.B. of Rs.25,000/- (Rupees Twenty Five Thousand) each with one solvent surety each of the like amount with following condition:

a) The applicants shall attend the concerned police station on every Sunday, between 8.00 a.m. to 11.00 a.m. for a period of six months from the date of this order and thereafter on every 1st Sunday of every month till disposal of the appeal.

III. Criminal application is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)

(V. K. JADHAV, J.)

vsm/-