

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

INTERIM APPLICATION NO. 1780 OF 2021

IN

CRIMINAL APPEAL NO. 206 OF 2021

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Pappu Ganpat Uttekar
Age : 31 yrs., Occ : NIL,
R/at : Mutha, Tal. : Mulshi,
Dist. : Pune.
(At present lodged in
Nashik Central Jail)

...Applicant
(Original Accused No.8)

Versus

1. State of Maharashtra
(At the instance of Paud
Police Station, Dist. : Pune) Respondent

Mr.Rajiv Patil, Senior Advocate i/b Mr.Prashant M. Patil for
applicant/appellant.

Mr.V.B. Konde-Deshmukh, APP for respondent-State.

**CORAM : S. S. SHINDE &
N.J. JAMADAR, JJ.**

Reserved for Order on : 1st December 2021.

Pronounced on : 21st December 2021.

ORDER :

1. This is an application for suspension of sentence under
section 389 of the Criminal Procedure Code, 1973 ('the Code'),
during the pendency of the appeal.

2.

3. The applicant-original accused No.8 came to be convicted
alongwith eight other accused, for the offence punishable under

section 302 read with section 34 of the Indian Penal Code, 1860 ('the Penal Code') and sentenced to suffer imprisonment for life and pay fine of Rs.5,000/- with default stipulation, for having committed murder of Eknath Baban Kudale ('the deceased') in furtherance of his common intention with the convicted co-accused, by the learned Additional Sessions Judge, Pune, by judgment and order dated 30th January 2021 in Sessions Case No.460 of 2015.

4. Being aggrieved thereby and dissatisfied therewith, the appellant has preferred this appeal assailing the legality, propriety and correctness of the judgment of conviction and order of sentence.

5. The applicant has preferred the instant application with the assertion that the learned Additional Sessions Judge committed a manifest error in returning the finding of guilt qua the applicant sans legal evidence. The fact that the testimony of Kashinath Baban Kudale (PW-1), the first informant, who was allegedly the sole eye-witness to the occurrence, blisters with contradictions, inconsistencies and improvements, was lightly brushed aside by the learned Additional sessions Judge. The applicant, thus, has a

very strong chance to succeed in appeal. The applicant has been in custody since 29th May 2015. It is extremely unlikely that the appeal would be heard and decided within a reasonable time. In the circumstances, it is necessary to suspend the sentence and enlarge the applicant on bail during the pendency of appeal.

6. We have heard Mr. Rajiv Patil, the learned Senior Counsel for the applicant and Mr. Konde-Deshmukh, the learned APP for the State at length. With the assistance of the learned counsels for the parties, we have perused the impugned judgment, depositions of the witnesses and the material on record.

7. Mr. Rajiv Patil, the learned Senior Counsel would urge that the learned Additional Sessions Judge was in error in not adequately dealing with the submissions canvassed on behalf of the applicant. First and foremost, the testimony of Kashinath Kudale (PW-1) could not have been implicitly relied upon in the face of the attendant circumstances which render the very presence of Mr. Kashinath Kudale (PW-1) at the time and place of occurrence doubtful. Secondly, even if maximum latitude is given to the testimony of Kashinath Kudale (PW-1) and it is construed rather generously, yet, the identity of the applicant as one of the

assailants cannot be said to have been established to the hilt. Thirdly, the circumstantial evidence in the nature of recovery of the sickle (koyta) pursuant to the alleged disclosure made by the applicant is of no assistance to the prosecution as the learned Addl. Sessions Judge recorded in clear and explicit terms that the said weapon of offence was not sent for analysis. Thus, the nexus between the said alleged weapon of assault and offence cannot be said to have been established.

8. In contrast, Mr.Konde-Deshmukh, the learned APP stoutly opposed the prayer for enlarging the applicant on bail during the pendency of the appeal. Attention of the Court was invited to the fact that the genesis of the occurrence is in the alleged gang rivalry. The deceased was brutally done to death as is evident from the fact that there were as many as 26 chop, stab and incised wounds on the person of the deceased. In the backdrop of the evidence on record, the learned Sessions Judge was justified in returning the finding of guilt, urged, Mr.Konde-Deshmukh. It was further submitted that having regard to the genesis of the occurrence, the release of the appellant during the pendency of the appeal would pose serious threat to the first informant and rest of the prosecution witnesses.

9. We have given our anxious consideration to the rival submissions.

10. To begin with, the gravamen of indictment against the applicant/accused was that the deceased was dealing in the business of real estate. A dispute had arisen between the deceased and Pandurang Marathe over sharing the profits from the said business. The deceased was an accused in the alleged murder of one Pintu Marne. Whereas Pandurang Marathe was an accused in the alleged murder of Balu Marne. While Pandurang Marathe was incarcerated, the accused Swapnil Bhilare was looking after the business of Pandurang Marathe. Thus, there was a rivalry between the deceased, on one side, and the accused, on the other side. In the wake of the said feud, on 1st December 2014, the first informant had gone to Bhukum to deliver the daily newspapers. Near Rameshwar Temple, Bhukum, he saw I-10-car of the deceased. Ten to twelve persons were quarreling with the deceased. As he rushed towards the said spot, co-accused Sagar Gole threw chilly powder in the eyes of the deceased. Accused Swapnil Bhilare and Anil Khatpe were armed with sickle. Accused Mahesh Wagh was armed with chopper, accused Vaibhav Shelar was armed with sword,

accused Swapnil Khatpe, Ram Kedari and Hemant Godambe and two unknown persons were armed with sharp weapons. Accused-applicant Pappu Uttekar was armed with sickle. The armed accused unleashed blows by means of their respective weapons. The deceased tried to run towards the rear side of the temple. But, the accused chased and assaulted him by their respective weapons. After the assault, the accused fled away in an Omni Car. The deceased was taken to Sahyadri Hospital. However, the deceased was declared dead.

11. In the backdrop of the aforesaid nature of the accusation, the fact that the deceased met a homicidal death could hardly be disputed. The evidence of Dr.Amol Shinde (PW-12) and the post-mortem report, which came to be proved in his evidence, establish beyond the pale of controversy that the deceased had sustained as many as 26 external injuries, most of which were chop, stab and incised wounds, and succumbed to those injuries.

12. The endeavour on the part of the applicant to draw home the point that Kashinath Kudale (PW-1), the first informant, was not a natural witness by adverting to the circumstances like the motor cycle which the first informant was riding and the newspapers which the first informant claimed that he was to deliver, were not

found at the scene of occurrence, does not merit acceptance at this stage. The learned Additional Sessions Judge has ascribed justifiable reasons to arrive at the conclusion that the testimony of Kashinath Kudale (PW-1) allures confidence. It is imperative to note that the first information report containing the core of the prosecution case, including the place of occurrence, the identity of the assailants, the weapons with which the assailants were armed, the manner of assault and the circumstances in which the assailants fled away, came to be lodged almost instantaneously. Thus, at this juncture, we are not inclined to delve deep into the submission that the testimony of Kashinath Kudale (PW-1) is unworthy of sustaining the guilt of the accused.

13. Mr.Patil laid emphasis on the aspect of the identity of the applicant as one of the assailants. To this end, attention of the Court was invited to the manner in which Kashinath Kudale (PW-1) fared in the cross-examination. Kashinath Kudale (PW-1) conceded that the applicant accused Pappu Uttekar was never in his school nor in his group. He is not residing in the area of Khaptewadi, Bhukum. Nobody introduced the applicant to him. Till the date of occurrence, he had no conversation with the applicant. Nor had he met the applicant. On the strength of these admissions, an earnest

endeavour was made to demonstrate that the applicant was a complete stranger to Kashinath Kudale (PW-1), the first informant, and in the absence of prior test identification parade, the testimony of Kashinath Kudale (PW-1) could not have been made a legitimate foundation to establish the identity of the applicant as one of the assailants.

14. It is true that there was no prior test identification parade. However, at this juncture, we are not persuaded to accede to the submission on behalf of the applicant for reasons more than one. Firstly, name of the applicant alongwith the weapon with which the applicant was allegedly armed, does find mention in the first information report. Secondly, the evidence is required to be appreciated in the light of the fact that, in our society, the interactions are rather informal. Each house is not a castle. The members of the society often know a large number of persons even if they have had no occasion to interact or formally communicate. Thirdly, Kashinath Kudale (PW-1) did recognize the applicant as one of the assailants from the dock. It is trite that prior test identification parade is not an immutable rule of law as it falls in the realm of investigation. If the evidence before the Court inspires confidence, as the learned Additional Sessions Judge concluded, in

this case, failure to hold the test identification parade is not fatal to the prosecution.

15. There is another circumstance which is of significance. Sanjay Nathu Khandare (PW-3), the public witness to the discovery allegedly made by the applicant, deposed to the fact that the applicant made disclosure statement and pursuant to the statement made by the applicant, the weapon of assault (sickle) was recovered. Sanjay Nathu Khandare (PW-3) identified the applicant from the dock as the person who had made the said discovery. Mr.Vivek Pansare (PW-16), the investigating officer who effected the recovery, lent support to the claim of Sanjay Nathu Khandare PW-3. Thus, there is circumstantial evidence which lends support to the claim of Kashinath Kudale (PW-1).

16. It is true that the investigating officer had not forwarded the said sickle for analysis to Forensic Science Laboratory. However, the aforesaid lapse in investigation does not completely erode the factum of discovery made by the accused leading to recovery of the weapon of assault.

17. Lastly, the genesis of the occurrence and the manner in which the deceased was done to death cannot be lost sight of. In the backdrop of the material on record that the occurrence in

question was, in a sense, a part of a series of reprisal killings, the apprehension on the part of the prosecution appears to be well founded. The manner in which the assailants unleashed blows by deadly weapon on the deceased resulting in 26 injuries, most of which were chop, stab and incised wounds, reveals the ferocity of the attack and also underscores pre-meditation.

18. For the foregoing reasons, we are not persuaded to exercise the discretion in favour of the applicant.

19. Hence, the following order :

O R D E R

The application stands rejected.

The observations made hereinabove are for the purpose of determining the prayer for suspension of sentence and they may not be construed as an expression of opinion on merits of the appeal.

[N.J. JAMADAR, J.]

[S.S. SHINDE, J.]