

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

CRIMINAL APPEAL NO. 105 OF 2022

- 1] Lata w/o Bhagwat Kavade,
Age : 47 years, Occu. Household,
R/o. Kanerwadi, Tq. Kallamb,
Dist. Osmanabad.
- 2] Bhagwat s/o Shankar Kavade,
Age : 52 years, Occu. Agri.,
R/o. Kanerwadi, Tq. Kallamb,
Dist. Osmanabad.
- 3] Datta s/o Bhagwat Kavade,
Age : 23 years, Occu. Driver,
R/o. Kanerwadi, Tq. Kallamb,
Dist. Osmanabad.
- 4] Sachin s/o Bhagwat Kavade,
Age : 25 years, Occu. Agri.,
R/o. Kanerwadi, Tq. Kallamb,
Dist. Osmanabad.

....Appellants
[Orig. Accused]

Versus

- 1] The State of Maharashtra
- 2] Gaurav s/o Fulchand Nikam,
Age : 19 years, Occu. Education,
R/o. Ratnapur, Tq. Kallamb,
Dist. Osmanabad.

....Respondents

....
Mr. Manoharrao A. Tandale h/f Mr. Hanumant P. Jadhav, Advocate for
the appellants

Mr. S. D. Ghayal, APP for respondent/State
Mr. Shashikant E. Shekade, Advocate for respondent no. 2

....

CORAM : SMT. VIBHA KANKANWADI
AND
RAJESH S. PATIL, JJ.

DATE : SEPTEMBER 23, 2022

ORAL JUDGMENT [PER SMT. VIBHA V. KANKANWADI, J.] :-

1. **Admit.**

2. The present appeal has been filed under Section 14(A) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 to challenge the order dated 07.01.2022 passed by the learned Special Judge (Atrocities Act), Osmanabad, below Exh. 4 in Special (Atro) Case No. 119/2021.

3. Heard learned advocate Mr. Manoharrao A. Tandale holding for Mr. Hanumant P. Jadhav for the appellants, Mr. S. D. Ghayal, learned APP for respondent/State and Mr. Shashikant E. Shekade, learned counsel for respondent no.2.

4. It has been vehemently submitted on behalf of the appellants that the crime came to be registered on the basis of FIR lodged by respondent no. 2 in respect of death of his father. Now, the investigation is over and charge-sheet is filed. Under such circumstances, the further physical custody of the appellants is not necessary for the purpose of investigation. Perusal of the charge-sheet would show that the case is based on circumstantial evidence. The *post mortem* report though includes eight surface wounds in column no. 17 and one injury in column no. 19, yet gives the probable cause of death as 'asphyxia due
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to drowning'. However, it appears, that later on i.e. 18.11.2021, the Medical Officer appears to have changed his mind and states that the death might have been caused due to the injuries due to a sharp edged stone. The informant appears to have lodged the report belatedly and in his FIR he says that after the death of his mother, his father had developed illicit relations with appellant no. 1 and when he had gone to meet her on 25.09.2021, he would have been killed by the appellants accused persons. The circumstantial evidence, which the prosecution intends to rely upon, appears to be on the point of 'last seen together and the discovery panchanama under Section 27 of the Indian Evidence Act.' The appellants are in jail since 14.10.2021 and they are ready to abide by the terms of the bail. He relied on the decision in **State of U.P. through CBI vs. Amarmani Tripathi** reported in (2005) 8 SCC 21, wherein it has been held that, the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. While a vague allegation that accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. He prayed for release of the appellants by setting aside the impugned order.

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5. Learned APP as well as learned advocate for respondent no.2 strongly opposed the appeal and supported the reasons given by the learned Special Judge while rejecting the bail application under Section 439 of the Cr.P.C. Learned APP agreed that the case rests on circumstantial evidence, however, the circumstances are strong enough. On the basis of the information given by the Police Patil of village Itkur on 27.09.2021, accidental death was reported and it appears that it was taken up for inquiry. During that process, the inquest panchanama was prepared and dead body was sent for *post mortem*. Panchanama of the spot where the dead body was found got executed. The CDR that was grabbed would show that there was phone calls between the deceased and the accused/appellant no. 1 and then it has been stated by the witnesses that there were illicit relations between the deceased and the appellant no. 1. Statement of one Shabbir Badshah Shaikh under Section 161 as well as 164 of Cr.P.C. would show that he along with his friend Sridhar Tekale were proceeding around 02:00 p.m. on 29.05.2021 towards Malegaon – Beed. Around 02:30 p.m. they were stopped by the deceased on Massa Bus Stop. He then requested by saying that he should be dropped till Kanherwadi Pati. He also told that he had given a phone call to son but he has not come. He has then stated that when they were near the Bridge, deceased told that the son has come from opposite side and therefore asked Shabbir Shaikh to stop the vehicle. He got down from his two wheeler and went along with the boy on two wheeler bearing registration No. MH-25/AT-2193. The said Shabbir has identified the said boy as Datta i.e. accused no. 3. Therefore, there is strong evidence in the form of CDR, last seen together and discovery which would dis-entitle the appellants from being released on bail.

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6. At the outset, it is to be noted that the case rests on circumstantial evidence and, therefore, there has to be evidence pointing out towards the accused. We are at a very preliminary stage and, therefore, the principles those have been laid down in **Amarmani Tripathi** (supra) as well as other decisions of the Apex Court as well as this Court, are required to be considered. As per F.I.R., deceased appears to be serving at Terkheda in veterinary hospital. He used to reside at Yermala but his son informant/present respondent no. 2 was residing at Ratnapur, Tq. Kalamb, Dist. Osmanabad. Son says that while leaving the house on 25.09.2021, his father had informed that he would go in the evening to Ratnapur, however, he did not return on the next day also and, therefore, he had given phone calls to the relatives and then was searched for the father for about 2 to 3 days. He then states in the FIR that his uncle Mahesh Mahadeo Nikam is in police department. On 01.10.2021, uncle Mahesh came to know about the death of deceased – Fulchand, when his photograph in dead condition was published. The FIR has been lodged on 13.10.2021 and it is stated that as the informant/son was in grief, he could not lodge the report. Whether that delay has been explained or not would be ultimately decided by the trial Court but still a fact will have to be considered is that the brother of the deceased Mahesh is in police department and had come to know about his death on 01.10.2021. Whether he could remain quiet for about 12 to 13 days thereafter is a question. The son says about the illicit relations between the father and appellant no. 1 but has not stated from whom he came to know about it and the entire charge-sheet appears to be silent as to whether uncle Mahesh who is in police department was knowing about the said illicit relationship or not. The motive is stated to be the said illicit relationship and, therefore, all these factors would be considered by the trial Court.

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7. When the dead body was sent for *post mortem* on 27.09.2021, its identity was not established and, therefore, the *post mortem* report states that the *post mortem* has been done on an unknown body. Though, as aforesaid, surface wounds those were found as per column no. 17 were eight in number and there was also CLW on parietal region noted in column no. 19, the probable cause of death that was given by the Medical Officer at that time was the cause of death as “asphyxia due to drowning”. It appears that thereafter the seized stone under Section 27 of the Indian Evidence Act was sent by the Investigating Officer to the Medical Officer and thereafter he states that the injuries noted in the *post mortem* are possible by sharp edged stone. This discrepancy is also then required to be considered as to what kind of evidence is collected in this case. It is stated that there was conversation between deceased and appellant no. 1 and it also appears that there was attempt to get CDR as well as tower location but at this stage it is not forming part of charge-sheet.

8. The further circumstance on which the prosecution intends to rely on is the statement of two persons who had seen the deceased allegedly with the accused no. 3 – Datta. Witness Shabbir Badshah Shaikh is resident of village Ratnapur and it also appears that he was knowing deceased. He has not stated that he was not knowing informant, who is, in fact, stated to be residing in Ratnapur. In whose connection deceased told him that he had given phone calls to son and he has not come would be explained by the witness or such explanation can be taken from him but apparently if we want to connect it with the FIR then in the FIR it is stated that while leaving house in Yermala deceased had informed that he was going to Ratnapur may be for meeting informant and he would have called informant to take him as
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stated by witness Shabbir. The appellants are resident of village Kanherwadi, post Andora, Tq. Kalamb, Dist. Osmanabad. Statement of Shabbir Shaikh would show that he was not knowing the appellant no. 3 prior to the said incident. No doubt there appears to be an evidence in the form of his identification but then now the part of collection of evidence has come to an end. The other piece of evidence is the discovery of weapon i.e. stone by appellant no. 1 and also the discovery by appellant no. 2 about the place from where he had thrown the mobile in the river.

9. The prosecution has invoked Section 3(2)(V)(va) of the Atrocities Act, however, Section 302, 201 of IPC are not included in the schedule attached to said section. Under such circumstance, *prima facie* also it can be said that the said Section is not attracted here.

10. When the investigation is over and with this kind of evidence that has been collected the appellants need not be kept behind the bars till the conclusion of the trial. They are resident of another place and the witnesses are residing at a different place. Under such circumstance, all these aspects ought to have been considered by the learned Special Judge while considering the application under Section 439 of the Code of Criminal Procedure.

11. Important point to be noted is that the learned Special Judge has absolutely not given proper reasons while considering the bail application. Stereo type reasons that the offence is serious and the maximum punishment for the offence under Section 302 IPC. There cannot be the crieteria for rejecting the bail. When such order is passed without application of mind, then it deserves to be set aside.

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12. Following order is passed.

ORDER

- [i] Appeal stands allowed.
- [ii] The order passed by the learned Special Judge (Atrocities Act), Osmanabad, below Exh. 4 in Special (Atro) Case No. 119/2021 on 07.01.2022, stands set aside. Said application stands allowed and disposed off. The appellants be released on PR of Rs. 50,000/- (Rupees Fifty Thousand) with two sureties of Rs. 25,000/- (Rupees Twenty Five Thousand), each.
- [iii] They shall not tamper with the evidence of prosecution in any manner.
- [iv] They shall not visit Ratnapur, Dist. Osmanabad, till the conclusion of the trial.
- [v] The appellants shall comply with the requirements under para nos. 12 (1) to (6) of Chapter-I of the Criminal Manual, whichever are applicable.
- [vi] Bail before the trial Court.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE