

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

943 CRIMINAL APPLICATION NO.877 OF 2020
IN
CRIMINAL APPEAL NO. 262 OF 2020

SHAIKH KALIM @ KALLU SHAIKH SALIM
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. More Abhijit S.
APP for Respondent : Mr R D Sanap
Advocate for Assist to APP : Ms V S Ghanekar

...

AND
CRIMINAL APPLICATION NO.1205 OF 2020
IN
CRIMINAL APPEAL NO.393 OF 2020

SYED SHAHABODDIN ALIAS SHAHAB S/O SYED
RASHED
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER.

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Mr. R.S.Deshmukh Sr. Counsel I/b Mr. D R Deshmukh
Advocate for the applicant.
APP for Respondent : Mr R D Sanap
Advocate for Assist to APP : Ms V S Ghanekar

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CORAM : V.K. JADHAV & SANDIPKUMAR C. MORE, JJ.

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Date of Reserving the order : March 02, 2022
Date of pronouncing the order : March 08, 2022

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ORDER :- (Per V K Jadhav, J.)

1. Pending the Criminal Appeal No.393 of 2020 and Criminal Appeal no.262 of 2020 preferred against the

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judgment and order of conviction dated 14.2.2020 passed by the Additional Sessions Judge, Aurangabad in Sessions Case No.243 of 2018 convicting thereby both the applicants (appellants) for the offence punishable under sections 302, 201, 364, 365, r/w 34 of IPC and sentencing them to suffer imprisonment as detailed in the operative part of the order, the applicant/original accused No.6 (referred as accused no.8 in the charge sheet) Syed Shahaboddin alias Shahab s/o Syed Rashed has preferred criminal application no.1205 of 2020 in criminal appeal no.393 of 2020 and applicant/original accused no.7 Shaikh Kalim @ Kallu Shaikh Salim has preferred criminal application no.877 of 2020 for suspension of substantive part of the sentence and for bail.

2. The prosecution story in brief is that, on 16.5.2018 deceased Sk. Jabbar Sk. Sattar was abducted with an intention to confine him wrongfully and secretly and further Sk. Jabbar Sk. Sattar was murdered. It is also the prosecution story that the evidence connecting with

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his murder was caused to be disappeared with an intention to screen and save from legal punishment. The prosecution has proved involvement of the present applicants/accused in connection with the crime as a culprit to the extent of the applicant Syed Shahaboddin @ Shahab s/o Syed Rashed in Criminal application no.1205 of 2020 and as an abettor to the extent of the applicant Shaikh Kalim @ Kalu Shaikh Salim in criminal application no.877 of 2020.

3. The learned Senior Counsel Mr. Deshmukh i/b Mr. D R Deshmukh for the applicant in criminal application no.1205 of 2020 submits that, the prosecution evidence mainly rests upon the evidence of approver PW-18 Shaikh Imran Shaikh Karim alias Baba and PW 2 Raeesa Begum. Approver PW-18 Shaikh Imran Shaikh Karim alias Baba was arrayed as an accused no.2, however, subsequently he has filed an application to pardon and his application was allowed and he has become the approver. The learned Senior Counsel submits that, in order to rely upon the evidence of the

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approver PW-18 Shaikh Imran Shaikh Karim alias Baba, the approver has to take active and positive part in the commission of offence. In the instant case, approver PW-18 Shaikh Imran Shaikh Karim alias Baba has not taken any active part in the incident of abduction of deceased Sk. Jabbar Sk. Sattar and in causing assault to deceased Sk. Jabbar Sk. Sattar, which resulted into his homicidal death. The learned senior counsel submits that entire attempt on the part of the approver PW-18 Shaikh Imran Shaikh Karim alias Baba is to save himself and to implicate others. His evidence is wholly exculpatory, falsely implicating other accused. The learned Senior counsel submits that, no reliance can be placed upon his evidence. The learned senior counsel submits that there is no corroboration to the evidence of approver PW-18 Shaikh Imran Shaikh Karim alias Baba on material parts. Learned senior counsel submits that PW-2 Raeesa Begum is not a witness to the actual incident. Thus, there is no corroboration to the evidence of the approver PW-18 Shaikh Imran Shaikh Karim alias Baba. Learned senior counsel submits that

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even if the evidence of approver PW-18 Shaikh Imran Shaikh Karim alias Baba is considered, then, no specific role has been attributed to the applicant Syed Shahaboddin @ Shahab s/o Syed Rashed in criminal application no.1205 of 2020 so as to connect him with the commission of murder. Learned senior counsel submits that the allegations have been made mainly against accused Shaikh Wajed @ Babala Shaikh Asad and Shaikh Amjad Shaikh Asad @ Mosin. As per the approver's evidence, accused Shaikh Amjad Shaikh Asad @ Mosin and the present applicant Syed Shahaboddin @ Shahab s/o Syed Rashed brought deceased Sk. Jabbar Sk. Sattar at the spot of the incident on the motorcycle. Further, the applicant Syed Shahaboddin @ Shahab s/o Syed Rashed went to bring auto-rickshaw and he came the spot again alongwith auto-rickshaw. Learned senior counsel submits that on the basis of these limited role ascribed to the applicant Syed Shahaboddin by approver PW-18 Shaikh Imran Shaikh Karim alias Baba, the Trial Court has convicted the applicant/accused Syed Shahaboddin @ Shahab s/o

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Syed Rashed, as detailed in operative part of the judgment and order of conviction. The learned senior counsel submits that there is a mark difference between the injuries noted in the inquest panchnama and the post-mortem report. The learned senior counsel submits that the applicant may be released on bail by suspending the substantive part of the sentence till the disposal of the appeal.

4. The learned counsel Mr More appearing for the applicant Shaikh Kalim @ Kallu Shaikh Salim in criminal application no.877 of 2020 submits that, the applicant is a auto-rickshaw driver and, he was convicted by the trial court as an abettor. Learned counsel submits that, even as per the approver's evidence PW-18 Shaikh Imran Shaikh Karim alias Baba the applicant Shaikh Kalim @ Kallu Shaikh Salim- a rickshaw driver was not knowing as to what is going on the spot. Admittedly, he has not participated in the actual commission of the crime nor abetted the commission of the crime in any manner. He was called

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there to carry the injured in his auto-rickshaw. The applicant may be released on bail by suspending the substantive part of the sentence till the disposal of the appeal.

5. The learned APP has strongly resisted both these criminal applications and submits that evidence of the approver PW-18 Shaikh Imran Shaikh Karim alias Baba is reliable, trust worthy, consistent and there is a sufficient corroboration to his evidence. Though, PW-2 Raeesa Begum is not a witness to the incident of giving blows of knife to deceased Sk. Jabbar Sk. Sattar by the accused, however, she had been to the spot, requested the accused persons not to extend the beating to the deceased Sk. Jabbar Sk. Sattar and she has also heard the noise of the persons to whom the accused were extending the beating. The learned APP submits that the prosecution has examined PW-13 Dr. Vikas Madan Rathod to prove the homicidal death of deceased Sk. Jabbar Sk. Sattar. PW-13 Dr. Vikas Madan Rathod has conducted the postmortem examination of the dead

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body of Sk. Jabbar alongwith Dr. Vaibhav Wankhede. He has deposed that dead body was approximately 30 years and it was a male dead body. He further deposed that a stone was tied around abdominal cavity of size 32x80cmx12 and its weight was 10.17 kgs. PW 13 Dr.Vikas Rathod has noticed 19 external injuries and most of the injuries are punctured wound, incised wounds, stab injuries etc. The cause of death of Sk. Jabbar was cut throat with multiple stab injuries. The learned APP submits that prosecution has well established the role played by both the applicants in connection with the commission of the murder. The Trial Court has rightly convicted both the applicants. The applicants are not entitled to be released on bail by suspending the substantive part of the sentence.

6. The prosecution case mainly rests upon the evidence of the approver PW-18 Shaikh Imran Shaikh Karim alias Baba. It is well settled that the approver's evidence must pass double test of reliability and corroboration for material particulars. It is also a

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settled position that accomplice is competent witness against co-participant in the crime, however, there should be a corroboration from the independent source in material aspects.

7. We have carefully gone through the evidence of the approver PW-18 Shaikh Imran Shaikh Karim alias Baba. On 16.5.2018 while returning to the house from the side of the river, accused Amjad met him. Accused Amjad told him to carry wooden rafter. Accordingly, they took wooden rafter and kept near the river. At that time, he saw accused Shaikh Wajed @ Babla Shaikh Asad there. Said Shaikh Wajed @ Babla Shaikh Asad came near the place where wooden rafter was kept. There were talks between the accused Sk. Amjad Shaikh Asad @ Mosin and accused Shaikh Wajed @ Babla Shaikh Asad. Approver PW-18 Shaikh Imran Shaikh Karim alias Baba further deposed that, Shaikh Amjad took out a mobile phone for calling the applicant/accused Shahaboddin (the applicant in criminal application no.1205 of 2020). Thereafter, accused Sk. Wajed went to bring the

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applicant Shahaboddin. After 15 minutes, accused Shaikh Amjad and applicant/accused Shahaboddin brought deceased Sk.Jabbar Sk. Sattar on motorcycle. Accused Sk. Amjad gave a blow of leg on the chest of deceased Sk.Jabbar Sk. Sattar, in consequence of which he fallen down. Thereafter, they have removed his clothes. At the instance of accused Sk. Wajed, approver PW-18 Shaikh Imran Shaikh Karim alias Baba slapped the deceased Sk. Jabbar Sk. Sattar. Prima facie, it cannot be said that the approver PW-18 Shaikh Imran Shaikh Karim alias Baba had not participated in commission of the crime and, his evidence is exculpatory. Approver PW-18 Shaikh Imran Shaikh Karim alias Baba has further deposed about the role played by accused Shaikh Amjad Shaikh Asad @ Mosin and Shaikh Wajed @ Babala Shaikh Asad. He has also deposed that PW-2 Raeesa Bhabhi came there and told to accused Shaikh Wajed @ Babala as to why he was beating a poor person and further requested him to leave that poor person and not to beat him. Even PW 2 Raeesa Begum told accused Shaikh Wajed @ Babala

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that if he wants, he may cut her hand but leave that person. However, Shaikh Wajed @ Babala asked that lady to leave that place. Approver PW-18 Shaikh Imran Shaikh Karim alias Baba further deposed about all the details as to how deceased Sk. Jabbar Sk. Sattar was assaulted in a barbaric and inhuman manner. Initially, accused Sk. Wajed @ Babala Shaikh Asad gave a blow of knife (suri) behind the right ear of deceased Sk. Jabbar Sk. Sattar, as such blood was oozing from that injury. Thereafter, Sk. Amjad Shaikh Asad @ Mosin asked Haroon to put liquor in one Glass and forced the deceased Sk. Jabbar to drink the said liquor. After drinking the said liquor, deceased Sk. Jabbar was not in a position to stand and thereafter accused Sk. Wajed @ Babala gave another blow of knife upon left shoulder of deceased Sk. Jabbar Sk. Sattar, due to which left shoulder of Sk. Jabbar Sk. Sattar was torned. Thereafter, accused Sk. Amjad Shaikh Asad @ Mosin asked approver PW-18 Shaikh Imran Shaikh Karim alias Baba to bring water from the house of Raisa Bhabhi. Accordingly, he went at the house of PW-2 Raesa

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Bhabhi. Even, at that time, PW-2 Raeesa Bhabhi told him that not to involve in the said activities of those persons, however, approver PW-18 Shaikh Imran Shaikh Karim alias Baba took the water and came on the spot. The applicant/accused Syed Shahaboddin @ Shahab s/o Syed Rashed went to bring the auto-rickshaw and he came on the spot with the auto-rickshaw. Accused Sk. Wajed @ Babala bring one handle of spade and given a blow of the handle of spade upon the leg of Sk Jabbar Sk. Sattar, due to which he was tossing. Thereafter, accused Sk. Wajed @ Babala Shaikh Asad, Sk. Amjad Shaikh Asad @ Mosin, Haroon and accused Syed Shahaboddin @ Shahab S/o Syed Rashed put the deceased Sk Jabbar Sk. Sattar in auto rickshaw. Accused Shaikh Wajed @ Babala gave blow of knife upon the chest of deceased Sk. Jabbar Sk. Satrar for four to five times. The evidence of approver PW-18 Shaikh Imran Shaikh Karim alias Baba is corroborated by PW-2 Raeesa Begum. The evidence of approver PW-18 Shaikh Imran Shaikh Karim alias Baba is also corroborated by PW-13 Dr. Vikas Madan Rathod, who

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had conducted postmortem examination on the dead body of Sk.Jabbar Sk. Sattar. We are shocked to see the description of the external injuries on the person of deceased Sk Jabbar Sk. Sattar. Those external injuries were 19 in numbers and most of the injuries are punctured wound, incised wound and stab injuries on the various parts of the body. Further, as per the evidence of Dr. Vikas Rathod a stone was tied around the abdominal cavity of size 32x80cmx12 cm and its weight was 10.17 kgs. There is a specific role ascribed to the applicant/accused Syed Shahaboddin @ Shahab s/o Syed Rashed in Criminal application no.1205 of 2020. We are not inclined to release him on bail by suspending substantive part of the sentence.

8. So far as the applicant/accused Shaikh Kalim @ Kallu Shaikh Salim in criminal application no.877 of 2020 in criminal appeal no.262 of 2020 is concerned, his role is limited. He is an auto-rickshaw driver. There is no positive evidence against him to conclude that he has abetted the commission of murder of Sk Jabbar Sk.

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Sattar in any manner. Approver PW-18 Shaikh Imran Shaikh Karim alias Baba has also deposed that the applicant/accused Shaikh Kalim @ Kallu Shaikh Salim-auto-rickshaw driver was not knowing about the incident. In view of the same, we are inclined to release him on bail by suspending the substantive part of the sentence. Hence, We proceed to pass the following order:

ORDER

I. Criminal application No.1205 of 2020 in Criminal appeal No.393 of 2020 (Syed Shahaboddin @ Shahab s/o Syed Rashed Vs. the State of Maharashtra) is hereby dismissed.

II. Criminal application no.877 of 2020 in criminal appeal no.262 of 2020 (Shaikh Kalim @ Kallu Shaikh Salim Vs. the State of Maharashtra) is hereby allowed.

III. Pending the criminal appeal no.262 of 2020, the substantive part of the sentence passed by the learned Additional Sessions Judge,

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Aurangabad on 14.2.2020 in Sessions Case No.243 of 2018 stands suspended to the extent of the applicant Shaikh Kalim @ Kallu Shaikh Salim only till disposal of Criminal Appeal No.262 of 2020 and till then the applicant Shaikh Kalim @ Kallu Shaikh Salim be released on bail on furnishing P.B. of Rs.20,000/- (Rs.Twenty Thousand) with one solvent surety of the like amount. Bail before the lower court.

IV. Criminal application no.877 of 2020 in criminal appeal no.262 of 2020 accordingly disposed off.

(SANDIPKUMAR C. MORE, J.) (V.K. JADHAV, J.)

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