

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

**914 CRIMINAL APPLICATION NO.2785 OF 2021
IN APPEAL/344/2019**

SAYYAD GAUSS S/O SAYYAD NOOR

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. G.K. Naik Thigle, Advocate for applicant

Mr. S.D. Ghayal, APP for respondent

**Ms. Pournima Salve, Advocate h/f Mr. S.J. Salunke, Advocate
for respondent No.2 in Appeal/344/2019**

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

DATE : 04th OCTOBER, 2022

PER COURT :

1 Present application has been filed by original accused No.12 for suspension of sentence and releasing him on bail. He is sentenced thus –

1) Accused No.12 Sayyad Gaus Sayyad Noor is hereby convicted under Section 235(2) of the Code of Criminal Procedure for the offence punishable under Section 147 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for two (02) years and also pay the fine of Rs.5,000/- (Rupees Five Thousand only), in

default of payment of fine he shall undergo Rigorous Imprisonment for one (01) month.

2) Accused No.12 Sayyad Gaus Sayyad Noor is hereby further convicted under Section 235(2) of the Code of Criminal Procedure for the offence punishable under Section 148 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for three (03) years and also pay the fine of Rs.5,000/- (Rupees Five Thousand only), in default of payment of fine he shall undergo Rigorous Imprisonment for one (01) month.

3) Accused No.12 Sayyad Gaus Sayyad Noor is hereby convicted under Section 235(2) of the Code of Criminal Procedure for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for life till his death and also pay the fine of Rs.20,000/- (Rupees Twenty Thousand only), in default of payment of fine he shall undergo Rigorous Imprisonment for four (04) month.

4) All the sentences shall run concurrently.

2 Heard learned Advocate Mr. G.K. Naik-Thigle for the applicant and learned APP Mr. S.D. Ghayal for the respondent.

3 It will not be out of place to mention here before proceeding further that co-accused Nos.11 and 14 Nitin and Mahendra had also filed application for suspending the sentence imposed against them bearing Criminal Application No.1064 of 2020 in Criminal Appeal No.344 of 2019

and it came to be rejected by this Court on 13.07.2020.

4 The learned Advocate for the applicant submitted that the role played and evidence that has been adduced by the prosecution against the present applicant is different from the accused Nos.11 and 14 and, therefore, the rejection of their application will not have adverse effect on the present application. Learned Trial Court has held that the offence has proved against the present applicant on three counts; one is - discovery under Section 27 of the Indian Evidence Act of the sword, second is - alleged statements of the eye witnesses and third is - his identification. However, the observations in a lengthy Judgment would show that at many places the learned Judge has himself expressed doubt about the prosecution story and even the eye witnesses have not been believed. Another piece of evidence, that is, taken against the present applicant is the blood stains on his clothes and the non explanation of the same by the present applicant. In fact, unless the involvement of the applicant in the crime is established beyond reasonable doubt, no question arises regarding his explanation about the alleged blood stains on his clothes. The applicant is behind the bars since last 11 years and, therefore, he deserves to be released on bail by suspending the sentence, in view of the quality of evidence that has been adduced against him.

5 The learned APP as well as learned Advocate for the original informant have objected the application and supported the reasons given by the learned Trial Judge.

6 At the outset, it is to be noted that as per the prosecution story in all 17 accused were involved in the crime. Out of them accused Nos.1 and 2 were discharged by the Court and the trial proceeded against others; yet, accused Nos.10 and 16 were absconding. When it comes to the offence of formation of unlawful assembly as well as criminal conspiracy, even if any accused is absconding; yet, his presence as per the prosecution story will have to be counted. The original accused No.17 appears to have released under Section 169 of the Code of Criminal Procedure. One Balu @ Ravindra Dashrath Khakal is stated to have been murdered. It is the contention of the prosecution that he was assaulted by sword, stick and at the point of pistol. We are more concerned with the role attributed to the present applicant as well as the evidence that has been adduced as well as considered by the Trial Court. This Court while rejecting the application filed by accused Nos.11 and 14 has made observations that the record shows that there is evidence on the point of motive. The first incident that had taken place on 26.09.2010. At that time, there was an attempt to eliminate the deceased by some of the accused persons, however, at that time 'B' Summary was reported. The

second and ultimate incident took place on 11.10.2011. Deceased as well as witness Shaker were on one motorcycle as well as other witnesses were on the other motorcycle. When their motorcycles were intercepted near Bus Stand of Kerul by the accused persons, who had come in car, it appears from the evidence that some of the witnesses were knowing some of the accused and others were unknown to them. Accused persons were holding firearm as well as dangerous weapons like sword, knife etc. The evidence that has been led appears to be positively against accused Bhausahab, Mahendra, Krishna and Ashok. Now, as regards the present applicant is concerned, though the Trial Court has not believed the entire version of the eye witnesses; yet portion of the same has been accepted. The circumstantial evidence has been considered. No doubt, the Trial Court has expressed doubt about the Identification Parade and it appears that the eye witnesses have given the different place of the accused where he was standing at the time of Identification Parade. The question would be - As to whether we can give importance to the number where the accused was standing or to the basic fact that he is identifying the accused ? We also require to interpret Section 291-A of the Code of Criminal Procedure which deals with identification report of the Magistrate and by this provision which was duly inserted in 2006 was with an intention to make the report of the Identification Parade admissible in evidence without the examination of the Magistrate. Further,

we are also require to consider as to what was the time gap between the Identification Parade and the testimony of the eye witnesses. If there is too much gap, then memory fails.

7 It can be seen that this Court accepted the fact at the time of order dated 13.07.2020 that the Trial Court has not believed the eye witnesses, but material on record shows that all eye witnesses were in the company of the deceased, and they were consistent in saying that they were present at the time of incident. Therefore, it is also required to see whether the circumstantial evidence can be mingled with the direct evidence and whether such evidence was before the Court to consider it as beyond reasonable doubt. However, at this stage, it can be said that when prima facie evidence is there and an opinion as well as conclusion has been drawn upon the churning of the evidence by the Trial Court and taking into consideration the brutality of the murder, this cannot be considered as a fit case where a sentence would be suspended and the applicant can be released on bail. Application stands rejected.

(Rajesh S. Patil, J.)

(Smt. Vibha Kankanwadi, J.)