

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

BAIL APPLICATION NO.1487 OF 2021

Ganesh Balasaheb Sonwane

... **APPLICANT**

VERSUS

The State of Maharashtra

... **RESPONDENT**

.....

Mr. Satej S. Jadhav, Advocate for applicant

Mr. S.P. Sonpawale, A.P.P. for respondent – State, assisted by

Mrs. Rashmi S. Kulkarni, Advocate for complainant

.....

WITH

CRIMINAL APPLICATION NO.3082 OF 2021

Rameshwar s/o Macchindra Bhutkar

... **APPLICANT**

VERSUS

The State of Maharashtra

... **RESPONDENT**

.....

Mrs. Rashmi S. Kulkarni, Advocate for applicant

Mr. S.P. Sonpawale, A.P.P. for respondent No.1 – State

Mr. Satej S. Jadhav, Advocate for respondent No.2.

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CORAM : R. G. AVACHAT, J.

Date of reserving order : 27th September, 2022

Date of pronouncing order : 10th October, 2022

ORDER :

Criminal Application No.3082/2021 is allowed.

The original informant is permitted to assist learned A.P.P.

2. Heard. This is an application for bail under Section 439 of the Code of Criminal Procedure. The applicant has been arrested in connection with Crime No.48/2017, registered at Shani-Shingnapur Police Station, Taluka Newasa, District Ahmednagar for the offences punishable under Sections 302, 506, 143, 147, 148, 149, 120-B, 201 of the Indian Penal Code, Sections 3/25, 4/25 of the Arms Act and Sections 37(1)(3) and 135 of the Maharashtra Police Act.

3. The First Information Report (F.I.R.) has been lodged by a brother of deceased Ganesh Bhutkar on 21/12/2017. It is his case that, his brother (deceased), co-accused Avinash and the applicant Ganesh Sonwane had jointly purchased a land at Shani-Shingnapur Shivar. The deceased Ganesh was in jail. Co-accused Avinash, therefore, got the sale deed executed in his exclusive name. There was, therefore, a dispute between the two, the deceased and co-accused Avinash. It is further his case that, by 10.00 in the morning on 20/12/2017, the applicant talked with the deceased on cell phone. He asked the deceased that the dispute could be resolved on negotiations. He, therefore, invited the deceased to a parking space at Shani-Shingnapur. It was nothing but a plot to kill the deceased. As determined, the deceased went to the given place. The applicant and co-

accused arrived there in a four-wheeler. Others came on two motorbikes as well. All of them were armed with weapons like sword, fire arms, stick etc. The informant was told that his brother was being assaulted at a parking space. He, therefore, rushed there and saw the applicant and co-accused assaulted the deceased with sharp weapons. The applicant allegedly pierced a sword in chest of the deceased. All of them then fled.

4. The informant and persons who had witnessed the incident first took the deceased to Rural Hospital, at Shani-Shingnapur. He was then shifted to Ahmednagar. The deceased was declared brought-dead. The informant approached the concerned police station and lodged the F.I.R.

5. On investigation, the charge sheet has been filed. The trial is said to have commenced. The informant is being cross-examined.

6. Learned counsel for the applicant would submit that, the applicant has been in jail for little over four years. There were about 101 CCTV cameras installed at Shaneshwar temple and around. The investigating officer has collected CCTV footage. The applicant is not seen therein. The applicant was at Rahuri at the given time. The investigating

officer has purposely not collected the Call Data Record (CDR) of the cell phone of the applicant, while he collected CDRs of all the co-accused to indicate that they were at or around the scene of offence. Over four years have passed since the arrest of the applicant. Although the trial has commenced, 5 Senior Advocates representing different accused have been appearing in the case. Learned Advocate for the accused No.1 has concluded the cross-examination. It would necessarily take a long time for conclusion of the trial. The applicant is not responsible for the delay in progress of the trial.

7. Learned counsel for the applicant would further submit that, the defence has placed on record CCTV footage. The prosecution and the learned counsel appearing for the informant objected to read the same in evidence. The same suggests that the CCTV footage placed on record by the defence does not favour the prosecution. According to learned counsel, there is a delay in lodging of the F.I.R. It has been lodged after deliberation. The informant, in his statement under Section 164 of the Code of Criminal Procedure, claims to have had approached the concerned police station the same day of the incident. The station diary entry in that regard has been made. The applicant has not

been named therein. What was reported by the informant to the Police Station Officer that time is the First Information Report. The same has been suppressed. The station diary entry in that regard has been obtained by the applicant under Right to Information Act in the recent past. This is a change in the circumstance, coupled with a lapse of long time post rejection of the applicant's earlier bail application. According to the learned counsel, the applicant is entitled for bail due to the change in the circumstances and a relook at the prosecution material.

8. The learned A.P.P., on the other hand, objected to grant bail to the applicant. According to him, it is a serious offence. There are not less than six eye witnesses. All of them have attributed the applicant with specific overt act. What has been relied on by the applicant could only be considered in his defence evidence. There is no change in the circumstance, giving cause of action for the applicant to move the second bail application.

9. Learned counsel appearing for the informant would submit that, it is a case of brutal murder. The deceased suffered not less than 27 injuries. Eye witness account is natural one since all of them were of the very village and have

their own business place/s at or around the scene of offence. The CCTV footage collected by the investigating officer does not contain scene of offence. The offence took place in an open space i.e. a parking slot. The same is accessible from all sides. The learned counsel would further submit that, post rejection of earlier bail application of the applicant, there is no change in the circumstances giving cause of action for him to move the present bail application. The learned counsel relies on the Apex Court judgment in case of **Kalyan Chandra Sarkar & ors. Vs. Rajesh Ranjan & ors. (MANU/SC/0045/2005 – Criminal Appeal No.1129/2004 and Criminal Appeal No.120/2005 – arising out of SLP (Crl.) No.4954/2004)**, decided on 18/1/2005.

10. Learned counsel for the informant would further submit that, bail application of co-accused has been rejected in the recent past. The trial has commenced. While rejecting the earlier bail application, all the material relied on by the prosecution was considered by this Court. The informant is being cross-examined. Any observations regarding merits of the matter may influence the trial Court. The same would be prejudicial to the prosecution. The CCTV footage placed on record by the defence cannot be looked into at this stage. She would further submit that, the F.I.R. was lodged promptly.

The informant was a real brother of the deceased. It was but natural for him to first rush the deceased for medical treatment. While he approached the police station, he came to know his brother to have passed away. According to learned counsel, it is an offence punishable with death sentence or imprisonment for life. Section 149 of the Indian Penal Code has also been invoked. Four years incarceration as against the offence punishable with death or life imprisonment cannot be a ground to grant the applicant bail. The learned counsel, therefore, urged for rejection of the bail application.

11. Considered the submissions advanced. Perused the F.I.R. and the papers relied on. The applicant is in jail for little over four years. His last application for bail has been rejected by this Court way back in September 2019. It is true that, in case of Kalyan Chandra Sarkar (supra), the Apex Court has observed :-

“In earlier proceedings, findings on prima facie case against respondent and legality and evidentiary value of retracted confession given – Reconsideration and recording of new finding by High Court was without any fresh material or legal basis – approach of High Court irresponsible, contrary to records and law.”

In the very case, the Apex Court has observed :

“Precedent – Criminal case – Similarity of facts in one case – Cannot be used in another case.

While deciding the cases on facts, more so in criminal cases, the Court should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case.”

The facts in the case of Kalyan Chandra Sarkar (supra) indicate that, while the Apex Court has set aside the order granting bail to the respondent therein on his 8th bail application was set aside. A barely eleven days after that order, 9th bail application filed by him was allowed by the High Court.

12. This Court, while rejecting the applicant’s earlier bail application, had observed in paragraph No.4 of the order dated 9/9/2019 as under :

“4. On going through the allegations made in the complaint and on perusal of the charge sheet, it appears that there are more than six eye witnesses to the incident including the informant and each of them have attributed a specific role to the applicant. The applicant has not only participated in the commission of crime, but he has used sword and inflicted the injuries on the vital part of the deceased. So far as recording in the CCTV is concerned, same only speaks about the entry and exit of the deceased and some of the accused persons on the spot. However, the learned A.P.P. has rightly pointed out that actual commission of the crime was not recorded in the said CCTV. On perusal of the postmortem notes, I find

that there are 27 external injuries on the person of the deceased and out of those injuries, most of the injuries are incised wounds. The cause of death is due to multiple deep incised wounds and stab injuries to chest. It is a brutal murder in the broad day light witnessed by independent eye witnesses. I am not inclined to release the applicant on bail.”

13. It was a broad day-light murder. The deceased suffered 27 external injuries with sharp and pointed weapons. The F.I.R. has been lodged by his real brother. There is material to indicate that there was a dispute between the deceased and accused No.1 over a landed property. Many a time, it happens that, a bail application of an accused charged with a serious offence is considered within a very short span of time of commission of the offence. Court goes by the case of the prosecution. Many a time, the material relied on by the prosecution is not scanned threadbare. No detailed scrutiny of material relied on may be done at the stage of deciding a bail application moved in a very short span of time post commission of crime. But on lapse of time, if some new material is brought to the notice of the Court, the same may lead to have a relook at the entire prosecution material.

14. No doubt, in the case in hand, there are six eye witnesses, who claim to have had seen the applicant, along with co-accused, came in a Scorpio vehicle and assaulted the

deceased with sharp weapons. As against this, a CCTV footage obtained by the investigating officer has also been relied on. Admittedly, Shaneshwar Devasthan has installed about 101 CCTV cameras at and around the temple. In the CCTV footage collected by the investigating officer, although the actual commission of the crime has not been captured, it is seen therein that the culprits had come at the site in a four-wheeler and on two motorbikes. The applicant is not seen in or on any of those vehicles either coming to the scene of offence or leaving the place in/ on those vehicles. Whereas the eye witnesses account state that the applicant had come in the four-wheeler and went away therein. The CCTV footage contradicts the eye witness account so far as regards the applicant is concerned. It is informed that, the trial has commenced. Since there are number of accused persons and each one being represented by different Advocate, examination-in-chief and cross-examination of P.W.1 for one of the accused persons was under-way for little over one year. It is the case of the prosecution that, the present applicant had made phone call to the deceased in the morning of the day of incident and asked him to come to a particular place (scene of offence) for settling the dispute. The learned counsel for the applicant has submitted that, the investigating

officer has not collected CDRs of the applicant's cell phone or that of the deceased to reinforce the prosecution case. Admittedly, the investigating officer has collected CDRs of many of the co-accused. The learned counsel has also every reason to contend that the applicant was not at the scene of offence at the particular time. The prosecution relies on a script of conversation between deceased and accused No.1 and another co-accused. The transcript thereof indicates that the deceased was insisting the accused No.1 to call the applicant as he (applicant) was to come by 5.30 p.m. or 6.00 p.m. It was the conversation that took place just half an hour before the incident. This material appears to have not been relied on either by the applicant or the prosecution while the earlier application for bail was considered by this Court.

15. Post rejection of the applicant's earlier bail application, he has obtained copies of station diary entry, under Right to Information Act. The copies thereof have been placed on record to indicate the informant had in fact been to the concerned police station just after half an hour of the incident and reported something. There is another station diary entry indicating the A.P.I. of the concerned police station forwarded the message to the headquarters (Office of the Superintendent of Police), giving gist of the offence with

names of culprits. The name of the present applicant does not figure therein. It has also been brought to the notice of this Court that the defence also obtained CCTV footage from Shaneshwar Devasthan and placed on record of the trial Court. The production thereof has been allowed. Here the learned counsel for the complainant objects to read the same in evidence. The same suggests that, the same is not favourable to the prosecution at least so far as regards the applicant's case is concerned.

16. For all the above reasons, the Court is of the view that, the following changed circumstances post rejection of the applicant's earlier bail application lead this Court to grant the applicant bail. It needs to be observed that, the applicant is in jail for little over four years. He has no criminal antecedents. He has roots within the limits of the jurisdiction of the Court conducting the trial. If he is convicted, he is bound to be behind the bars.

- (i) The applicant is in jail for little over four years.
- (ii) Little over three years have passed post rejection of his earlier bail application.

- (iii) a telephonic conversation between the deceased and accused No.1 appears to have not been considered while earlier bail application was decided.
- (iv) Station diary entry suggesting the informant to have been to the police station within half an hour of the incident has been placed on record post rejection of the earlier application. The F.I.R. has been recorded by 5.00 in the morning.
- (v) The CCTV footage indicating co-accused arrived at the scene of offence in/ on vehicles and left the place in/ on the very vehicle suggests conspicuous absence of the present applicant along with them to come to the scene of offence and/ or leave the same. While the eye witnesses claim the applicant was one of the co-accused to come together and then leave together.

17. Hence the order :

ORDER

- (i) The Bail Application is allowed.
- (ii) The applicant be released on bail in connection with Crime No.48/2017, registered at Shani-Shingnapur Police Station, Taluka Newasa, District Ahmednagar for the offences punishable under Sections 302, 506, 143, 147, 148, 149, 120-B, 201 of the Indian Penal Code, Sections 3/25, 4/25 of the Arms Act and Sections 37(1)(3) and 135 of the

Maharashtra Police Act on his executing P.R. bond in the sum of Rs.15,000/- (Rupees fifteen thousand) with one surety in the like amount.

(iii) The applicant shall not tamper with the prosecution evidence.

(R. G. AVACHAT, J.)

The request of the learned counsel for the informant to observe that the order shall not entitle co-accused to claim parity, is stated to be rejected, since this Court has no authority to make such observations. It is only for the Court concerned before whom such claim would be raised to decide the same on its own merits. It is, however, made clear that, the observations made herein are prima facie in nature. The trial Court shall not be influenced thereby while deciding the case on merits.

(R. G. AVACHAT, J.)

fmp/-