

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

BAIL APPLICATION NO. 821 OF 2020

Atul Namdev Ghule ...Applicant

Versus

State of Maharashtra ...Respondent

Mr. Nitin Kamble, for the Applicant.

Mr. P. H. Gaikwad, APP for the State/Respondent.

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CORAM: N. J. JAMADAR, J.

RESERVED ON: 1st JULY, 2022

PRONOUNCED ON: 6th JULY, 2022

ORDER:-

1. The applicant is arraigned along with co-accused in CR No.267 of 2016, registered with Khadak Police Station, Pune, for the offences punishable under Sections 120B, 302, 307, 143, 147, 148 and 149 of the Indian Penal Code, 1860 ("the Penal Code") and Section 37(1) read with Section 135 of the Maharashtra Police Act, 1951 has preferred this application to enlarge him on bail.

2. The prosecution case runs as under:

Arjun Deokar (the deceased) was the cousin of Sangram Khamkar (the first informant). The deceased was an accused in the prosecution for alleged murder of Rakesh Ghule. He

was on bail. On 22nd September, 2016, the deceased came to the house of the first informant at Shukrawar Peth, Pune. In the evening, at about 8.30 pm. the deceased and the first informant proceeded to Shahu Square to have tea. Sunil Khopde, their friend joined them. On the way, they noticed their another friend, Amol Ombase standing in front of Popular Height building. While they were speaking with Amol Ombase, seven to eight persons suddenly rushed towards them from Shahu Square. They were exhorting each other to eliminate the deceased. The first informant had known few of them namely; Sonya Dhawade, Amol Giri, Ritesh Pawar and Dinesh Dhawade.

3. According to the first informant, Sangram Khamkar, Sonya Dhawade and Ritesh Pawar were armed with pistol. Sonya Dhawade and Ritesh Pawar started firing at the deceased Arjun. The first informant, Sunil Khopade and Amol Ombase took shelter behind the vehicles parked thereat. The above named assailants, according to the first informant, were also accompanied by Shashikant Ghule, applicant Atul Ghule, Chandrakant Navale and Pappi Shirke. They threatened that nobody should intervene lest he would also be killed. Co-accused Ritesh Pawar and Sonya Dhawade

shot at the deceased. The deceased was critically injured and fell down unconscious. After the assailants fled away, the first informant and his associates shifted the deceased first to KEM Hospital. Later on, for better treatment the deceased was shifted to Ruby Hall Hospital. The first informant approached police and lodged report.

4. At this stage itself, it would be necessary to note that the deceased was discharged from hospital on 23rd October, 2016. The deceased died on 5th December, 2016. Consequently, the offence punishable under Section 302 of the Penal Code came to be added.

5. The applicant was arrested on 23rd September, 2016. Co-accused were also arrested. After completion of investigation and finding the complicity of the accused, charge-sheet, followed by supplementary charge-sheet, has been lodged.

6. The applicant has preferred this application for bail on the ground that the applicant was not one of the assailants, as alleged by the prosecution. There is glaring inconsistency in the first information report and the subsequent statement of the witnesses as regards use of the pistol by the applicant. Co-accused Chandrakant Navale, Manoj Shirke, Dinesh

Dhawade and Divakar Singh have been released on bail. Thus on the ground of parity as well, the applicant deserves to be enlarged on bail.

7. I have heard Mr. Kamble, the learned Counsel for the applicant and Mr. Gaikwad, the learned APP for the State, at some length. With the assistance of the learned Counsels, I have perused the report under Section 173 of the Code of Criminal Procedure, 1973 ("the Code") and the documents annexed with it.

8. Mr. Kamble, the learned Counsel for the applicant, strenuously submitted that in the First Information Report (FIR) lodged by Sangram it was not at all the case of the prosecution that the applicant had used the pistol and fired at the deceased. On the contrary, two of the co-accused namely Sonya Dhawade and Ritesh Pawar were attributed with the said role of firing at the deceased. Though the applicant was stated to be one of the members of the unlawful assembly yet no overt act, apart from exhorting the rest of the co-accused and threatening the persons who could intervene to save the deceased, has been attributed to the applicant. This Court taking note of distinct role attributed to the co-accused was persuaded to release co-accused

Chandrakant Navale (BA/682/2018) and Dinesh Dhawade (BA/811/2018), by an order dated 31st July, 2018, and Divakar Singh (BA/3014/2018), by an order dated 9th April, 2019. Mr. Kamble further urged that the applicant has been in custody for more than five years and eight months. Having regard to this long period of incarceration also, the applicant deserves to be released on bail.

9. Mr. Gaikwad, the learned APP, joined the issue by canvassing a submission that there are statements of eye witnesses, namely, Sunil Khopade and Amol Ombase, who have attributed the role of firing at the deceased to the applicant as well. Therefore, having regard to the nature of the occurrence and the circumstances of the case, wherein the applicant can be said to have a strong motive for eliminating the deceased as the latter was accused of the murder of the brother of the applicant, the applicant does not deserve to be released on bail. Moreover, the weapon of offence came to be seized pursuant to discovery made by the applicant under Section 27 of the Indian Evidence Act. It was further submitted that even the deceased had named the applicant as one of the assailants, who was armed with a

pistol, and the bullet fired by the applicant stuck him at the waist.

10. I have carefully perused the material on record and gave anxious consideration to the submissions canvassed across the bar.

11. To start with, it is pertinent to note that in the FIR, Sangram had named co-accused Sonya Dhawade and Ritesh Pawar as the assailants, who were armed with pistol and fired at the deceased Arjun. The applicant was not named as the person who was armed with a pistol. The role attributed to the applicant along with co-accused Shashikant Ghule, Chandrakant Navale and Pappi Shirke was of giving exhortations to the co-accused and threatening the persons with dire consequences.

12. In the aforesaid backdrop, the learned APP invited the attention of the Court to the statements of Sunil Khopade and Amol Ombase, the two friends, who accompanied the deceased and the first informant. Sunil Khopade stated that there were three person, who were armed with the pistol. However, out of those three persons, two assailants armed with pistol fired at the deceased. Amol Ombase supports Sunil Khopade by asserting that three of the assailants were

armed with pistol and two of them fired at the deceased. The statements of Sunil Khopade and Amol Ombase were recorded on the very day, the informant lodged the FIR.

13. The supplementary statements of Sunil Khopade and Amol Ombase were recorded on 22nd November, 2016. In the supplementary statement, Sunil Khopade stated that Atul Ghule, the applicant was armed with a pistol and the bullet fired by the applicant stuck in the waist of the deceased. Sunil Khopade also reiterated the said version. These statements were purportedly recorded post Test Identification Parade held on 28th October, 2016. In the said TI Parade, the witnesses Sunil Khopade and Amol Ombase, the prosecution asserts, identified the applicant as one of the persons, who had fired at the deceased.

14. The aforesaid material sought to be pressed into service against the applicant is required to be appreciated in the light of the fact that the first informant claimed to have known the applicant from before. He was named by the first informant as one of the persons who was the member of the unlawful assembly in the prosecution of the common object of which the deceased was shot at. Sunil Khopade and Amol Ombase, however, had not named the applicant, in their initial

statement. It is further imperative to note that though Sunil Khopade and Amol Ombase had stated that three assailants were armed with pistol, yet they categorically stated that only two of the assailants armed with pistol shot at the deceased. The claim that the third person had also shot at the deceased, *prima facie*, appears to have been made post TI Parade only.

15. The learned APP banked upon the discovery made by the applicant leading to the recovery of the weapon of assault. It is pertinent to note that the said discovery was allegedly made by the applicant on the very day he was arrested. Yet, the applicant's name as one of the assailants armed with pistol came in the frame only on 28th October, 2016.

16. The learned APP led emphasis on the statement of the deceased recorded on 2nd December, 2016, wherein the applicant was named as one of the assailants, who was armed with a pistol and fired at him. The deceased seems to have stated that at the time of occurrence four persons were armed with pistols namely; the applicant, Shashikant Ghule, Sonya Dhawade and Ritesh Pawar. The deceased stated that the shot fired by the applicant stuck in his waist.

17. Since the aforesaid statement of the deceased, which seems to have been recorded by the Investigating Officer on 2nd December, 2016, throws light on the circumstances of the transaction leading to the death of the deceased, on principle, it may be admissible in evidence. However, the prosecution is required to surmount many hurdles in pressing the said statement as a dying declaration. First and foremost, the deceased was discharged from the hospital on 26th October, 2016. The deceased was again brought at Ruby Hospital on 5th December, 2016 with history of sudden onset of breathlessness followed by unconsciousness. The deceased was declared dead.

18. There is no explanation forthcoming as to why the statement of the deceased was not recorded in the intervening period. This aspect was adverted to by this Court while releasing Divakar Singh on bail. It is also not the case that in the intervening period the investigation was not underway. Interestingly, the TI Parade was held on 28th October, 2016, a couple of days of the deceased having been discharged from hospital. Supplementary statements of the witnesses were recorded on 22nd November, 2016.

19. In the aforesaid view of the matter, at this juncture, *prima facie*, the question as to whether the applicant was armed with a pistol and fired at the deceased, at the time of occurrence, is in the realm of controversy. The fact that all three witnesses namely Sangram Khamkar – the first informant, Sunil Khopade and Amol Ombase are in unison on the point that only two of the assailants armed with pistol, fired at the deceased, renders the prosecution version that the third assailant, armed with pistol, fired at the deceased, in the corridor of uncertainty. Since the applicant was not named as one of the assailants, who fired at the deceased, in the FIR, *prima facie*, the applicant deserves exercise of discretion.

20. The applicant has been in custody for more than five years and eight months. If it is found that the case of the prosecution that the applicant was one of the persons, who fired at the deceased, is not *prima facie* borne out, then the role attributed to the applicant becomes identical to that of the co-accused who have been released on bail. The element of parity then comes into play.

21. For the foregoing reasons, I am persuaded to exercise the discretion in favour of the applicant.

22. Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) The applicant - Atul Namdev Ghule be released on bail in CR No.267 of 2016, registered with Khadak Police Station, Pune, on furnishing a P. R. Bond in the sum of Rs.30,000/-, with one or two sureties in the like amount, to the satisfaction of the learned Sessions Judge, Pune.

(iii) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to any of the prosecution witnesses.

(iv) The applicant shall regularly attend the proceedings before the jurisdictional Court.

(v) The applicant shall mark his presence at Khadak Police Station on the first day of October – 2022, January – 2023, April – 2023 and July – 2023, in between 10.00 am. to 11.00 am., till the completion of trial.

(vi) The applicant shall furnish his permanent residential address and contact details to the Police

Inspector, Khadak Police Station and intimate the change, if any.

(vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined to the consideration of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the co-accused.

[N. J. JAMADAR, J.]