

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.43 OF 2023

1. Angad s/o Shivaji Khillare
Age: 27 years, Occu.: Labour,
R/o. At Post Singnapur,
Tq. and Dist. Parbhani
2. Mohan s/o Baburao Khillare
Age: 21 years, Occu.: Agri.,
R/o. At Post Singnapur,
Tq. & Dist. Parbhani.

.. Appellants

Versus

1. The State of Maharashtra
Through : In-charge Police Inspector,
Daithan Police Station,
Tq. & Dist. Parbhani.
2. Balaji s/o Motiram Kamble
Age: 31 years, Occu.: Labour,
R/o. At Post Singnapur,
Tq. and Dist. Parbhani.

.. Respondents

...
WITH

CRIMINAL APPEAL NO.51 OF 2023

Mahesh Subhash Kadam
(In FIR mentioned as Yuvraj Kadam)
Age: 21 years, Occu.: Agriculture,
R/o. Singnapur, Tq. & Dist. Parbhani

.. Appellant

Versus

1. The State of Maharashtra
Through Police Station Daithana,
Tq. & Dist. Parbhani.
2. Balaji Motiram Kamble
Age: 21 years, Occu.: Labour,
R/o. Singnapur,
Tq. & Dist. Parbhani

.. Respondents

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Mr. V. D. Sapkal, Senior Counsel i/b Mr. S. R. Sapkal, Advocate for appellants in Criminal Appeal No.43 of 2023.

Mr. S. J. Salunke, Advocate for appellant in Criminal Appeal No.51 of 2023.

Mr. M. R. Jamdhade and Mr. K. R. Jamdhade, Advocate for respondent No.2 in both the cases.

Mrs. V. S. Choudhari, APP for respondent No.1-State in both the cases.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : February 20, 2023.

JUDGMENT :- (Per Smt. Vibha Kankanwadi, J.)

. **Admit.**

2. Both the appeals have been filed by accused Nos.3, 4 and 5 as per charge-sheet under Sections 14-A(2) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "Atrocities Act") to challenge the rejection of their applications under Section 439 of the Code of Criminal Procedure, which they had filed at Exhibit-18 and Exhibit-16 respectively before the learned Special Judge/Additional Sessions Judge-2, Parbhani. Both the applications came to be rejected on 06.01.2023.

3. These appellants have been arrayed as accused in Crime No.189 of 2022, which came to be registered on the basis of the FIR lodged by present respondent No.2 for the offences punishable under

Sections 302, 307, 143, 147, 148, 149, 114, 341 of Indian Penal Code and under Section 3(1)(r), 3(1)(s), 3(2)(v) of the Atrocities Act with Daithana Police Station, Dist. Parbhani.

4. Heard learned Senior Counsel Mr. V. D. Sapkal instructed by learned Advocate Mr. S. R. Sapkal for the appellants in Criminal Appeal No.43 of 2023, learned Advocate Mr. S. J. Salunke for the appellant in Criminal Appeal No.51 of 2023, learned APP Mrs. V. S. Choudhary for respondent No.1 - State in both the cases and learned Advocate Mr. M. R. Jamdhade and K. R. Jamdhade for respondent No.2 in both the cases.

5. It has been vehemently submitted on behalf of the appellants that the learned Trial Judge erred in rejecting the bail applications. Though in the inquest panchanama only four injuries were noted, but 24 injuries were shown in the postmortem report. Even at the time of postmortem report, final opinion was not given and it was reserved till the receipt of histopathology report. In the Medico Legal Certificate it was mentioned that the deceased was suffering from fever and lung infection with bleeding. He was shifted to another hospital and, therefore, he was discharged from the earlier hospital. Deceased was suffering from viral pneumonia and turbid. The Medico Legal Certificate issued by Parbhani I.C.U. Hospital shows

that all the injuries mentioned were simple in nature, except the injury to metacarpal bone, which could not have been the reason for death. Therefore, when the fact is in doubt that death of the deceased is homicidal in nature, then the learned Trial Judge ought to have granted bail. The investigation is complete and charge-sheet is also filed. The learned Senior Counsel for the appellants in Criminal Appeal No.43 of 2023 as well as learned Advocate for the appellant in Criminal Appeal No.51 of 2023 have taken us through the various statements of the alleged eye witnesses, wherein it has been stated that the present appellants had assaulted deceased with iron pipe, but they have not stated to which part of the body the blows given by these persons, were received. In any way, the blows with iron pipe have caused simple injury only. As the learned Special Judge has erred in rejecting the applications, the appeal deserves to be allowed.

6. Per contra, the learned APP as well as the learned Advocate for respondent No.2 have strongly opposed the appeal and supported the reasons given by the learned Trial Judge. In fact, though the injuries those have been stated in the Medico Legal Certificate are simple in nature, but the cumulative effect of them has resulted in death. The deceased had given oral dying declaration to the informant - brother disclosing that these accused persons had participated in the assault. The facts of the case further show that there was previous enmity

and, therefore, if the appellants are released, then it will cause danger to the life of the witnesses.

7. At the outset, we would like to say that though the offences under the Atrocities Act have been registered, there was no question of bar under Section 18 or 18-A of the Atrocities Act, as the bail application, that was filed by the appellants, was under Section 439 of the Code of Criminal Procedure i.e. after their arrest. The bar under Section 18 or 18-A is restricted to Section 438 of the Code of Criminal Procedure only. The learned Special Judge, therefore, ought to have considered the case on the equal footing wherein the offence under Section 302 of Indian Penal Code is involved.

8. The FIR lodged by present respondent No.2 i.e. the brother of deceased would disclose that his brother deceased Govind and one Rahul Kamble were proceeding on motorcycle towards their house around 11.15 a.m. on 13.08.2022. They were intercepted by accused Akshay Khillare through his motorcycle and then he started beating Govind from backside. He fell down and then accused Angad, Akshay, Mohan and Yuvraj started assaulting him by iron pipe. Accused Pandurang Khillare and Rambhau Kadam instigating them and were abusing the deceased in the name of caste. This fact was told by Govind to informant Balaji when he came to know about the

assault and went to the home, where deceased was brought in injured condition by uncle Karbhari and friend Rahul. It is to be noted that informant Balaji in the FIR paints a picture that he came to know the names of the assailants on 13.08.2022 itself, but he has lodged the FIR on 17.08.2022. He has stated that he was under impression that deceased would give statement to the police after he regains consciousness, but till 17.08.2022 he did not regained the consciousness and, therefore, he had lodged the report. No doubt, whether this explanation for delay would be reasonable or not would be decided by the Trial Court, but still the fact remains is that when the deceased was admitted to hospital, at the time of admission, it would have been treated as Medico Legal Certificate. The police might be visiting the ward where he would have been admitted, still it appears that no efforts were taken to lodge the report. So apparent delay in lodging the FIR is one of the ground.

9. According to the FIR, Rahul Kamble was the person, who was accompanying deceased. He has also not lodged any report immediately, though, he, in his statement under Section 161 of the Code of Criminal Procedure, states about the assault on the deceased with iron pipe. He has not named the other accused except Angad Khillare. He does not say about the role of the other accused and further the charge-sheet would show that he had failed to identify

two of the accused persons. Important point to be noted is that witness Rahul and the present appellants are from the same village, still he has failed to identify two persons. In his supplementary statement, which was taken on the next day of his main statement under Section 161 of the Code of Criminal Procedure, he states that Govind was made to sit in the middle seat in the Bolero car and he was occupying the rear seat and at that time Govind was disclosing something about, who had assaulted him, yet since he was sitting in the rear seat and the window of the rear seat was open, due to the flow of wind, he was unable to hear what Govind was disclosing. Thus, it is to be noted that though this person from the same village has been posed as eye witness, yet fails to identify. Thereafter, it appears from the charge-sheet that the prosecution is relying on the oral dying declaration, which is alleged to have been given to his uncle and aunt, who were accompanying deceased to hospital. Even if that statement is taken as it is, it does not say on which part of the body the blows were received. Now, it is stated that there is discovery of Hero Honda Motorcycle as well as one iron pipe from appellant - Mohan under Section 27 of the Indian Evidence Act and similar is the discovery from appellant - Mahesh. Another aspect is that the inquest panchanama gives only four injuries, whereas the postmortem report gives about 24 injuries. It appears that he was taken to Global

Superspeciality Hospital first. The history is stated that of fever, chills and regor and followed by assault by rod by unknown person. This Medico Legal Certificate though issued on 18.08.2022 gives the account of the hospital from 14.08.2023 at 10.43 p.m. It is stated in the said certificate that the patient was unconscious since then and kept on ventilatory support. Therefore, question would be whether injured Govind was ever in conscious state as alleged by the witnesses and was in a fit state of mind to give the said dying declaration. In spite of all these facts, the said certificate states that the patient had taken discharge against medical advise on 18.08.2022 at 3.40 p.m.. At that time also the patient was unconscious and on ventilatory support. The postmortem report gives probable cause of death as "opinion reserved, viscera preserved for chemical analysis, organs kept for histopathological examination". The Medico Legal Certificate of Parbhani I.C.U. and Trauma Care Centre dated 13.08.2022 states that Govind was admitted with history of assault with head injury with fracture bone of fourth metacarpal right. There is also report from the medical officer to whom three iron rods were forwarded stating that the injuries on the person of the deceased are possible by such iron rod. It appears that the final report has not yet been issued in respect of cause of death. With this kind of evidence the appellants need not be asked to remain in jail.

All these aspects ought to have been considered by the learned Trial Judge, but there is absolutely no discussion and a very cryptic order has been passed, which is unsustainable in the eye of law. Therefore, it deserves to be set aside. The appeals are, therefore, required to be allowed, however, at the same time, the interest of the prosecution witnesses is also required to be protected. The conditions are therefore required to be imposed. Hence, the following order :-

ORDER

- i) Criminal Appeal Nos.43 of 2023 and 51 of 2023 stand allowed.
- ii) The order passed below application Exhibit-18 in Special Case No.196 of 2022 dated 06.01.2023 and order passed below application Exhibit-16 in Special Case No.196 of 2022 dated 06.01.2023 by learned Special Judge, under the Atrocities Act/ Additional Sessions Judge-2, Parbhani stand set aside. Both the said applications stand allowed.
- iii) The Appellants in Criminal Appeal No.43 of 2023 i.e. **(1) Angad s/o Shivaji Khillare** and **(2) Mohan s/o Baburao Khillare** and the Appellant in Criminal Appeal No.51 of 2023 i.e. **Mahesh Subhash Kadam (in FIR mentioned as Yuvraj Kadam)**, who have been arrested in connection with Crime No.189 of 2022 registered with Daithana Police Station, Dist. Parbhani for the offences punishable under Sections 302, 307, 143, 147, 148, 149, 114, 341 of Indian Penal Code and under

Sections 3(1)(r), 3(1)(s) and 3(2)(v) of the Atrocities Act, be released on P. R. Bond of Rs.30,000/- each with two solvent sureties of Rs.15,000/- each.

iv) All the appellants in both the appeals shall not reside at Singnapur, Tq. and Dist. Parbhani till the conclusion of trial. They should reside elsewhere, and before submission of bail papers, all the appellants should give complete address of their proposed residence with their mobile numbers to the Trial Court as well as to the Investigating Officer.

v) They shall not tamper with the evidence of the prosecution in any manner.

vi) They shall not indulge in any criminal activity.

vii) Bail before the Trial Court.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm