

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.217 OF 2023

Kachru s/o Gopala Kharat
Age: 45 years, Occu.: Agri.,
R/o. Bankinhola, Tq. Sillod,
Dist. Aurangabad.

.. Appellant

Versus

1. The State of Maharashtra
2. Mandabai Pundalik Kharat

.. Respondents

...

WITH
CRIMINAL APPEAL NO.212 OF 2023

Vitthal s/o Eknath Farkade
Age: 19 years, Occu.: Labour,
R/o. Bankinhola, Post. Wadod Bazar,
Tq. Sillod, Dist. Aurangabad

.. Appellant

Versus

1. The State of Maharashtra
Through the Police Inspector,
Wadod Bazar Police Station,
Tq. Sillod, Dist. Aurangabad.
2. Mandabai w/o Pundalik Kharat
Age: 65 years, Occu.: Agri.,
R/o. Bankinhola, Post. Wadod Bazar,
Tq. Sillod, Dist. Aurangabad.

.. Respondents

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WITH
CRIMINAL APPEAL NO.241 OF 2023

Bhausahab s/o Vitthal Farkade
Age: 36 years, Occu.: Agri.,
R/o. Village Bankinhola,
Tq. Sillod, Dist. Aurangabad

.. Appellant

Versus

1. The State of Maharashtra
Through Wadodbazar Police Station,
Tq. Sillod, Dist. Aurangabad.
2. Mandabai w/o Dattaji Ambhore
Age: 65 years, Occu.: Agri.,
R/o. Village Bankinhola,
Tq. Sillod, Dist. Aurangabad.

.. Respondents

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Mr. Prashant Giri, Advocate h/f Mr. N. S. Ghanekar, Advocate for appellant in Criminal Appeal No.217 of 2023.
Mr. D. M. Shinde, Advocate h/f Mr. L. H. Kawale, Advocate for appellant in Criminal Appeal No.241 of 2023.
Mr. V. S. Wakale, Advocate for appellant in Criminal Appeal No.212 of 2023.
Mrs. V. S. Choudhari, APP for respondent No.2 in all the matters.
Mr. S. K. Hingole, Advocate for respondent No.2 in all the matters.

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**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 24th April, 2023

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

. All these appeals have been filed by the appellants under Section 14-A(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "Atrocities Act") to challenge the order of rejection of their bail under Section 439 of the Code of Criminal Procedure by learned Special Judge, under the Atrocities Act, Aurangabad on 01.03.2023 below Exhibit-3, 4 and 5. All the appellants have been arrayed as accused in

Crime No.283 of 2022 i.e. Special Case No.49 of 2023. The offence has been registered with Wadod Bazar Police Station, Tq. Sillod, Dist. Aurangabad for the offence punishable under Sections 307, 326 read with Section 34 of Indian Penal Code, under Section 3(2)(v) of the Atrocities Act and under Section 3 of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013, on the basis of the FIR lodged by present respondent No.2.

2. Heard learned Advocate Mr. Prashant Giri holding for learned Advocate Mr. N. S. Ghanekar for the appellant in Criminal Appeal No.217 of 2023, Mr. D. M. Shinde holding for learned Advocate Mr. L. H. Kawale for the appellant in Criminal Appeal No.241 of 2023, learned Advocate Mr. V. S. Wakale for the appellant in Criminal Appeal No.212 of 2023, learned APP Mrs. V. S. Choudhari for respondent No.1 – State in all the matters and learned Advocate Mr. S. K. Hingole for respondent No.2 in all the matters. Perused the copy of the charge-sheet as well as the affidavit-in-reply filed by respondent No.2 along with the annexures.

3. Learned Advocates appearing for the appellants have vehemently submitted that the offence under the Atrocities Act cannot be said to have been made out against the applicant Kachru

Kharat, as he is also the member of Scheduled Caste. Perusal of the FIR lodged by respondent No.2 would show that injured Bhagwan had gone to purchase edible oil around 7.00 p.m. on 27.11.2022 and had not returned. One Prabhu Farkade had noticed that Bhagwan was lying in a Nala within the limits of the village Bankinhola, Tq. Sillod around 6.30 p.m. on 28.11.2022. After the information was received by respondent No.2, she along with her grandson and others went to the spot. Bhagwan was taken to private hospital. The Doctor examined him. There were burn marks on his right leg and stomach. The said Doctor asked the informant to take injured to Sillod Government Hospital, but it appears that on the next day they had taken him in Ambulance to Sillod. After examining him, the Doctor at the said hospital asked Bhagwan to be taken to Ghati Hospital, Aurangabad. Accordingly, Bhagwan was brought to Ghati Hospital, treated there and discharged in the late night, but it was advised that he should come for the follow up on Monday. Informant took him to house. It appears that thereafter, Bhagwan was not taken to Ghati Hospital on Monday as suggested by the doctors. It is then stated by the informant that after Bhagwan was brought to house, she had asked about the incident to him and then he narrated the incident. That means, the FIR is based on the information given by Bhagwan. At no point of time, Bhagwan was taken to police station. What

history was given with those hospitals where he was taken has not been made part of the charge-sheet. Now, the investigation is complete and charge-sheet is filed. The prosecution has contended that the appellants had taken Bhagwan to some unknown destination forcibly, made him to consume liquor and then by asking him to remove his clothes, he was asked to dig the pit for excavation of hidden treasure. Thereafter, some inflammatory substance was thrown on him and he was assaulted. Thereafter, when people from village came there for filling up water, he was released there and accused fled away, but thereafter Bhagwan was lifted from there and thrown out in the Nala. These contents of the FIR were not sufficient to give the details and it appears that even after the said disclosure, FIR was not lodged immediately. It is stated that written complaint was filed with Police Station on 02.12.2022. In the inquiry, police officer from the police station had gone to the house of informant and statement of Bhagwan was recorded, but then in the FIR it is stated that due to fear of police, Bhagwan did not say anything to them. This appears to be the lame excuse that has been put by respondent No.2 for the delay in lodging the FIR. When the said statement was recorded by police officer and Bhagwan had not told anything against the accused persons, there would not have been any occasion for the informant or the injured to lodge a report. It is then

stated in the FIR that as the health of Bhagwan got deteriorated, on 05.12.2022 he was taken in Ambulance with the help of Sarpanch as well as police to Ghati Hospital, Aurangabad. His right leg was amputated from thigh on 06.12.2022 and then the FIR has been lodged on 07.12.2022. The FIR is belated, afterthought and with *mala fide* intention. Further, the statement of Bhagwan, in this case, has been recorded on 19.01.2023. The delay has not been explained. Even if we consider the said statement as it is, he is not explaining the entire incident. He then states that one dumb small boy who is called by his nick name "Muka" (Dumb Person) had seen the incident. The statement of said dumb witness has been recorded under Section 161 of the Code of Criminal Procedure. His name is Macchindra Dnyaneshwar Pawar. His statement has been recorded with the help of his brother-in-law and he had given the said statement by gestures. Even if for the sake of arguments it is accepted that the scene was seen by Macchindra, he has not disclosed it to anybody till 28.12.2022. There is absolutely no connection between the injuries which would have been noted when Bhagwan was taken to private hospital then to Sillod Government Hospital or Ghati Hospital for the first admission and his amputation of leg. No case is made out for attracting Section 307 of Indian Penal Code. Now, the investigation is over and charge-sheet is filed and, therefore, the

further physical custody of the appellants is not required. They are ready to abide by the terms of the bail. The learned Trial Judge has failed to consider all these aspects and rejected the applications by passing cryptic order.

4. Per contra, the learned APP as well as the learned Advocate Mr. S. K. Hingole appearing for respondent No.2 in all the matters strongly opposed the applications. It is submitted by them that witnesses as well as injured are residing in the same village. The present situation of Bhagwan is critical, his right leg has been amputated. The photographs of the injury have been produced which would show the seriousness regarding the injuries. If the appellants are released on bail, then there is danger to the life of not only the injured as well as the eye witness as well as the mother of injured i.e. respondent No.2. It was further submitted on behalf of respondent No.2 that accused Nos.2 and 3 were having knowledge that Bhagwan is member of Scheduled Caste, yet they wanted to get the hidden treasure found; they behaved in cruel manner with Bhagwan only because he is member of Scheduled Caste. Literally witness Bhagwan is on his death bed and it is because of the injuries those were caused by some inflammable articles as well as burning wood and, therefore, the reasons given by the learned Trial Judge were correct.

5. At the outset, it is to be noted that all the accused came to be arrested on 26.12.2022. They had filed bail application under Section 439 of the Code of Criminal Procedure and, therefore, there was no question of bar under Section 18 or 18-A of the Atrocities Act. The said bar is applicable only when bail is sought under Section 438 of the Code of Criminal Procedure. Criteria to consider the applications under Section 439 of the Code of Criminal Procedure and 438 of the Code of Criminal Procedure are slightly different, though there are certain common points. The second aspect that is required to be considered here is that the charge-sheet was filed on 02.02.2023 and the application for bail under Section 439 of the Code of Criminal Procedure was filed subsequent to that. That means, the entire material was before the learned Trial Judge before deciding the application and, therefore, perusal of the charge-sheet was necessary.

6. The contents of the FIR are already reflected in the above paragraphs and, therefore, those are are not repeated. The respondent No.2 informant is 65 years old lady. She is the mother of injured Bhagwan. What could be gathered from the contents of the FIR was that though Bhagwan was found in unconscious condition to Prabhu Farkade around 6.30 p.m. on 28.11.2022, it is not stated by the informant as to when Bhagwan regained the consciousness. It would be the natural conduct of a person that if his or her near and

dear ones receive injuries or found in unconscious state, then the first question that would be asked would be as to how the things had happened, but in this case, the informant wants us to believe that though Bhagwan was taken to three hospitals, till then the mother had not asked son as to how he received injuries. The entire charge-sheet does not contain the documents to show as to what was the history that was given either by Bhagwan or anybody else thereby disclosing the names of the present appellants. What history was given at all these three hospitals was of importance, because statement of injured Bhagwan could have been taken by the police after it would have been stated that it was attempt to commit murder of Bhagwan. From the police papers, we could get the final injury certificate dated 19.04.2023 issued by the Government Medical College and Hospital, Aurangabad in respect of examining Bhagwan on 01.12.2022 at 2.30 p.m. The history that has been noted on the said certificate is "Exact history not known, patient was changing statements". At that time one burn injury to the right leg and abdomen, whose nature was simple, was noted. Second was the blunt trauma on the back and it could have been caused by hard and blunt object and it was also simple in nature. Therefore, there is evidence to say that Bhagwan had received simple injuries only on 01.12.2022 when he was examined at Ghati Hospital. The impression

from the FIR is that Bhagwan was taken to Ghati Hospital on 29.11.2022 and was discharged on the same day, but the said certificate appears to be in respect of examination of Bhagwan on 01.12.2022. This creates anomaly. At this stage itself we would like to consider statement of Bhagwan under Section 161 of the Code of Criminal Procedure and it says that incident had taken place on 29.11.2022, which is not even apparently corroborative to the prosecution story or the FIR.

7. Statement of alleged eye witness is also taken. We will not go into the technical aspect as to who could have been the interpreter, however, it is to be noted that he says that the accused persons have assaulted Bhagwan near temple of goddess on Babhulgaon road. He says that Bhagwan was assaulted by burning stick. He does not say any inflammable article was thrown towards Bhagwan.

8. Much has been stated about the amputation of the right leg from thigh and the prosecution intends to say that it is the outcome of the injuries caused in between 27.11.2022 to 28.11.2022. But as aforesaid the final certificate says that those injuries were simple. There is also one prescription of Dr. Abhijit Chormale from Gajanan Hospital dated 29.11.2022, which shows that there was injury to right leg and there was swelling and pain. It is rather stated that Bhagwan

was conscious, irritable with pain at that time. In view of the communication from the investigating officer, the medical officer has stated that the reason for amputation was gangrene and there was cellulitis. The amputation is done on 06.12.2022. The other documents, especially the medical history are not on record and, therefore, at this *prima facie* stage, we do not find that there is any connection between two incidents and injuries or the amputation was the cause of the injury caused on 27.11.2022 or 28.11.2022. With this kind of evidence, the appellants need not be kept in jail, as it will take long time to stand their trial. Merely because the witnesses are from the same village, the application ought not to have been rejected by the learned Trial Judge. The reasons for rejection of the application are wrong taking into consideration the evidence that was before the learned Trial Judge. The appeals therefore deserve to be allowed. Hence, the following order :-

ORDER

- i) All the appeals stand allowed.
- ii) The order passed by learned Special Judge under the Atrocities Act, Aurangabad below Exhibit-3, 4 and 5 in Special Case No.49 of 2023 dated 01.03.2023 stands set aside. The said application stands allowed.

iii) Appellant in Criminal Appeal No.217 of 2023 – **Kachru Gopala Kharat**, Appellant in Criminal Appeal No.212 of 2023 – **Vitthal Eknath Farkade** and Appellant in Criminal Appeal No.241 of 2023 – **Bhausahab Vitthal Farkade**, who have been arrested in connection with Crime No.283 of 2022 registered with Wadod Bazar Police Station, Dist. Aurangabad for the offences punishable under Sections 307, 201, 326 read with Section 34 of Indian Penal Code, under Section 3(2)(v) of the Atrocities Act and under Section 3 of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013, be released on P.R. Bond of Rs.50,000/- each with two solvent sureties of Rs.25,000/- each.

iv) The appellants in all the appeals shall not tamper with the evidence of the prosecution in any manner.

v) The appellants in all the appeals shall not indulge in any criminal activity.

vi) Bail before the Trial Court.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm