

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

CRIMINAL BAIL APPLICATION NO.3039 OF 2022

Hemant Ramesh Gaikwad	Applicant
Versus	
The State of Maharashtra	 Respondent

Ms. Sana Raees Khan, Advocate for the Applicant.

Mr. S.R. Agarkar, APP for the Respondent-State.

Mr. N.B. Khandagale, ASI, IO, Saswad Police station, Pune is present.

CORAM : SARANG V. KOTWAL, J.

DATE : 15th FEBRUARY, 2023

PC. :

1. This is third time the applicant is approaching this Court for his release on bail in connection with C.R. No.281/2018 registered at Saswad police station, District- Pune under Sections 302, 307, 143, 145, 147, 148 read with 149 of IPC and under Section 3(25) of the Indian Arms Act. On the first occasion, the applicant had preferred Criminal Bail Application No.1726/2019. In that application, following order was passed on 27.9.2019:

“1. After arguing for some time, learned senior counsel for the applicant, on instructions, prays for withdrawal of this application.

2. Permission is granted. The application is allowed to be withdrawn and is accordingly disposed of.”

2. After that, the applicant preferred second bail application vide Criminal Bail Application No.2767/2021. In that application, the following order was passed on 15.3.2022.

1. The Applicant had earlier approached this Court vide Criminal Bail Application No.1726/2019. On 27.9.2019, the following order was passed :

“1. After arguing for some time, learned counsel for the applicant, on instructions, prays for withdrawal of this application.

2. Permission is granted. The application is allowed to be withdrawn and is accordingly disposed of.”

2. The present application is filed on the ground that the other accused, who are similarly placed, were granted bail by the coordinate Benches of this Court. Learned counsel for the Applicant invited my attention to the material on record.

3. After I expressed my disinclination to grant relief in this application, learned counsel for the Applicant prays for unconditional withdrawal of this application. However, she submitted that the trial be expedited and some time-bound schedule be given considering that the Applicant is in custody since 2.8.2018. Her request is reasonable.

4. The application is allowed to be withdrawn unconditionally. However, the trial Court is requested to take up the matter as early as possible. The trial shall be concluded within a period of nine months from today. It is expected that the defence and the prosecution cooperate for expeditious disposal of the trial. The application is disposed of accordingly.”

3. Vide aforesaid order dated 15.3.2022, directions were issued to conclude the trial within a period of nine months from 15.3.2022. That period is over, but, the trial has not concluded. Therefore, I had called for the report from the trial Court as to why the trial could not be concluded. The District Judge-14 and the Additional Sessions Judge, Pune vide his report dated 13.1.2023 has explained as to why the trial could not be concluded. It is mentioned in that report that there were fifteen accused in the case i.e. Sessions Case No.786/2018. Out of them, two accused had died; and one accused i.e. the present applicant is an under-trial prisoner. The charges were framed against the accused on 25.4.2022. The accused Nos.13 & 14 were absent and, therefore, NBWs were issued against them. But subsequently they were reported to be dead. On 5.7.2022, the

Special Public Prosecutor had filed an application under Section 294 of Cr.P.C. and the defence had replied to it on 30.9.2022 & 11.10.2022. Learned Advocate for the accused had filed an application for getting copies of digital evidence from the concerned Forensic Laboratory. That application was made on 23.9.2022 and the matter was fixed on six dates for furnishing the copies of digital evidence. After those copies were furnished, the matter was fixed for recording the evidence on 29.11.2022. On that day, two pancha witnesses were present in the Court as prosecution witnesses, but learned Advocate for the accused Nos.1, 2, 6, 7, 8 & 13 filed an application for calling the record of the cross-case based on the FIR lodged by one of the accused Suresh, from the Court of Magistrate. Pursuant to that, a letter was sent to the J.M.F.C., for committing the cross-case in R.C.C. No.252/2019 to the Court of Sessions at Pune so that both the cases can be decided simultaneously. Those record and proceedings are yet to be received. The report mentions that the J.M.F.C. had given the date of 19.1.2023 for appearance of the accused before the Sessions Court.

4. Because of all these factors, there was delay in starting the recording of evidence. The delay mentioned by the learned trial Judge is because of the practical difficulties and because of certain applications made by the co-accused of the applicant. Therefore, a practical view will have to be adopted. The trial Judge is directed to take urgent steps to take up this matter expeditiously and conclude it expeditiously. If any of the accused is deliberately delaying the trial, the trial Court is sufficiently empowered to take steps and see to it that the trial is decided at the earliest.

5. In this background, I have considered the arguments of learned counsel for the applicant on merits of the matter in the interest of justice and also because the other co-accused are granted bail by various orders and the applicant is claiming parity.

6. The prosecution case is that there was enmity between Dadaso Katke and Dattatray Katke on one hand, and the first informant Sadhu Dalvi and his son Santosh on the other. On 31.7.2018, all the accused formed an unlawful

assembly and committed Santosh's murder. The FIR was lodged by Santosh's father Sadhu Dalvi. The investigation was carried out, spot panchnama was conducted, and the statements of some of the witnesses including the first informant were recorded under Section 164 of Cr.P.C..

7. Learned counsel for the applicant submitted that on the ground of parity, the applicant deserves to be released on bail. She submitted that in the FIR as well as in the statements of the eye witnesses and the statements recorded under Section 164 of Cr.P.C., it is clear that the role attributed particularly to Dadaso Katke and Dattatray Katke as well as to Bharat Gaikwad is exactly similar to the role attributed to the present applicant. And, therefore, on the ground of parity he deserves to be released on bail. These three co-accused are already granted bail by various Benches of this Court.

8. She submitted that the applicant had no motive. According to the prosecution case itself, the motive was specifically attributed to Dadaso Katke and Dattatray Katke. The applicant does not have criminal antecedents. He did not have

personal enmity with the deceased Santosh. There is discrepancy between the versions of the first informant in his FIR and in his statement recorded under Section 164 of Cr.PC..

9. She submitted that the eye witnesses have not stated that the applicant had fired at the deceased. Even the postmortem notes do not show any firearm injury. She further submitted that there were statements of the independent witnesses showing that Sadhu and Santosh were the aggressors. She further submitted that there was no recovery at the instance of the present applicant. His case stands on a better footing than that of the other co-accused and specially on a better footing than the main accused Dadaso.

10. Learned counsel for the applicant relied on the orders passed by the Hon'ble Supreme Court (i) in the case of Avinash Anant Pawar @ Ajit Dada Vs. the State of Maharashtra passed in Petition for Special Leave to Appeal (Crl.) No.1452/2022 dated 11.8.2022; and (ii) in the case of Sagar Tatyaram Gorkhe & another Vs. the State of Maharashtra passed on 3.1.2017 in Petition for Special Leave to Appeal (Crl.)

No.7947/2015, to contend that the long incarceration itself would be a ground for grant of bail. In the present case, the applicant is in custody since 2.8.2018.

11. Learned APP opposed these submissions. He relied on the statement of the first informant in the FIR and the statements of the eye witnesses. He relied on the ballistic examination report which showed that the country-made firearm found at the spot was used for firing before its examination in the laboratory.

12. He relied on the postmortem notes and submitted that there is one injury where it is mentioned that it was a suspected firearm injury. He submitted that the eye witnesses have stated that the applicant was holding the firearm. The firearm was found at the spot and there is a firearm injury to the deceased.

13. He further submitted that it is a brutal murder in which the deceased was assaulted mercilessly and his head was smashed beyond recognition.

14. Learned A.P.P. Shri Agarkar, on instructions, made submissions that the prosecution will try to complete the trial within a period of nine months if the accused do not cause any delay in the trial. He submitted that on the part of the prosecution, no delay will be caused and the witnesses shall be kept present on every date before the trial Court.

15. I have considered these submissions. The FIR lodged by the father of the deceased is important in this case. He has stated that there was enmity between Dadaso Katke, Dattatray Katke on one hand and the deceased Santosh on the other. On 31.7.2018, in the evening, an unknown boy came to the informant's house and called Santosh and told him that Dadaso Katke and Dattatray Katke had called him near a school. Therefore, the first informant and Santosh started going there. When they reached Chintamani Supermarket, at that time he saw nine accused including Dadaso Katke, Dattatray Katke, the present applicant, Bharat Gaikwad etc.. He further stated that Dadaso Katke, Bharat Gaikwad and the present applicant pointed their country made firearms towards Santosh. They

said that he would not be left alive. The first informant tried to snatch the firearm from Dadaso Katke. At that time, Dattatray Katke, Bharat Gaikwad and the present applicant held him. Balu Gaikwad assaulted the first informant on his head and the other accused started assaulting him. He has further stated that Dadaso Katke and the present applicant fired at Santosh. Resultantly, Santosh fell down. After that Dipak and others assaulted Santosh and hit him on his head causing his death. The first informant was also injured seriously. After that Santosh and the first informant were taken to a hospital. On this basis, the FIR is lodged.

16. There are statements of eye witnesses Sopan Patane and Dattraya Kamathe. Both of them have consistently stated that they saw that Bharat Gaikwad and the applicant had pointed their firearms towards Santosh. Dadaso Katke tried to fire at Santosh but his firearm could not fire the shot. Shobha Katke and Sanjana Gaikwad put chilly powder in the eyes of Santosh and the accused started assaulting him. Both of them have stated that Dadaso Katke, Dattatray Katke, Mohan

Gaikwad, Bharat Gaikwad, Dipak Bhandwalkar and the present applicant assaulted Santosh with stones on his head causing smashing of his head. He lay motionless at the spot.

17. There was recovery of a firearm with three live cartridges from the spot. One round was found at the spot. Besides this, around six stones of different sizes were found at the spot. Chilly powder was also recovered from the spot.

18. The postmortem notes show that there were 22 injuries on the dead body of Santosh. Most of the serious injuries were on the head and his head was practically smashed. It was a brutal assault. There were injuries all over the body. Importantly the injury No.8 mentioned thus :

“8. Punctured wound (suspected firearm wound of entry) present over right cheek, 4 cm medial to ear tragus, 3cm inferolateral to lateral canthus of right eye of diameter 2 cm, margins inverted, no burning, seinging or tattooing in surrounding region, red.”

The internal injuries show that there was underscalp haematoma present all over scalp. Examination of anterior cranial cavity showed fracture with infiltration staining seen at

fracture margins. There was open comminuted fracture present involving left frontoparieto temporal bone of size 12 cm x 8 cm, and right frontoparieto temporal bone of size 10 cm x 6 cm with skull bone fracture. Meninges was seen torn corresponding to fracture of skull. The brain showed multiple lacerations involving both frontoparieto temporal region, margins irregular and red. Part of brain matter was missing from the cavity.

Thus, it can be seen that it was a cruel and brutal assault on the deceased. The cause of death was head injury.

19. The first informant's statement was recorded under Section 164 of Cr.PC.. In that statement, he has specifically mentioned that Dattatray Katke, Dadaso Katke, Mohan Gaikwad and the applicant had assaulted Santosh with stones causing smashing of his head.

20. Thus, it can be seen that there is a strong evidence of the first informant and the eye witnesses attributing specific role to the present applicant. The FIR, which was recorded at the earliest point of time, mentions that the applicant had fired at the deceased.

21. In the light of this evidence, it has to be seen whether parity applies to the applicant. Dattatray Katke was granted bail by a coordinate Bench vide order dated 3.10.2022 passed in Criminal Bail Application No.686/2022. In that order itself it was mentioned that the allegations against the present applicant Hemant Gaikwad can be distinguished from those against Dattatray Katke. Thus, that order itself shows that there was no parity between Dattatray Katke and the present applicant.

22. As far as Dadaso Katke is concerned, he is granted bail by another coordinate Bench vide order dated 7.12.2022 passed in Criminal Bail Application No.1931/2022. That order was basically passed relying on the order granting bail to the coaccused Dattatray Katke. It was observed that the roles attributed to Dadaso and Dattatray were identical and, therefore, Dadaso was granted bail. In this situation, the observations in the order granting bail to Dadaso Katke cannot be read in isolation without referring to the order granting bail to Dattatray Katke, which clearly mentions that Dattatray

Katke's role was different, the allegations against Dattatray were different from Hemant Gaikwad i.e. the present applicant.

23. The roles of the other co-accused are different. The applicant is attributed two specific roles in the first information report and the statements of the eye witnesses. The first information report mentions that Dadaso Katke, Bharat Gaikwad and Hemant Gaikwad (present applicant) had pointed their firearms towards Santosh. When the first informant tried to snatch the firearm from Dadaso Katke's hand, the applicant and Dattatray held him. The FIR very specifically mentions that Dadaso Katke and the present applicant fired at Santosh. The prosecution case through other eye witnesses show that Dadaso Katke's firearm could not fire a shot and yet there was one possible firearm injury on the dead body of the deceased. Therefore, there is a strong circumstance against the applicant of firing at Santosh with a corresponding injury mentioned in the postmortem notes. This particular circumstance clearly distinguishes his case from that of all other accused including Dadaso Katke. According to the ballistic report, the firearm

found at the spot was used for firing before its examination in the laboratory.

24. Apart from that, the two important eye witnesses Sopan Patane and Dattatray Kamathe have specifically stated that alongwith the other accused, the applicant also assaulted the deceased with stones on his head. Thus, much more serious, grave and multiple roles are attributed by the first informant and these two eye witnesses to the present applicant. Therefore, his case is quite distinguishable from all other accused, because he had fired at the deceased.

25. As far as the ground of long incarceration is concerned, this ground will have to be looked at in the background of the strong material against the applicant and the savage assault mounted on the deceased in front of his helpless father. The applicant had used a firearm. These factors cannot be overlooked.

26. Learned APP has stated, on instructions, that the prosecution will take care to keep the witnesses present on every date. That statement is recorded and accepted. In view of this;

and also in view of the earlier order making the trial time bound, the trial Judge will have to take up this trial for hearing at the earliest and conclude it at the earliest. The applicant shall be produced by the jail authorities before the Court on every date. If any of the accused causes delay in conduct of the trial, the trial Court is sufficiently empowered to take strict action and further continue with the trial.

27. In view of this discussion, I am not inclined to grant bail to the applicant. With the result, the application is rejected.

(SARANG V. KOTWAL, J.)

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