

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

**INTERIM APPLICATION NO.1726 OF 2024
IN
CRIMINAL APPEAL NO. 1093 OF 2022**

Akash Arvind Pawar Age:27 years, At present Kalamba Jail, Kolhapur, District: Sangli (Accused in Kalamba Central Jail)	}	Applicant
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Versus

The State of Maharashtra (At the instance of Ashta Police Station, District: Sangli)	}	Respondent
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Mr. Hrishikesh Mundargi a/w Ms Pravada Raut, for the Applicant.

Mr. S. V. Gavand, APP, for the Respondent - State.

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**CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
DATED : 2nd JULY, 2024**

P.C:-

1. The Application is filed by accused No. 3, Akash Arvind Pawar, who face trial in Sessions Case No. 9 of 2016 before the Additional Sessions Judge, Islampur, alongwith three other accused persons and stand convicted for committing an offence punishable under Sections 302, 201, 364, 143, 147, 148 r/w Section 149 of the Indian Penal Code.

On being acquitted for the offence under Sections 143, 147, 148 r/w Section 149 of the IPC, he is sentenced to suffer imprisonment for life for committing offence punishable under Section 302 r/w 34 of the IPC. In addition, he alongwith other accused persons also stand convicted for committing an offence punishable under Section 201 r/w 34 of the IPC and sentenced to suffer rigorous imprisonment for three years. In addition, he is also directed to suffer rigorous imprisonment for 5 years on being convicted under Section 364 r/w 34 of the IPC, all sentences having been directed to run concurrently.

The applicant filed Criminal Appeal No. 1093 of 2022 calling in question the Judgment of conviction and imposition of sentence, and alongwith, the connected Criminal Appeal No. 446 of 2019 and Criminal Appeal No.215 of 2020, his Appeal is admitted and Record and Proceedings with paper-book is received. However, considering the pendency of the old Appeals, since the Appeal could not be taken up for hearing, we deem it appropriate to consider the Application filed by the applicant under Section 389, seeking his release on bail and for suspension of the sentence imposed on him, vide Judgment and Order dated 18.02.2019.

We have also taken note of the fact that, the applicant has undergone 9 years, 6 months and 25 days of imprisonment upon his arrest in the subject C.R. and has earned a remission of 2 years 4 moths and 25 days and he is presently housed in Kolhapur Open Prison, Kalamba.

2. In support of the application filed by the applicant seeking a relief of suspension of sentence, we have heard learned counsel Mr. Hrishikesh Mundargi alongwith Ms Pravada Raut for the applicant and Mr. S. V. Gavand, the learned APP for the State. We have also perused the paper-book presented before us alongwith the Record and Proceedings, which includes the impugned Judgment, as well as the deposition of witnesses.

From the material placed on record the prosecution case could be discerned to the effect that, on account of the existing enmity between accused Nos. 1 to 3 and deceased Samir Mustaf Sayyad @ Naikwadi in connection with a girl, on 03.10.2015, at about 7:00 p.m. the deceased Samir met him at Ashta, thereafter they went to a Chinese stall situated in front of Rukade Petrol Pump, and at that time, Ashraf came on the spot and he abused him. This provoked Samir to slap him. Thereafter, the informant Amit alongwith Samir proceeded towards pan stall and Samir told him that he would return in 5 minutes. The informant thereafter proceeded to the Chinese stall, at that time his friend Subodh also came there. The owner of the Chinese stall Sachin informed them that accused No. 1 Sangram, the present applicant Akash alongwith some boys were searching for them and he asked them to push away from the spot.

Thereafter, at about 09:30 p.m. when the informant was present in front of Hotel Janata Raja, the deceased Samir came there by motorcycle, and the information received from the

Chinese stall owner was transmitted to him. Samir told him that we would go to Ganapati temple and question the accused No. 1 to 3 as to why they had come to beat them and he left by his pulsar motorcycle.

Apprehending that the accused persons who were in a rage would do harm to Samir, the informant followed him and even he went to the Ganapati temple at around 9:45 p.m., the informant saw accused Nos. 1 to 5 and other persons carrying Samir from a lane and dropping him on the road. The informant could not notice any movements in Samir and even his clothes were stained with blood.

As per the informant, the persons present in the mob were assaulting Samir by means of stone, fist and kicks, and thereafter, they put Samir on their motorcycle in injured condition and took him towards Yallamma Devi road.

The informant thinking that he would also face their wrath ran away, and on account of fear did not return to his home and stayed outside. Samir was not traced out and therefore the informant suspected that the accused persons had taken away Samir with an intention to kill him and, therefore, the informant lodged a complaint with Ashta Police Station as regards the accused forming an unlawful assembly and assaulting Samir in a lane situated near Ganapati temple by means of stone and some dangerous weapons and caused him bleeding injuries and took him away by motorcycle.

3. The complaint lodged by informant Amit resulted in registration of FIR (Exhibit 39). Alongwith the complainant, Subodh Shedbale who was present with him was also cited and examined as a prosecution witness, who also make reference to the previous enmity.

The prosecution examined 24 witnesses to prove the charge against the accused persons, but out of them 15 witnesses did not support the case of the prosecution.

4. Mr. Mundargi representing the applicant would submit that PW 1 the informant is not trustworthy, as he was all the while worried about his friend Samir being assaulted and, therefore, followed him when he left the spot on motorcycle to question the accused as to why they were searching for him, but though he noticed Samir being assaulted and thereafter Samir in an injured condition being brought on the road from lane and the accused persons assaulted Samir with stone, fist and kicks and carried him on the motorcycle in an injured condition, he did not lodge the report immediately, but the complaint was lodged by him on the next day.

The conduct of the informant in lodging the FIR belatedly cast a doubt on credibility of the version of this witness as what Mr. Mundargi has submitted. In this context, when we turn to the deposition of PW 1, who identified the accused persons. In the cross-examination he admit that, he used to return from work at about 06:00 p.m. and sometimes he used to remain outside his house, but return by 07:00 p.m.. He

state that at 11:00 p.m he made a phone-call to mother of Samir i.e. Mumtaj inquiring about his whereabouts, and was told that, at 10:00 a.m. Samir and his friend Sagar had left the house informing that he would return for dinner at 09:00 p.m. Mumtaj told him that, she had contact with Samir at 09:00 p.m. and was told that he would return for dinner. He further admit that he made a phone-call to Mumtaj once again at 11:00 p.m., he was told that Samir has not returned home.

PW 1 state that Mumtaj reported to Ashta Police Station at 10:00 a.m. on 04.10.2015 and he alongwith Subodh were called by her to the police station and she narrated to the police that Samir did not return home and this was reduced in writing. It is surprising that, despite noticing that deceased Samir was assaulted by the accused persons, he did not disclose to his mother nor did report to the police station. It is only after the dead body of Samir was found and he was called by the police, the police obtained his signature by naming the accused as suspected accused.

In the cross-examination he admitted that there was darkness and, therefore, he could not see. He also admit that, he had not personally seen the assault on Samir and was unaware, as to how he died.

In addition, in the cross-examination he has admitted as below:

“It is true that I am friend of Samir, I was made as

complainant by the police. It is true that I have given my examination-in-chief as per complaint; however, no incidents were taken place as per chief examination.”

On not for supporting the prosecution case, PW 1 was cross-examined by the Public Prosecutor, but nothing fruitful in support of the prosecution case could be extracted from him. On being confronted with the statement recorded under Section 164 of Cr.P.C, he answered that, the complaint was returned and his signature was obtained. However, in his recross-examination for the accused, he once again had deposed to the following effect:

“15. It is true that I had not seen the incident stated in the complaint and my statement recorded by JMFC. It is true that I being the friend of Samir, as per say of police, I have given the statement before JMFC and the complaint.”

5. Another witness PW 9, Subodh Shedbale, contradict PW 1 in his version, when he depose that, though he saw the accused persons bringing Samir out of the lane in an injured condition, and they continued to beat him by stone, fist and kicks, due to fear of beating, they did not attempt to rescue. He has deposed that the accused persons then left the spot and they approached Samir who was lying on the road in a pond of blood, his motorcycle being parked there, but on account of fear, they left the spot. Thereafter, his friend Amit Khandagale (PW- 1) lodged the complaint against the accused. His version does not corroborate the version of the complainant and he categorically admit that, he had not reported about the

incident till recording of his statement by the police.

The detailed cross-examination of this witness make the case of the prosecution unreliable, and this aspect has been completely ignored by the learned Sessions Judge. As far as the recoveries are concerned, the panchas had turned hostile and did not support the case of the prosecution, which make the entire investigation doubtful.

In any case, when the version of the complainant is to be believed, if Samir was brought out of the lane in an injured condition, he is not an eye witness to the actual incident. Though, the P.I. after receiving information at midnight visited the spot, he did not make inquiries with any person. With the testimony of PW 1 and PW 9 being doubtful, as far as PW 9 is concerned, he appears to be a got-up witness and the suspicion is further reinforced by close assistance of PW 9 with the deceased. Even this witness did not report the incident to the police if he had seen the assault on deceased, but he refrained himself from reporting to the police.

6. As far as the recovery of dead body is concerned, the same is not proved, as the panchas did not support the case of the prosecution. Similar is the case of the recovery of motorcycle. Moreover, the prosecution has not brought any CDR of record, and there is no conclusive proof of recovery. There is also some inconsistency in ascertaining the actual time of death.

The aforesaid infirmities in the prosecution case require reappreciation and since the Appeal is admitted with no chance of it being heard at the earliest, we are of the *prima facie* view that, since there are chances of the appellant succeeding in Appeals, the sentence imposed on him. *Prima facie*, the prosecution having failed to establish its case beyond doubt, and since it is doubtful, the benefit must be in favour of the accused/applicant.

For this reason, the applicant deserves his release on bail by suspending the sentence imposed on him under the Judgment dated 18.02.2019, which is subject to the following terms and conditions:

:ORDER:

- (i) Interim Application is allowed.
- (ii) The sentence imposed upon the applicant vide the impugned Judgment dated 18.02.2019 in Sessions Case No. 09/2016, is hereby suspended during the pendency of the Appeal.
- (iii) The applicant Akash Pawar shall be released on bail in connection with C.R. No.149 of 2015 (SC No. 09/2016) registered with Ashta Police Station, Sangli, on furnishing P.R. bond to the extent of Rs.25,000/- with one or more sureties of the like amount.

(iv) The applicant shall report to the concerned Police Station on first Monday of every three months between 05:00 p.m. to 06:00 p.m.

(v) Upon release, the applicant shall furnish his contact number and permanent residential address to the Investigating Officer and shall keep him updated in case of any change.

(MANJUSHA DESHPANDE, J.)

(BHARATI DANGRE, J.)