

Sayali Upasani

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

BAIL APPLICATION NO.- 2842 OF 2023

Kaivalya Malhari Shikhre @ Kai ... Applicant

Vs.

The State of Maharashtra ...Respondent

**WITH
BAIL APPLICATION NO.- 1244 OF 2023**

Ganesh Ashok Gaikwad ... Applicant

Vs.

The State of Maharashtra ...Respondent

Mr. Raju Suryawanshi, for Applicant in BA/2842/23.

Mr. Ganesh Mahadev More, Hill Line Police Station, Present.

Mr. Amit Singh, through VC, for Applicant in BA No.
1244/2023.

Mr. S. R. Agarkar, APP for State/Respondent.

CORAM:- N. J. JAMADAR, J.

DATED:- 15th APRIL, 2024.

ORDER:-

1) The applicants, who are arraigned in CR No. 237 of 2021, registered with Hill Line police station, for the offences punishable under Sections 120B, 302, 201, 143, 144, 147, 148, 149 and 506 (2) of the Indian Penal Code, 1860, Section 135 read with Section 37 (1) of the Maharashtra Police Act, 1951 and Section 4 read with Section 25 of the Arms Act, 1959, have preferred these applications to enlarge them on bail.

2) Sushant Bhaskar Gaikwad @ Gudya (the deceased) was a friend of Kunal Gaikwad, the first informant. There was animosity between the deceased and Akash Shinde @ Chintya (A1). On 17th September, 2021, the deceased, first informant and their friend Prakash Raibole had drinks at Premnagar Hill. At 2 pm they came in front of the meat stall of Makhansingh. The first informant went to fetch a cigarette. He heard cries of 'Guddya found'. The first informant noticed that the Akash @ Chintya (A1), Amol More @ Vangya (A2), Yash Rupvate @ Monya (A3), Abhirup Thorat (A4) and a child in conflict with law were coming towards the deceased armed with sword, scythe, knife and iron rod. They exhorted that the deceased should not be spared. After noticing them, the deceased tried to flee away. The first informant also ran towards Dena Bank Lane and the witnessed the

occurrence. The accused Akash @ Chintya (A1), Amol More @ Vangya (A2), Yash Rupvate @ Monya (A3), Abhirup Thorat (A4) and child in conflict with law, allegedly assaulted the deceased by means of sword scythe, knife and iron rod. Prakash, the friend of the first informant also fled away in his auto rickshaw. After a few moments, the first informant saw A1 and his associates running back towards Netaji Chowk. Thereafter, the first informant went to the place where accused assaulted the deceased. The latter was lying in a pool on blood. He had sustained grievous injuries. Police arrived. He was shifted to the Central Hospital, Ulhasnagar. While the first informant was on the way to hospital, a person called on the cellphone of the first informant and identified himself as 'Chintya' and threatened to eliminate the first informant as well. Eventually, the deceased succumbed to the injuries.

3) Mr. Surywanshi, the learned Counsel for the applicant - Kaivalya Malhari Shikhre @ Kai in BA No. 2842 of 2023 submits that the applicant has been subsequently falsely roped in by way of an afterthought. Mr. Suryawanshi laid emphasis on the fact that the first informant had given a detailed account of the incident as it unfolded since the assailants came at Netaji Chowk armed with weapons and fled away after the assault on the

deceased. The first informant had specifically named the four co-accused and the child in conflict with law. The applicant was not named as one of the assailants. To rope in the applicant, on the next day, a supplementary statement of the first informant was recorded. However, the omission to name the applicant as the person, who was a member of the alleged unlawful assembly in prosecution of the common object of which the deceased was killed, dents the prosecution. Mr. Suryawanshi further submitted that the statement of Prakash is not of much assistance to the prosecution as his statement was recorded after about 18 days of alleged occurrence.

4) Mr. Amit Singh, the learned Counsel for the applicant – Ganesh Gaikwad in BA No. 1244 of 2023, submitted that there is no material to connect the applicant with the alleged offences. Neither the first informant nor Prakash, the alleged eyewitness have named the applicant – Ganesh as one of the assailants or for that matter a member of the alleged unlawful assembly. Ganesh Gaikwad is sought to be implicated on the basis of the disclosure statements allegedly made by the co-accused under Section 27 of the Indian Evidence Act, 1962. Even if those disclosure statements are considered at par, yet, it does not

appear that the applicant was present at the spot at the time of the commission of the alleged offences.

5) Mr. Agarkar, the learned APP, fairly submits that qua the applicant – Ganesh apart from the discoveries made by the co-accused Amol @ Chintya and Kaivalya, there is no other material to connect Ganesh with the alleged offences. However, as against Kaivalya, Mr. Agarkar submitted that there is adequate material. It was submitted that the first informant has ascribed a justifiable reason for the omission to mention the name of the Kaivalya as one of the assailants. In addition, pursuant to the discovery made by the applicant blood stained clothes of the applicant have been recovered. Thirdly, there is material to indicate that the voice of the person, who had called the first informant after the alleged occurrence, matches with that of the applicant.

6) To begin with, the material qua Ganesh. Evidently, neither Kunal, the first informant, nor Prakash, the other eye witness, has named the applicant–Ganesh as the person, who accompanied Akash @Chintya(A1). Even in the supplementary statement of the first informant, the applicant–Ganesh was not named. It is not the prosecution case that the first informant and Prakash

had claimed that apart from the named assailants, there were unknown associates of the Akash @ Chintya (A1).

7) It appears that the applicant – Ganesh has been implicated on the basis of the disclosure statement made by Akash @ Chintya (A1) and Amol @ Vangya (A2). Firstly, disclosure statement made by an accused is not legal evidence qua a non-maker co-accused. Secondly, at best, the role attributed to the applicant is that of bringing two of the assailants at Netaji Chowk on his motorcycle. Thereafter, the applicant – Ganesh had allegedly left the spot along with another motorcyclist on whose motorcycle, two of the co-accused had reached Netaji Chowk.

8) In this view of the matter, prima facie, there is no material to indicate that the applicant Ganesh was a member of the unlawful assembly in prosecution of the common object of which the deceased was killed. Thus, a case for bail is made out.

9) As regards the applicant- Kaivalya, it is necessary to note that on the very day of occurrence, co-accused namely Akash @ Chintya (A1), Amol @ Vangya (A2), Yash Rupvate @ Monya (A3), alongwith the child in conflict with law, were apprehended. It does not appear that, at that point of time, the identity of the applicant as one of the assailants emerged. The applicant was named as one of the assailants in the supplementary statement

of the first informant recorded on 18th September, 2021. Undoubtedly, FIR is not an encyclopedia. However, in the case at hand, it appears, the first informant had opportunity to see the assailants at three stages. First, when the assailants came to Netaji Chowk armed with weapons and exhorted that they could find 'Gudya', the deceased. Second, the first informant claimed to have seen those assailants chasing and assaulting the deceased, who tried to flee away. Third, after perpetrating assault, the first informant claimed, the assailants ran back towards Netaji Chowk.

10) In this view of the matter, I find substance in the submission of Mr. Suryawanshi that the first informant had narrated the alleged occurrence in the FIR, in detail. Prima facie, the omission to name the applicant as one of the assailants cannot be said to be in consequential or immaterial.

11) In the supplementary statement, the first informant further stated that while he was on the way to hospital along with deceased, in addition a person who identified himself as Chintya, another person spoke with him and threatened to kill him. The prosecution alleges that the said second person was the applicant. This fact was also not stated in the FIR. Prima facie, the omission appears material.

12) The reliance on the transcript of the alleged conversation between the first informant, Akash @ Chintya (A1) and third person, to rope in the applicant as the said third person, appears to be a matter for evidence. To what extent the evidence of Prakash Raibole, whose statement came to be recorded on 5th October, 2021, when the applicant was already arrested on 26th September, 2021, would corroborate the version of the first informant would also be a matter for adjudication at the trial.

13) In the aforesaid view of the matter, I am impelled to hold that a prima facie case for exercise discretion in favour of the applicant- Kaivalya is also made out.

14) Hence, the following order.

: O R D E R :

(i) The applications stand allowed.

(ii) The applicants be released on bail in CR No. 237 of 2021, registered with Hill Line police station, for the offences punishable under Sections 120B, 302, 201, 143, 144, 147, 148, 149 and 506 (2) of the Indian Penal Code, 1860, Section 135 read with Section 37 (1) of the Maharashtra Police Act, 1951 and Section 4 read with Section 25 of the Arms Act, 1959, on furnishing a P.R. Bond in the sum of

Rs.30,000/- each, with one or two sureties in the like amount, to the satisfaction of the trial Court.

(iii) The applicants shall mark their presence at Hill Line police station Police Station on the first Monday of every alternate month between 10.00 am to 12.00 noon for a period of two years or till conclusion of trial, whichever is earlier.

(iv) The applicants shall not tamper with the prosecution evidence and/or give threat or inducement to the first informant and any of the persons acquainted with the facts of the case.

(v) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicants and co-accused and the trial court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]