

Sayali Upasani

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

BAIL APPLICATION NO. 2717 OF 2023

Asif Shaikh and Others

...Applicants

Vs.

State of Maharashtra

...Respondent

Mr. Irfan A. Shaikh, for Applicant.

Mr. S. R. Agarkar, APP for State-Respondent No. 1.

Mr. Ashok Dhamale, API, APMC Police Station, Navi Mumbai,
Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 11th MARCH, 2024

ORDER:-

1) The applicants, who are arraigned in CR No. 50 of 2023 registered with APMC Police Station, Thane for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860, have preferred these application to enlarge them on bail.

2) Santosh (the deceased), was the son of the first informant. On 8th February, 2023, the deceased and his maternal cousin – Vikas Hiwale and their two friends Dinesh Rathod and Sachin Chavhan had drinks. While they were on their way on a scooty at Annapurna Chowk, Sector 30, Vashi, there was an altercation with the persons in the auto rickshaw, which had come in close contact with the scooty they all were riding.

3) At about 11.45 pm., the deceased, Vikas and their friends stopped near a tea Stall to have tea. The four persons with whom the deceased and his friends had an altercation, a while ago, came thereat in the auto rickshaw. One of them was armed with a Bambu Stick. Those four persons allegedly mounted an assault on the deceased, Vikas and his friends. Vikas and his friends ran away to a distance. But the deceased was assaulted by those four assailants by fist and kick blows. One of the assailants gave a blow by means of a Bambu Stick. Another allegedly picked up a stone lying at the spot and assaulted the deceased. Vikas and his friends alleged that those persons addressed each other as Abdul, Sikandar, Asif and Kaif . After the assailants fled away, the deceased was shifted to Municipal Hospital, Vashi. Eventually, the deceased succumbed to injuries.

4) The applicants came to be arrested. Two of the co-accused Abdul Manihar and Sikandar Rajbhar made disclosure statements leading to the recovery of the wooden stick and a piece of broken paver block. The applicants and the co-accused were allegedly identified in the test identification parade by Vikas and his friends.

5) Mr. Irfan Shaikh, the learned Counsel for the applicant submitted that there is no material to show that either of the applicants was the person, who allegedly assaulted the deceased by means of Bambu Stick. Laying emphasis on the injuries found on the person of the deceased, during the course of the inquest as well as the post mortem examination, Mr. Shaikh would urge that the deceased had sustained only one injury on the head i.e. CLW on the left side of occipital region. Rest all were impact abrasion. In the circumstances, according to Mr. Shaikh, the complicity of the applicants for an offence punishable under Section 302 of the Penal Code, 1860 by resorting to the principle of constructive criminality under Section 34 of the Penal Code, 1860, appears debatable.

6) As against this, Mr. Agarkar, the learned APP submits that the incident had occurred in two stages. In the first stage, there

was an altercation followed by minor fisticuffs. In the second stage, the applicants and the co-accused had allegedly followed the deceased and the other injured. That shows a clear pre-meditation. Therefore, the applicants are equally complicit in an offence punishable under Section 302 of the Penal Code, 1860.

7) From the perusal of PM report, it becomes evident that the cause of death was 'head injury'. The injuries noted by the Autopsy Surgeon in column No. 17 reveal that there was only one CLW on head. Rest were abrasions primarily on the limbs. Prima facie, it seems that one blow by means of a hard and blunt object was given on the head of the deceased. The statements of Vikas and Sachin recorded under Section 161 as well as 164 of the Code of Criminal Procedure, 1973 do not throw light on the identity of the person, who allegedly gave a blow by means of Bambu Stick.

8) Thus, at this stage, even if it is assumed that the applicants were present at the scene of occurrence and participated in the alleged assault, yet, there is prima facie no material to indicate that either of the applicants was the person who assaulted the deceased by means of hard and blunt object.

9) The discovery made by the co-accused Abdul Manihar and Sikandar Rajbhar was pressed into service on behalf of the prosecution to connect the accused with the alleged offence. Prima facie, it appears that a joint disclosure statement attributed to co-accused Abdul and Sikandar has been recorded. To what extent such joint discovery can be fastened to a particular accused would be a matter of adjudication at the trial. Even if the said disclosure statement is taken into account, it appears that the co-accused Sikandar had picked up a Bambu Stick which was lying on the road, and assaulted the deceased. Another co-accused Abdul had allegedly picked up a stone lying on the spot and gave a blow on the head of the deceased. In view of the aforesaid material, none of the applicants prima facie appears to be the person, who assaulted the deceased on head.

10) It is true few of the witnesses have identified the applicants in the test identification parade. However, the weight to be attached to such identification in the test identification parade, in the backdrop of the fact that the features of the assailants were not described at an earlier point of time, would be again a matter for adjudication at the trial.

- 11) In the aforesaid view of the matter and having regard to the nature of the occurrence and the role attributed to the applicants, and the fact that the investigation is complete and charge-sheet has been lodged, a prima facie case to exercise the discretion in favour of the applicants appears to have been made out.
- 12) I am, therefore, inclined to allow the application.
- 13) Hence, the following order.

: O R D E R :

- (i) The applications stand allowed.
- (ii) The applicants Asif Shaikh and Kaif Raeen be released on bail in CR No. 50 of 2023 registered with APMC Police Station, Thane for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860, 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 the APMC Police Station, Thane on the first Monday of every 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 the trial court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]