

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3009 OF 2024

Abdul Karim Fatemohammad Manihar	...Applicant
vs.	
The State of Maharashtra	...Respondent

Mr. Irfan Shaikh, for the Applicant.
Mrs. Mahalaxmi Ganapathy, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.
DATE : AUGUST 8, 2024

P.C.:

1. Heard the learned counsel for the parties.
2. The applicant who is arraigned in C.R. No. 50 of 2023 registered with APMC police station, Thane for an offence punishable under section 302 read with 34 of Indian Penal Code, 1860 seeks to be enlarged on bail.
3. Santosh (the deceased), was the son of the first informant. On 8th February, 2023, the deceased and his maternal cousin -Vikas Hiwale and two of their 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.
4. 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 Bamboo 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 Bamboo 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.

5. The applicant allegedly assaulted the deceased by means of a stone. The applicant and the co-accused came to be arrested on 10th February, 2023. The applicant Sikandar Rajbhar (A/3) made a disclosure statement leading to recovery of wooden stick and piece of broken paver block. The applicant and the co-accused were allegedly identified in the Test Identification parade by Vikas Hiwale and his friends.

6. Mr. Irfan Shaikh, the learned counsel for the applicant, submitted that by an order dated 11th March, 2024, this Court had released the co-accused Asif Shaikh and Kaif Mobin Raeen. This

Court had adverted to the fact that the identification of the said co-accused as well as the applicant is debatable as the features of the assailants were not described at an earlier point of time. This Court has also adverted to the aspect of evidentiary value of the disclosure statement purportedly attributed to the applicant and Sikandar Rajbhar (A/3). Mr. Shaikh would urge that even otherwise, the alleged discovery is of no significance as the bamboo stick and paver block were recovered from a place open and accessible to all. Lastly, since the deceased had sustained only one head injury, which was the cause of death, it is debatable whether the alleged assault was with intent to cause death of the deceased. The offence thus may not fall within the dragnet of section 302 of the Penal Code.

7. Mrs. Ganapathy, learned APP, opposed the prayer for bail. It was submitted that in the order dated 11th March, 2024 this Court had adverted to the role of the applicant borne out from the material on record. In the disclosure statement, the applicant had volunteered to show the place where the stone, by means of which he had assaulted the deceased, was kept. Therefore, according to the learned APP, there is sufficient material to establish the complicity of the applicant. Hence, the applicant does not deserve to be enlarged on bail.

8. While releasing the co-accused Asif Shaikh and others, this Court had briefly adverted to the nature of the material arrayed against the accused, including the circumstance of the discovery under section 27 of the Evidence Act. The observations in paragraphs 7 to 11 bear upon the claim of the applicant as well.

Hence, they are extracted below:

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 bamboo 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 that, 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.

9. As noted above, the first informant and the witnesses had not known the applicant and the co-accused from before. It does not appear that the witnesses had described the features of the assailants. In the statements of Sachin Chabria and Vikas Hiwale, recorded before the learned Magistrate under section 164 of the Code also, the witnesses have stated that the persons who accompanied the rickshaw driver, with whom there was an altercation initially, started to assault the deceased and the witnesses by means of stick and stone. Prima facie, the witnesses have not attributed a specific role to the applicant.

10. Secondly, postmortem report indicates that apart from CLW over left side of occipital region, the deceased had sustained impact abrasions. There was only one head injury. The role of assaulting the deceased by means of bamboo stick has been attributed to Sikandar Rajbhar (A/3) and assault by means of stone has been attributed to the applicant, primarily on the basis of disclosure

statement made by the applicant and the co-accused Sikandar Rajbhar.

11. As noted in the aforesaid order, the discovery is not free from infirmities. The prosecution will have to surmount the challenge to the discovery on the count that it was a joint discovery. To what extent, such a joint discovery can be fastened to a particular accused would be a matter for adjudication at the trial. Moreover, even if the disclosure statement is taken into account, it appears that the weapon of offence i.e. stone was allegedly picked up from the scene of occurrence. The said stone, was recovered from a place open and accessible to all after about eight days of the arrest of the applicant. In these circumstances, whether the assailants had the requisite mens rea to cause death of the deceased and whether the offence would fall within the dragnet of section 302 of the Penal Code, would be a matter for trial. To add to this, there is an element of reliability of the evidence of identification of the applicant and the co-accused as the assailants.

12. In the totality of the circumstances and having regard to the fact that the applicant has been in custody for one and a half year and it is unlikely that the trial can be concluded within a reasonable period, I am persuaded to exercise discretion in favour of the applicant.

Hence, the following order.

ORDER

- 1] The application stands allowed.
- 2] The applicant be released on bail in C.R. No. 50 of 2023 registered with APMC police station, Thane, on furnishing a P.R. Bond of Rs. 30,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at APMC police station on the first Monday of every alternate month between 11 am to 1 pm till conclusion of the trial.
- 4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.
- 5] The applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- 6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)