

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR

CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 3166 OF 2025
IN
CRIMINAL APPEAL NO. 907 OF 2025

Kirtimala Aagatrao Kale

...Applicant

Versus

The State Of Maharashtra

...Respondent

.....

Adv. Shivani Kondekar, for Applicant.

Mr. Pankaj P. Deokar, learned APP for the Respondent-State.

.....

CORAM : MADHAV J. JAMDAR &
PRAVIN S. PATIL, JJ.

DATE : 7th MAY, 2026.

P.C. :

1. Heard Ms. Shivani Kondekar, learned counsel appearing for the Applicant and Mr. P. P. Deokar, learned counsel appearing for the Respondent – State.
2. By the present Interim Application, the Applicant is seeking suspension of sentence and enlargement on bail during the pendency of the Criminal Appeal.
3. In the Criminal Appeal No.907 of 2025, the challenge is to the legality and validity of the Judgment and Order dated 5th March 2025

passed by learned Additional Sessions Judge, Barshi, At Barshi, District Solapur, in Sessions Case No.63 of 2021.

4. By the impugned Judgment and Order dated 5th March 2025, Accused No.1 - Kirtimala Aagatrao Kale i.e.,the present Applicant, Accused No.4 – Aagatrao Laxman Kale and Accused No.6 – Akash @ Akshay @ Rocky Ashok Bhalekar have been convicted for an offence punishable under Section 302 read with Section 34 of the I.P.C. and they are sentenced to suffer rigorous life imprisonment each and to pay fine of Rs.3,000/-. They are also convicted for an offence punishable under Section 120(b) read with Section 34 of the I.P.C. and sentenced to suffer rigorous imprisonment for 14 years each and to pay fine of Rs.2,000/- each. They further also convicted for the offence punishable under Section 201 read with Section 34 of the I.P.C. and sentenced to suffer rigorous imprisonment for three years each and to pay fine of Rs.1,000/- each. Accused No.5 has been acquitted of all the charges.

5. It is the principal submission of Ms. Kondekar, learned counsel appearing for the Applicant, that the present case is based on circumstantial evidence and that the learned Sessions Judge has not specifically recorded the circumstances against the present Applicant which conclusively prove the offences punishable under Sections 302, 201 and 120-B read with Section 34 of the I.P.C. She submits that the circumstances which can be culled out from the reasoning given by the

learned Trial Court are as follows:

- i. Deceased last seen together with Accused Nos.3 and 6.
- ii. Discovery of the dead body of the deceased at the instance of the Applicant i.e. Accused No.1.
- iii. Motive is, by use of Black Magic, wherein about 3 years ago allegedly Accused had committed the murder of Somnath Kale.
- iv. Recovery of blood-stained weapon at the instance of the present Applicant.
- v. Discovery of the ashes produced by burning the clothes of all the Accused at the instance of the Applicant.

6. It is the submission of Ms. Kondekar, learned counsel appearing for the Applicant that the Panchnama regarding discovery of dead body of the deceased at the instance of the Applicant, is before the Applicant's arrest and therefore, on the touch stone of law laid down by the Supreme Court in the Case of *Rajesh and Another Versus State of Madhya Pradesh*¹, the said circumstance can not be taken into consideration. As far as the motive is concerned in committing the murder of Somanath Kale, PW3 – Komal Somnath Kale and IO – Rajkumar Balaji Kendre have stated in their depositions that the death of Somnath Kale is accidental, and therefore, the motive is not established. She submitted that, as the case is of circumstantial

1 (2023) 15 Supreme Court Cases 521

evidence, motive has to be established. As far as the recovery of weapon at the instance of the Applicant and blood-stains found on the said weapon, it the contention that the Chemical Analyzer's Report regarding blood-stain is inconclusive, and therefore, those circumstances cannot be taken into consideration. She further submitted that the Applicant is a lady of 29 years, and therefore, the relief sought in the Interim Application be granted and the Applicant be released on Bail.

7. On the other hand, the learned APP for the Respondent – State strongly opposed the Application. He submitted that by considering all the circumstances and by giving detailed reasons, the learned Sessions Court has convicted the Applicant. He therefore, submitted that the the present Interim Application be rejected.

8. Before considering the rival submissions, it is necessary to set out the well established parameters required to be taken into consideration while considering the case of circumstantial evidence. The Supreme Court in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*² in paragraph no.153 has held as follows :

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

² (1984) 4 SCC 116.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

[Emphasis added].

9. Thus, what the supreme Court has held is that the circumstances from which the conclusion of guilt is to be drawn should be fully established. The primary principle is that accused must be and not merely may be guilty before a Court can convict. The facts so established must be so consistent only with the hypothesis of the guilt

of the accused. The circumstances should be of conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved. It has been further held that there should be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

10. For considering this bail application, the circumstances on record are required to be examined for recording *prima facie* satisfaction regarding the involvement or otherwise of the Applicant in the crime.

11. As far as the circumstance of discovery of the dead body of the deceased at the instance of the Applicant is concerned, it is required to be noted that the panchnama regarding discovery of the dead body of the deceased at the instance of the Applicant i.e. Accused No. 1 under Section 27 of the Evidence Act was recorded on 31st January 2021 at 15:40. The FIR has been lodged on 31st January 2021 at 23.14 and the Applicant has been arrested on 1st February 2021 at 11.04. a.m..

12. In view of this factual position, it is necessary to set out Paragraph No.28 and Paragraph No.35 of the Judgment of the Supreme Court in the case of ***Rajesh and another*** (supra), which read as under :

“28. Section 26 of the Evidence Act, 1872 (for brevity "the Evidence Act"), provides that no confession made by any person whilst he is in the custody of a police officer shall be proved

against such person, unless it is made in the immediate presence of a Magistrate. Section 27, thereafter, is in the nature of an Exception to Section 26 of the Evidence Act. It states that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Therefore, it is essential under Section 27 of the Evidence Act that the person concerned must be "accused of an offence" and being in the "custody of a police officer", he or she must give information leading to the discovery of a fact and so much of that information, whether it amounts to a confession or not, that relates distinctly to the fact discovered, may be proved against him. In effect, both aspects viz. being in "the custody of a police officer" and being "accused of an offence", are indispensable prerequisites to render a confession made to the police admissible to a limited extent, by bringing into play the Exception g postulated under Section 27 of the Evidence Act.

35. In the case on hand, though Rajesh Yadav was taken to the police station, be it on 29-3-2013 or even earlier, he could not be said to be in "police custody" till he was arrested at 18:30 hours on 29-3-2013, as he did not figure as an "accused" in the FIR and was not "accused of any offence" till his arrest. Therefore, it was his arrest which resulted in actual "police custody", and the confession made by him, before such arrest and prior to his being "accused of any offence", would be directly hit by Section 26 of the Evidence Act and there is no possibility of applying the Exception under Section 27 to any information given by him in the course of such confession, even if it may have led to the discovery of any fact. In consequence, the purported discovery of the dead body, the murder weapon and the other material objects, even if it was at the behest of Rajesh Yadav, cannot be proved against him, as he was not "accused of any offence" and was not in "police custody" at the point of time he allegedly made a confession. So too would be the case with Raja Yadav and Om Prakash Yadav, as they also were not named as the "accused" in the FIR and were not "accused of any offence" till they were arrested and taken into "police custody", well after the recording of their confessions and the alleged seizures based thereon. Needless to state, this lapse on the part of the police is fatal to the prosecution's 9 case, as it essentially turned upon the "recoveries" made at the behest of the appellants, purportedly under Section 27 of the Evidence Act."

13. Thus, what has been held by the Supreme Court is that for the purpose of Section 27 of the Evidence Act, what is necessary is that the

information has to be given by the person who is accused of any offence and when he is in Police custody.

14. The material on record shows that the panchnama allegedly recorded under Section 27 of the Evidence Act regarding discovery of the dead body of the deceased is recorded on 31st January 2021 at 15:40 and the FIR has been subsequently lodged on 31st January 2021 at 23.14 and the date of arrest is on the next date i.e. 1st February 2021 at 11:04 a.m.

15. Thus, at the relevant time of the panchnama, the Applicant was neither an accused in the offence nor in the custody of the police officer. Thus, *prima facie*, the circumstance of discovery of the dead body of the deceased at the instance of the Applicant on 31st January 2021 at 15:40 is not relevant and there is no legal evidence of the said discovery panchnama under Section 27 of the Evidence Act. Thus, *prima facie* observations of the Hon'ble Supreme Court in the case of ***Rajesh & Another*** (supra) are applicable to the present case.

16. As far as the circumstance of "last seen together" is concerned, the said circumstance is not against the present Applicant, but is stated to be against Accused No. 3 and Accused No. 6.

17. As far as the motive that the deceased had killed Applicant's brother namely, Somnath Kale in the year 2018 by using Black Magic, the evidence of PW3 – Komal Somnath Kale and the PW14 – IO –

Rajkumar Balaji Kendre is contrary to the said circumstance as PW3 (at Page150) and PW14 (at Page 285) have stated that said Somnath Kale has died in an accident.

18. As far as the circumstance of discovery of the weapon at the instance of the Applicant and blood-stain on the said weapon are concerned, the Chemical Analyzer's Report show that the blood group found on the weapon is inconclusive (At page 7 of Compilation)

19. Thus, *prima facie*, this is the case where it cannot be held that the the circumstances from which the conclusion of guilt is sought to be drawn are fully established. There is substance in the contention raised by the Ms. Kondekar, learned counsel appearing for the Applicant that the circumstances are not of conclusive nature and circumstances do not exclude every possible hypothesis except the one to be proved. In the present case, there is no complete chain not to leave any reasonable ground for the conclusion consistent with the innocence of the accused. There is also substance in the contention that this is not the case where all human probability act must have been done by the accused.

20. The Applicant is a lady of 29 years.

21. Accordingly, in the facts and circumstances, the case is made out for grant of suspension of sentence and grant of bail.

22. In view of the above discussion, we pass the following order :

::ORDER::

- [a] The sentence imposed on Applicant by learned Additional Sessions Judge, Barshi, At Barshi, District Solapur vide judgment and order dated 5th March 2025 passed in Sessions Case No.63 of 2021 is suspended till the final disposal of Criminal Appeal No.907 of 2025.
- [b] The Applicant be released on furnishing PR bond in the sum of Rs. 25,000/- with one or more solvent sureties of like amount in connection with Sessions Case No.63 of 2021.
- [c] Bail be submitted before the trial Court.
- [c] Till the Criminal Appeal is disposed of, the Applicant shall report to the Trial Court on the 1st Monday of every quarter commencing from June 2026.
- [d] The Applicant shall attend this Court when appeal is listed for final hearing.

23. It is made clear that observations made in this order are *prima facie* observations made for the consideration of application seeking suspension of sentence and bail.

24. Interim application is disposed of in above terms.

[PRAVIN S. PATIL, J.]

[MADHAV J. JAMDAR, J.]