

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 2780 OF 2015

Nilesh s/o Sitaram Ghanekar

.... APPLICANT

V E R S U S

The State of Maharashtra & Ors.

.... RESPONDENTS

.....

Mr. Shrish Gupte, Senior Advocate with

Mr. Ashok Mundargi, Senior Advocate

i/b Lex Aquila Law Firm for the applicant.

Mr. D.R.Kale, Public Prosecutor for Resp. - State.

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CORAM : V.M.DESHPANDE, J.

DATE : 16th JUNE, 2015

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PER COURT :

1. This is an application u/s 439 of the Code of Criminal Procedure for grant of bail.

2. Present applicant is arrested in connection with Crime No. 86/2015 registered with Satara police station, Aurangabad Dist. Aurangabad for the offences punishable u/s 307,308,419,420,468,471,120 (B),109,114,182,211,194 read with 34 of the Indian Penal Code and u/s 3 read with 25 and 27 (2) of the Indian Arms Act.

3. Heard Mr. Shrish Gupte, learned Senior counsel with Mr. Ashok Mundargi, learned Senior counsel instructed by Lex Aquila Law Firm for the applicant and Mr. D.R.Kale, learned Public Prosecutor for Respondent – State in extenso.

4. Both the learned counsels submitted their respective case thoroughly and urged before this Court for their respective prayers.

5. The submission of the learned Senior counsel is that the applicant is arrested without there being any F.I.R. against him. He submitted that, therefore, the detention in the custody of the present applicant is nothing but an illegal detention. He further submitted that the penal sections for which the applicant is sought to be prosecuted, are not at all applicable in the given set of facts. He submitted that, at the most, if everything is granted in favour of the prosecution, applicant can be booked for the offence punishable u/s 182 of the Indian Penal Code. He submitted that the offence u/s 182 of the Indian Penal Code is non cognizable and bailable offence. He submitted that in order to circumvent, intentionally the provisions of Sections 307,308,419,420,468,471 of the Indian Penal Code are pressed into service. He submitted that a close look to all these Sections would reveal that those provisions are totally inapplicable.

He further submitted that the applicant was arrested on 23/05/2015. After having his initial police custody remand, he has been sent to Magisterial custody

remand and thus his custodial presence is not warranted and, therefore, he prays that the applicant be released on bail.

6. Per contra, learned Public Prosecutor, in his usual submissive manner, submitted that during the course of investigation, it is noticed by the Investigating Officer that the F.I.R. filed by the present applicant is false one. He further submitted that the applicant has entered into conspiracy with two other arrested accused and one other accused who is still absconding and, therefore, the applicant is also booked for the conspiracy. He submitted that from the other two arrested accused, two pistols are recovered at their instance. He also submitted that other accused is still absconding. He submitted that the applicant hails from legal profession and if he is released on bail, he will tamper the prosecution case and, therefore, the application for bail should be rejected.

7. At the out set, it is to be observed that undisputedly, present applicant has lodged F.I.R. with police station Satara, Aurangabad on 06/05/2015. Investigating Officer after going through the said F.I.R., noticed that it discloses the commission of cognizable offence, therefore, he registered the same as Crime No. 86/2015 for the offence punishable U/s 307, 120(B) of the Indian Penal Code and u/s 3 and 25 of the Indian Arms Act against two unknown persons and the person who is named therein.

Chapter XII of the Code of Criminal Procedure [for short, 'Code'] deals with the information to the police and their powers to investigate. Section 154 of the Code deals

with, if the information, either orally or in writing, is received in police station or to the Officer incharge of the police station, is of the opinion that it relates to the commission of a cognizable offence, he is to enter that information or intimation in its substance in a book kept in the police station in such form as the State Government has prescribed. Section 155 of the Code deals with the information as to the non cognizable offence and investigation of such cases. The Police Officer gets power to investigate the cognizable case through section 156 of the Code. Procedure is mentioned in Section 157 of the Code. Section 169 of the Code deals with the release of the accused when the evidence is deficient. Section 169 of the Code reads as under :

“ Release of accused when evidence deficient : If, upon an investigation under this Chapter, it appears to the Officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial ”.

After the completion of the investigation u/s 173, if the Investigating Officer is of the view that the material collected during the course of investigation is sufficient, then he is duty bound to forward the report to the Magistrate in a form prescribed by the State Government.

8. In the present case, after the receipt of the F.I.R. No. 86/2015, according to the learned Public Prosecutor, the investigation was conducted. He has invited my attention to the notice given by the Investigating Officer to the present applicant u/s 41 (A) of the Code, by which the applicant was called at the police station for the investigation in respect of Crime No. 86/2015 lodged by the applicant himself. There is no dispute that in pursuance to the said notice, applicant has responded. Applicant is arrested on 23/05/2015. Thus, the applicant is arrested when he had been to the police station in response to the notice given to him by the Investigating Officer u/s 41 (A) of the Code.

It is also not in dispute that till today there is no separate F.I.R. lodged against the present applicant. Applicant is arrested in respect of crime in which he himself is a first informant.

9. According to the submission of the learned Public Prosecutor, during the course of the investigation, it was found by the investigating Officer that the F.I.R. lodged by the present applicant is false one.

10. The Investigating Officer has filed affidavit before

this Court. The affidavit is completely silent to that effect. Further, learned Public Prosecutor has fairly submitted that till today the Investigating Officer has not filed appropriate summary before the learned Magistrate pointing out that the F.I.R. lodged by the present applicant is false one.

Thus, till this time, without there being anything on record, present applicant is arrested in connection with crime, in which he himself is a first informant.

11. During the course of investigation, if the Investigating Officer, after the collection of the material, is of the opinion that the complaint filed is false one or otherwise, Investigating Officer has to file appropriate summary before the learned Magistrate. Learned Magistrate thereafter is duty bound to give the notice to the first informant and after hearing the complainant has to decide about the summary filed by the Investigating Officer. After hearing the complainant, it is open for the learned Magistrate either to accept the respective summary filed by the Investigating Officer or the learned Magistrate can reject the same.

In the present case, no such procedure is adopted by the Investigating Officer. The Investigating Officer himself has decided that the F.I.R. lodged by the first informant/present applicant is false one. It is not the province of the Investigating Officer to decide as to whether the F.I.R. lodged by the first informant is false or otherwise.

12. In the present case, since till today no summary is filed before the learned Magistrate, that means till today there

is no material available on record to show that the contents of F.I.R. No. 86/2015 are untrue or the complaint is false one. In that view of the matter, applicant can not be arrested bereft of any independent F.I.R. against him.

13. Further, applicant is in jail since 23/05/2015. The investigation, so far as applicant is concerned, is already over and thereafter he has been taken in magisterial custody remand. The bail of the applicant is opposed by the learned Public Prosecutor on the ground that if the applicant is released on bail, (i) he shall tamper the evidence of the prosecution case, (ii) the person who is named in the F.I.R., is having threat perception from the applicant and (iii) one of the accused is still to be apprehended. Alternatively, he submitted that if the applicant is to be released on bail, he shall be released on certain conditions.

14. It is informed to this Court that the applicant is a practicing lawyer since 1997. There is no dispute on the part of the prosecution side that the applicant is not having deep root in the society. It is also not the case of the prosecution that he will not be available to the course of justice.

15. The submission of the learned Public Prosecutor that if the applicant is released on bail, then he will tamper the evidence, is not based on any foundation. Mere apprehension or perception on the part of the prosecution that the applicant if released on bail, will tamper with the prosecution case, is not sufficient to hold him in the jail. The prosecution is duty

bound to place relevant material on record to show that in case the applicant is released on bail, he will tamper with the prosecution case. In the present case, according to the learned Public Prosecutor, since the applicant belongs to the legal fraternity, there is chance of tampering the prosecution case. In fact, in his reply, Investigating Officer has stated that there is every possibility of tampering of the prosecution case by the applicant by using the skill of his profession. Such apprehension, as expressed in the affidavit, is ill-founded. What is material for making such statement is not disclosed in the affidavit or in the investigation papers. Further, the other accused, according to the prosecution, are absconding, for that the present applicant can not be held to be responsible unless there is material on record that he has facilitated the absconding of such accused person.

16. Learned Public Prosecutor has invited the attention of this Court to the complaint lodged by the person, who was named as accused by the applicant. After having gone through the same, the apprehension can be taken care of by imposing certain conditions.

17. In one of the recent decisions of the Hon'ble Apex Court, Hon'ble Apex Court in Sanjay Chandra Vs. Central Bureau of Investigation reported in (2012) 1 Supreme Court Cases 40 has observed in paragraph 40 as under,

“ The grant or refusal to grant bail lies within the discretion of the

court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But, at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required ”.

18. In the very same Judgment, Hon'ble Apex Court has ruled that the object of bail is neither punitive or preventive. In the said Judgment, it has been observed that the detention in custody pending completion of trial would be cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. What is that “necessity” is not at all spelt out in the present prosecution case.

19. Paragraph No. 23 of the said Judgment reads as under :

“ Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson ”.

20. In view of the aforesaid guidelines as available and after taking the over-all survey of the prosecution case, this Court is of the considered opinion that further continuance of the applicant in jail is not warranted. That leads me to pass the following order.

ORDER

(i) Present Criminal Application is hereby allowed.

(ii) Applicant Nilesh s/o Sitaram Ghanekar be released on bail in connection with Crime No. 86/2015 registered with Satara police station,

Aurangabad Dist. Aurangabad for the offences punishable u/s 307,308,419,420,468,471,120 (B),109,114,182,211,194 read with 34 of the Indian Penal Code and u/s 3 read with 25 and 27 (2) of the Indian Arms Act on he executing P.R. Bond of Rs. 50,000/- [Rupees Fifty Thousand] with two solvent sureties of like amount. Bail before the trial Court.

(iii) Present applicant shall attend local Crime Branch of Aurangabad city once in a week, preferably on every Sunday in between 4.00 – 5.00 p.m. till the Charge Sheet is filed.

(iv) Present applicant shall not indulge himself in such a fashion by which the present case of the prosecution is tampered.

(v) The parties to act on the hamdast of the operative order of this Order.

[V.M.DESHPANDE, J.]