

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 24 OF 2015

Arun Prakash Balani .. Applicant

Versus

State of Maharashtra .. Respondent

Mr. Mahesh Jethmalani, Sr. Advocate i/b Ms. Gunjan Mangla for the Applicant.

Ms. P.P. Shinde, for the State/Respondent.

Mr. S.A. Varpe, C.P.I. Khar Police Station.

Adv. Jayesh Wani for the original informant.

CORAM :- SMT. SADHANA S. JADHAV, J.

DATED :- JANUARY 16, 2015.

P.C. :-

1 The applicant herein was arrested on 3.1.2015 in Crime No.6 of 2015 registered at Khar Police Station for the offences punishable under Sections 328, 354, 506(2) and 329 of IPC. The applicant was presented before the concerned Magistrate on the same day i.e. 3.1.2015 and was given police custody till 5.1.2015. The applicant was sent to judicial custody on 5.1.2015. The applicant filed an application under Section 439 of Cr.P.C. before the Sessions Court on 6.1.2015. The Court was on leave. Hence, the matter was

assigned to the in-charge Court. The matter was adjourned to 13.1.2015. In the meanwhile, the applicant had approached the High Court and had filed the present application under Section 439 of Cr.P.C.

2. On 8.1.2015, this Court (Coram: P.D.Kode, J.) had issued notice before admission, returnable on 13.1.2015. It was directed to be listed first on Supplementary Board.

3. On 13.1.2015, the learned Senior Counsel had advanced submissions on behalf of the applicant. The learned APP was also heard and the matter was treated as part-heard. On 14.1.2015, the matter was again heard partly and was adjourned to 15.1.2015. On 15.1.2015, Mr. Jaswani, learned counsel for the complainant had tendered written arguments which were taken on record and marked “X” for identification. Upon perusal of the written arguments, Hon'ble Justice P.D. Kode had passed an order “Not before the Bench presided over by the undersigned”. The matter was circulated before this Court since liberty was granted to move the appropriate Bench. The learned Senior Counsel, at the time of circulating the matter, had

submitted before this Court that the matter was heard at length. It was closed for orders and thereafter on 15.1.2015, Hon'ble Justice Kode had refused to hear the matter. Hence, the matter was heard by this Court in the afternoon sessions after the Production Board.

4. It is contended by the intervener by way of written submissions that the applicant herein does not deserve any special status to jump the queue before the Sessions Court and approach the High Court when the matter is pending before the subordinate judiciary and hence it was prayed that the application be dismissed as not maintainable.

5. As against this, the learned Senior Counsel submits that the application before the Sessions Court has been withdrawn when the matter was being argued before Hon'ble Justice Kode. That the matter was heard on 13.1.2015, 14.1.2015 and 15.1.2015. The learned Senior Counsel further submits that Section 439 of Cr.P.C. contemplates concurrent jurisdiction upon the Sessions Court as well as the high Court for considering the application for bail.

6. The learned APP submits that although it is true that there is concurrent jurisdiction under Section 439 of Cr.P.C., judicial propriety warrants that the matter be decided by the Court of the first instance and that there is no special reason for availing of the remedy before the High Court when the matter is being decided by the Court of the first instance. It is true that this would set a wrong precedent. However, taking into consideration the facts of the present case and that the predecessor Bench had entertained the application despite the fact that an application seeking bail was pending before the Sessions Court, this Court is inclined to hear the matter on merits. However, it is made clear that this shall not be taken as a precedent. Moreover this Court cannot be oblivious of the fact that the application filed before the Sessions Court has been withdrawn. It would, therefore, not be appropriate to relegate the applicant to Sessions Court.

7 It is the case of the prosecution that on 2nd January 2015 the prosecutrix has approached the Khar Police Station and had lodged a report in respect of an incident dated 13th December 2014.

She has alleged in the report that she had met the present applicant in November 2014. In the second week of December 2014, the applicant had allegedly called upon her along with her banker at Khar Gymkhana in respect of business transaction. She was to arrange for finance from banker for the present applicant. At Khar Gymkhana while they were having a fruit juice, the complainant is alleged to have received a phone call from her father and, therefore, she went to the side of the pool to receive the call. After she returned she had fruit juice at the request of the present applicant. After taking fruit juice she felt drowsy. The applicant is alleged to have informed her that his cousin resides in close proximity and, therefore, they had decided to go to the house of cousin of the present applicant. The cousin of the applicant had requested the complainant to take rest in the bed room. The complainant had requested them to wake her up after about 20 minutes. After she regained from the drowsiness she woke up and she found that applicant herein was attempting to outrage her modesty. She had disliked the said gesture. The applicant is alleged to have immediately apologised for his act and thereafter they had again resumed their meeting at Khar Gymkhana.

The complainant has further alleged that in the process of outraging her modesty the applicant had denuded her of her chain which was worth Rs.2,00,000/-. On the basis of her statement, Crime No.6 of 2015 was registered at the Police Station on 2nd January 2015. On 3rd January 2015, the applicant was arrested.

8 The applicant was presented before the Judicial Magistrate, First Class on 3rd January 2015 and was remanded judicial custody till 5th January 2015. In the course of investigation, the applicant while in police custody, had disclosed to the Investigating Officer that he had intimate relation with the complainant, that he has taken her photograph on his cell phone however, he had expressed his inability to give the cell phone to the Investigating Officer while in police custody. The cell phone was given to the Advocate representing the accused applicant before the Sessions Court. While in police custody it was also admitted that the chain was in the house of the cousin of the applicant. However, it was misplaced. The applicant is alleged to have met the complainant on 13th December 2014, hence it is an admitted fact.

9 The learned Senior Counsel in the course of argument has drawn the attention of this Court to the whats-app messages between the complainant and the applicant. Prior to 13.12.2014, it appears that there were intimate chats between the complainant and the applicant and they had also exchanged the images of each other. Learned Senior Counsel submits that there is delay in lodging FIR. This would assume importance in view of the fact that soon after the incident also the complainant had purportedly accepted the apology from the applicant and they had resumed their meeting at Khar Gymkhana soon thereafter. They had also sent messages to each other after the incident i.e. on 14.12.2014. It does not in any manner reveal that the complainant was annoyed with the applicant for the incident dated 13.12.2014. She has accepted the apology from the applicant. It is true that there is no plausible explanation for the delay in setting the law into motion for an alleged serious incident dated 13.12.2014. The complainant and the applicant had also exchanged intimate messages “after 13th December 2014 till almost filing of the FIR”. The conduct of the applicant and complainant after the incident assume importance.

10 The learned Senior Counsel appearing for the applicant has further submitted that in the present case Sections 328 and 329 of I.P.C. would not be attracted in any way. Section 328 contemplates as follows :-

“328. Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

11 In the present case, as far as section 328 is concerned, there was no intention to cause hurt, rather no hurt was caused to the applicant. Taking into consideration the fact that the applicant has been in custody since 3rd January 2015 and that the application filed by the applicant before the Sessions Court has been withdrawn before the Sessions Court. This Court had heard the application on merits. On perusal of the papers of investigation, it prima facie appears that there were intimate relations between the complainant and the applicant. Irrespective of the incident dated 13th December 2014, they had resumed their contacts with each other. Learned senior

counsel submits that this would simply mean that the complainant had accepted the apology given by the applicant. Learned senior counsel upon instructions submits that since the chain is missing he would deposit the value of the chain before the concerned Magistrate's Court. The applicant has made out prima facie case for grant of bail.

12 The observations made herein above are prima facie in nature and shall not be considered for quashing of FIR, discharge application or at the time of trial.

ORDER

- (i) The application is allowed.
- (ii) The applicant shall deposit the sum of Rs.2,00,000/- by demand draft before the concerned Magistrate within one week from the date of his release.
- (iii) The Applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.50,000/- and one or more sureties in the like amount.
- (iv) The learned senior counsel pon instructions submits that the advocate Zamir Khan would hand over the cell phone of the applicant to the Investigating Officer today. The Investigating Officer shall take the custody of the same after recording a panchnama of handing over cell phone.

- (v) The applicant shall co-operate with the investigating agency to the best of his capacity and report to the Police station as and when called. Application is disposed of.

13 Intervening application is heard, allowed and disposed of. Learned counsel for the intervenor has conceded to delete the objectionable material in the written submissions.

(SMT. SADHANA S. JADHAV, J.)