

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

9 CRIMINAL APPLICATION NO. 5210 OF 2016

**SHAHU @ MANGESH S/O SURESH
DESHMUKH**

VERSUS

**THE STATE OF MAHARASHTRA
& ANR.**

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Mr. R.M.Deshmukh, Advocate for Applicant.

Mr. S.M.Ganachari, A.P.P. for Resp. – State.

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CORAM : A.M.BADAR, J.

DATE : 28th SEPTEMBER, 2016

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PER COURT :

1. Applicant/accused in Crime No. 41/2016 registered at Mehunbare police station, Dist. Jalgaon for the offences punishable u/ss 307,143,147,149,141,323,504,427 of the Indian Penal Code, by this application is seeking pre-arrest bail.

2. Heard learned counsel for applicant/accused. He

argued that co-accused Deepak Wagh, against whom role of assault by means of fighter is ascribed, has been granted anticipatory bail by learned Additional Sessions Judge, Jalgaon and, therefore, on the principle of parity, applicant is entitled for anticipatory bail. It is further argued that F.I.R. itself shows that applicant had only kicked motorcycle on which informant Imran Shaikh Shabbir @ Raju was travelling along with his maternal uncle Shaikh Nisar Shaikh Gani. Except this, nothing is averred against present applicant in the subsequent assault by other accused persons. It is further argued that informant is habitual offender involved in several offences registered in that area. My attention is drawn to the Judgment in Sessions Case No. 120/2011 convicting informant of the offence punishable u/s 376 of Indian Penal Code and other offences. My attention is further drawn on 2 proposals for externment of informant to contend that informant is habitual offender and police also wants him to be out of territorial jurisdiction of Jalgaon and other adjoining districts. It is argued that recent proposal dated 23/07/2016 also shows that 5 offences were registered against informant Imran Shaikh Shabbir @ Raju.

3. It is argued by learned counsel for applicant that even brother of informant, in past, had lodged report alleging commission of various offences, but investigating agency ultimately found that averments in respect of offence punishable u/s 395 of Indian Penal Code are unsubstantiated. It is further argued that applicant is serving as Security Guard with Bombay Municipal Corporation from the year 2014 and

as very limited role is attributed to him in crime in question, his custodial interrogation is not warranted. Nothing is required to be recovered from applicant.

4. Learned A.P.P. opposed the application by placing reliance on injury certificates of informant Imran Shaikh Shabbir @ Raju as well as that of Shaikh Nisar Shaikh Gani. Learned A.P.P. further argued that there are several eye witnesses to the incident in question, who are naming present applicant. Statements of passers-by also reflect commission of offence alleged against present applicant and his associates.

5. Perused papers of investigation including F.I.R. lodged by Imran Shaikh Shabbir @ Raju on 18/06/2016. Voluminous documents relied by learned counsel for applicant shows that informant has heavy criminal antecedents and proposals were moved by the police officers for his externment. This, at the most, will keep the Court on guard in order to check whether there is possibility of false implication. However, there is no rule either of law or of prudence that habitual offender will always speak a lie.

6. Offences alleged against present applicant and co-accused are punishable u/ss 307,143,147,148,149,323,504 of the Indian Penal Code apart from those under the Arms Act and the Maharashtra Police Act. F.I.R. by Imran Shaikh Shabbir @ Raju is to the effect that when on 18/06/2016 at about 9.30 a.m. he was proceeding from Mehunbare to Chalisgaon on his motorcycle with his maternal uncle Shaikh

Nisar Shaikh Gani, present applicant who was riding the motorcycle with co-accused Munna Sapke, as pillion rider, came from behind near bridge of Girna and kicked motorcycle of the informant causing fall of informant as well as of his maternal uncle Shaikh Nisar Shaikh Gani. Then, according to informant, the present applicant and co-accused Munna Sapke abused him and he was made immobile by pointing country made revolver at him by co-accused Munna Sapke. Thereafter, other accused persons came by a taxi. It is further averred that thereafter co-accused indulged in rioting. Other co-accused assaulted the informant as well as his maternal uncle Shaikh Nisar Shaikh Gani by means of swords, fighter and fiber rod. It is further averred that when Shaikh Sadiq who was working in the adjoining field, tried to intervene. Accused persons abused and slapped him. F.I.R. shows that the incident was witnessed by Bilal Shah and Mansur Ali.

7. Papers of investigation shows that statements of witnesses were immediately recorded by Investigating Officer. Shaikh Sadiq, whose presence on the spot is vouched in F.I.R. has named present applicant as a person who was present on the spot at the time of the incident. Shaikh Sadiq has described how the incident of assault was going-on. Shaikh Nisar Shaikh Gani is an injured witness. His version is corroborating the version of informant and this witness is also stating that present applicant had kicked motorcycle of informant causing their fall. Statements of Bilal Shah and Mansur Ali, whose presence is disclosed in F.I.R. are also stating about presence of present applicant at the time of

incident in question. Syed Rauf and Bhaiyasaheb Patil appears to be natural witnesses, who had seen happening of the incident in question, but they were not knowing names of assailants.

8. On this factual back-drop, it can not be said that there is concoction about the incident. Presence of applicant on the scene of occurrence is vouched by witnesses.

9. On this back-drop, let us consider whether kicking the motorcycle causing fall of injured and subsequently abuses and threatening to them, will absolve applicant from the rigor of Section 307 read with section 149 of the Indian Penal Code making him entitled for anticipatory bail. The incident, as disclosed by the informant as well as injured witnesses, goes to show that it was done with meeting of minds. In a planned manner, *prima facie*, it appears that the injured and his maternal uncle were made immobile and in that part of the incident, the present applicant had taken main role. Immediately thereafter, co-accused came from the direction of Mehunbare village and indulged in rioting and assaulted the informant and his maternal uncle Shaikh Nisar Shaikh Gani. *Prima facie*, there is evidence regarding formation of an unlawful assembly with a common object. As object is merely a mental state of mind, no direct evidence can be said to be available. Common object is required to be gathered from the acts and the result therefrom. It is well settled that once membership of unlawful assembly is established, it is not incumbent to establish whether any

specific overt act has been done by the accused. Mere membership of unlawful assembly is sufficient and every member of unlawful assembly is vicariously liable for the act done by other members of unlawful assembly. In this context, I found no substance in the contention of learned counsel for applicant that as no role is stated to have been played by applicant in the actual assault, Section 307 of the Indian Penal Code is not attracted in the case of present applicant.

10. Perusal of injury certificate of Imran Shaikh Shabbir @ Raju goes to show that he has suffered fracture of Orbit. This seat of injury shows the intention. The force applied while dealing a blow also point out intention. Apart from fracture of Orbit, Imran Shaikh Shabbir @ Raju has suffered other injuries also. In the similar way, Shaikh Nisar Shaikh Gani has also suffered blunt trauma and contusion. For attracting Section 307 of the Indian Penal Code, even infliction of any injury is not at all necessary. What is necessary is an intention coupled with overt act. Therefore, *prima facie*, at this stage, it can not be said, particularly looking to the injuries caused, that the offence u/s 307 of the Indian Penal Code is not at all attracted.

11. The order of the learned Additional Sessions Judge, by which co-accused has been granted anticipatory bail is bereft of any reasoning in respect of applicability of section 149 of the Indian Penal Code and as such the same is of no assistance to claim parity.

12. Criminal antecedents of informant are not relevant at this stage. Those will have to be kept in mind at the time of deciding the case.

13. In this view of the matter, considering the nature of offence, the manner in which it was committed and the evidence available against present applicant, no case for pre-arrest bail is made out. Hence, the following order.

(i) The Criminal Application stands rejected.

(ii) Needless to mention that all these observations are prima facie in nature which shall have no bearing on the trial against present applicant.

[A.M.BADAR, J.]