

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO. 220 OF 2017

Shabbir @ Noor Ahmed Munshi ...Applicant
Versus
State of Goa ...Respondents

Mr S G Desai, Senior Advocate with Mr. D. Dhond, Advocate
for the Applicant.
Mr S R Rivankar, Public Prosecutor *for the Respondents-*
State.

CORAM: NUTAN D. SARDESSAI, JJ

Reserved for Order on : 21st September, 2017
Order Pronounced on : 28th September, 2017

ORAL ORDER

1. Heard Shri S. G. Desai, learned Senior Advocate appearing for the Applicant and Shri S. R. Rivankar, learned Public Prosecutor appearing for the State.

2. It was the contention of Shri S. G. Desai, learned Senior Advocate appearing for the Applicant that the offence was committed on 04.01.2014, the applicant was arrested on the same day and has been in custody for the last more than three and half years. An incident had occurred during the morning session when the Applicant had driven away two persons from his shop while the second incident took place at around 12.00 noon when the Complainant visited his shop alongwith his

sons and assaulted him with an iron pipe causing him bleeding injuries and his fall to the ground. He had lodged a complaint from the police custody itself against the Complainant and his sons regarding the incident which had occurred on the morning of 04.01.2014 but no offence was registered by the police which compelled him to file a Writ Petition pursuant to which a direction was issued to the learned JMFC to conduct the necessary inquiry under Section 156(3) of the Cr.P.C. Shri S. G. Desai, learned Senior Advocate further submitted that the occurrence was not intentional and there was provocation by the Complainant by returning at 12.00 noon for questioning him about the incident of morning. At the highest, the Applicant had acted in exercise of his right of self defence and the incident followed thereafter. In any event, his case was covered under Section 100 of the Indian Penal Code and no case whatsoever was made out to allege the offence under Section 302 of the Indian Penal Code though the charge was framed against him thereunder.

3. It was the contention of Shri S. G. Desai, learned Senior Advocate that assuming without admitting the offence at the highest against him was made out under Section 304(ii) of the Indian Penal Code. His last bail application was moved in July of this year and which came to be rejected by the Children's Court. The trial had progressed in which 17 witnesses had been examined including the Complainant and his family. The Children's Court however rejected the bail application for the reasons recorded at paragraphs 13, 15 and 16 and there was no basis in the finding of the learned Children's Court that he

was likely to tamper with the evidence. He adverted to the statements of Pw.3 and Pw.9 to show that his plea in defence was amply admitted at the instance of the two prosecution witnesses. The chargesheet had been filed based on his complaint against the Complainant and his major sons and also against the minor son before the Juvenile Court. He relied in Gudikanti Narasimhulu & Ors. v. Public Prosecutor, High Court of Andhra Pradesh [AIR 1978 SC 429]; Sanjay Chandra v. Central Bureau of Investigation [(2012)1 SCC 40] and Babu Singh & Ors v. State of U. P. [AIR 1978 SC 527] to buttress his case for his release on bail.

4. Shri S. R. Rivankar, learned Public Prosecutor on behalf of the State contended that five witnesses of the prosecution had turned hostile which was a clear indication that the Applicant was tampering with the witnesses unlike five witnesses who had corroborated the case of the prosecution in material particulars. No plea was taken on behalf of the Applicant of self defence at the time of framing of charge or that an offence under Section 304(ii) of the Indian Penal Code was made out and not that under Section 302 of IPC was made out against him. The charge had been framed under Section 302 of the IPC and which order had attained finality in the absence of any challenge at his instance. He further contended without prejudice to his case that no finding should be given by this Court regarding whether the offence under Section 304(ii) of the IPC or that under Section 302 of the IPC was made out as it would unduly influence the Trial Court and

affect the trial which is proceeding under Section 302 of the IPC. He therefore prayed for the dismissal of the application.

5. Shri S. G. Desai, learned Senior Advocate in reply submitted that 5 witnesses who were supporting the case of the prosecution were primarily the Complainant and his family members. The Applicant had amply made out a case for the grant of bail and even otherwise there was no basis in the case of the Respondents that he was tampering with the witnesses.

6. i would consider the submissions in the light of the material brought on record apart from the Judgments relied upon by the learned Senior Advocate.

7. In Gudikanti Narasimhulu (supra), the Hon'ble Apex Court held that refusal of bail causes injury to the right of personal liberty guaranteed by the Constitution. The Court is bound to ensure the ends of justice while considering the bail application. The possibility to thwart the course of justice had to be considered. Where the conduct of the accused in the sub-jail was satisfactory and there was no threat caused to public peace when accused was previously released on parole held that the accused was entitled to conditional bail.

8. In Sanjay Chandra (supra), the Hon'ble Apex Court held at paragraphs 21, 22 and 23 as under :

“21. In bail applications, generally, it has been laid down from the earliest times that

the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a 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. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only

the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of a 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."

9. In Babu Singh (supra), the Hon'ble Apex Court was considering the bail of the appellants who were charged for the offence of murder but were acquitted by the Sessions Court. On Appeal, the High Court held them guilty and sentenced them to life imprisonment. They filed the second application for bail after the first bail application was rejected. It was found that there was no evidence to show that the appellants during the long 5 years when they were out of prison pending appeal that their conduct had any effect on disturbing the peace of the locality. While granting bail, the nature of charge and nature of evidence was a vital factor to be taken into consideration for the grant of bail. The Court had to also consider the likelihood of the applicant interfering with the

witnesses. Refusal of bail was not for punitive purpose but for the bifocal interest of justice to the individual involved and the society affected. Bad record and police prediction of criminal prospects to invalidate the bail are admissible in principle but shall not stampede the Court into a complacent refusal. There was no rational for denying bail to a person who had been sentenced to life imprisonment and when the Court was not in a position to dispose of the appeal for five to six years. The Court should ordinarily unless there are cogent grounds for acting otherwise release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.

10. There was no particular rebuttal of the fact at the instance of the Respondents that the Applicant had on the morning of 04.01.2017 hauled up the two unknown minor boys in the complex for moving about in a suspicious manner and that on the same afternoon while he was in his shop, the Complainant had come to his shop alongwith his three sons and questioned him about his acts in the morning of the alleged assault. It is otherwise borne out from the material produced by the Applicant that he was assaulted with an iron rod on his head by the son of the Complainant named Danish due to which he had sustained bleeding injuries on his head and which was sutured with ten stitches. There was also no rebuttal of the fact that the Applicant had lodged a complaint from custody alleging the assault on his person by the Complainant and his son and that no action was initiated by the police which compelled him to file a Writ Petition invoking

the jurisdiction of this Court and getting a direction to the learned JMFC to initiate proceedings under Section 156(3) of the Cr.P.C. It was subsequently brought on record during the course of arguments that a chargesheet was filed at his instance against the Complainant and his major sons before the JMFC in respect of the incident of assault on his person and against the minor son of the Complainant before the Juvenile Court. In this backdrop, the case has to be appropriately viewed to better appreciate the background of the case which festered into an incident of assault purportedly at the instance of the Applicant and which ultimately resulted in the death of the Complainant's son.

11. Shri S. G. Desai learned Senior Advocate had produced on record the statement of one of the witnesses namely Rupesh, Pw.3 examined before the Children's Court who had revealed that while the Applicant was alone in the shop initially, two sons of the Complainant had caught hold of him. The other accused had come to the rescue of the Applicant and tried to intervene and while a fight was going on between the victim and the Applicant herein, one of the witnesses had brought a rod and hit it on the head of the present Applicant who fell down and was bleeding. No doubt, he was cross examined at the instance of the prosecution and later at the instance of the Applicant and when he reiterated that the Applicant had fallen at the spot, was bleeding profusely till the police arrived and took him for medical examination. The other witness Riyaz Pw.9, examined by the prosecution too revealed that the deceased and the Complainant had caught

hold of the Applicant and thereafter the second witness had gone to his shop and lifted a zinc pipe and hit it on the head of the Applicant who sat down holding his head with bleeding injuries. He too was cross examined on behalf of the State but suffice it to state that during his cross examination at the instance of the Applicant, he maintained that the Applicant was sitting at the spot in front of the shop till the arrival of the police. There was blood on the rod and ground and which had also fallen on his clothes. The second prosecution witness had thrown the zinc pipe at the spot followed by someone from the crowd lifted the pipe which precipitated the deceased-victim to run towards Pooja Hotel and followed by the person who had lifted the pipe who ran after him and hit him with the pipe. The victim had then fallen near Pooja Hotel and thereafter the said man had thrown the pipe and run away. This evidence of the two material witnesses of the prosecution apparently support the case in defence that he was assaulted with a zinc pipe/iron pipe on his head by the family of the Complainant and that he had sustained bleeding injuries and that he had fallen on the ground which is apparently unlike the case of the prosecution that the Applicant had given a chase to the victim and assaulted him with an iron rod on his head causing fatal injuries to him.

12. It is not as if the Applicant had concocted the case of assault but the medical report too reveals that he had suffered suture injuries on his head and that a separate prosecution was launched against the Complainant and his major sons as also the minor before different fora i.e. before the JMFC and

before the Juvenile Court respectively. It is borne out from the order of the learned Children's Court that a case was set out on behalf of the Applicant that Section 302 of the Indian Penal Code was not applicable to the case and what was applicable at the highest was Section 304 of the Indian Penal Code since there was no intention to cause the death of the minor victim boy ensued was in the course of the sudden fight between the Complainant and his major four sons on one side and the Applicant with others on the other. It is another matter that the charge has been framed against the Applicant under Section 302 of the Indian Penal Code and which order has admittedly attained finality in the absence of any challenge at his instance. Nonetheless, it would not deter this Court from arriving at its own conclusions based on the materials on record. Besides, as submitted by Shri S. G. Desai, learned Senior Advocate on behalf of the Applicant, the incident was apparently an outcome of some altercations between the Complainant and his sons and that the Applicant who was inflicted an injury on his head being a serious bleeding injury requiring ten sutures not ruling out the possibility of the Applicant reacting in defence and mounting an attack on the victim in response thereto. This is of course apparent from a, prima facie, consideration of the case at hand and it cannot be ruled out that the Applicant could have acted in his right of self defence after he was seriously injured and inflicted the fatal injuries on the person of the victim. Therefore a possibility of an offence under Section 304(ii) of the IPC being made out against the Applicant cannot be ruled out as remote although it is always open to the prosecution to take its case forward

based on the charge framed against the Applicant under Section 302 of the IPC. The learned Children's Court will not be influenced by the observations made by this Court on its own independent assessment of the material and would decide the case on its own merits at the conclusion of the trial.

13. The learned Children's Court while deciding the last bail application of the Applicant was seized of the fact that the blood of the Applicant had fallen in front of his shop and that the report of the CFSL Laboratory revealed that it was human blood of 'A' group fallen on the shirt, white banian and in front of the shop of the Complainant and being the blood group of the Applicant. Besides, it was also observed that human blood was detected on the weapon of assault namely iron/zinc pipe and blood sample was found on the shutter of the shop of the Applicant being of blood group 'A'. However, the learned Presiding Judge in her own wisdom recorded that the author of the report was yet to be examined and that in the absence thereof it was difficult to conclude that the blood group of group 'A' was detected in the said exhibits.

14. The learned Children's Court was also seized of the fact that some of the prosecution witnesses had resiled from their statements recorded under Section 161 of the Cr.P.C. but hastily concluded that there appeared to be some sort of interference with the evidence/witnesses and on that premise concluded that there would be interference by the Applicant and tampering of the evidence in case he was released on bail at this crucial stage of the trial. There was no other material

brought to the notice of the Children's Court to show that the Applicant who was admittedly in custody had in any manner brought about any influence on any of the witnesses particularly those who had resiled from the prosecution case and supported his case in defence which was otherwise borne out from the complaint at his instance and the chargesheet filed before the learned JMFC and the Juvenile Court. Thereafter, the learned Children's Court had short circuited the order by recording that the reasons earlier discussed in the previous orders still held good and wrapped up the order on the premise that the offence being grave and serious, no case whatsoever was made out for his release on bail and rejected the bail application.

15. There is no particular dispute of the fact that the trial is in progress and that of the 35 witnesses listed in the chargesheet, 17 have been examined thus far in a case which is more than three and half years old. One does not know the speed at which the trial is being conducted before the learned Children's Court and the turn of events qua the other witnesses to be examined by the prosecution in support of its case. However, in all probability, the trial at the rate at which it is proceeding could take another three years or more and there is every possibility of the Applicant languishing in jail during that period. i am all the more fortified in this observation looking to the tenor of the order of the learned Children's Court, the pace at which the trial is progressing and last but not the least, also considering the specific plea in

defence set up by the Applicant. Therefore, in the circumstances, i deem it appropriate to pass the following :

O R D E R

(i) The Applicant is ordered to be enlarged on bail on executing a personal bond in the amount of ₹50,000/- and furnishing one local surety in co-extensive amount to the satisfaction of the learned Children's Court.

(ii) He shall co-operate with the course of the proceedings and shall not intimidate or threaten the witnesses remaining to be examined at the instance of the prosecution.

(iii) He shall make himself available before the Court during the course of the trial and otherwise shall not bring about any threat or intimidation to any of the witnesses also examined thus far.

(iv) The learned Children's Court shall proceed with the trial uninfluenced by the observations made by this Court on the possibility of an offence under Section 304(ii) of the IPC being made out against the Applicant and not that under Section 302 of the IPC.

(v) In these terms, the application stands disposed off.

(vi) Parties to act on the basis of the authenticated copy of this Order.

NUTAN D. SARDESSAI J.