

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****BAIL APPLICATION NO. 931 OF 2018**

Yug S/o. Ravindrapal Singh TuliApplicant.
Vs.
State of MaharashtraRespondent.

WITH
CRIMINAL APPLICATION NO. 435 OF 2018
IN
BAIL APPLICATION NO. 931 OF 2018

Rakesh LakdawalaApplicant.
(Intervener)
Vs.
The State of Maharashtra & Anr.Respondents.

WITH
CRIMINAL APPLICATION NO. 550 OF 2018
IN
BAIL APPLICATION NO. 931 OF 2018

Mr. Pratik Babasaheb ThakurApplicant.
(Intervener)
Vs.
The State of Maharashtra & Anr.Respondents.

Mr. Shirish Gupte, Senior Advocate with Mr. Shyam Dewani with Mr. Chirag Chanani with Ms. Supriya Kak with Mr. Pratik Thakkar i/by Dewani Associates for the Applicant in Bail Application No. 931 of 2018.

Mr. Satish Maneshinde and Ms. Lakshmi Raman for the Applicant/Intervener in Application No. 435 of 2018.

Mr. Subhash Jha a/w Ms. Sanjana Pardeshi i/by Mr. Prakash Wagh for the Applicant/Intervener in Application No. 550 of 2018.

Mr. Prakash Shetty, Special P.P. for the Respondent-State.

CORAM : A. S. GADKARI, J.
DATE : 27th APRIL, 2018.

P.C.:-

This is an Application under Section 439 of Cr.P.C..

The Applicant, Accused No.8, is seeking bail in C.R. No. 291 of 2017, dated 29th December, 2017 under Sections 304, 337, 338, 216, 285, 197, 198, 119, 420, 465, 466, 471 read with Sections 34 and 36 of the Indian Penal Code, registered with N.M. Joshi Marg Police Station, Mumbai.

2 Heard Mr. Gupte, learned Senior Counsel for the Applicant in Bail Application No. 931 of 2018, at length, Mr. Shetty, learned Special P.P. for the Respondent-State, Mr. Maneshinde learned counsel for the Applicant-intervener in Application No. 435 of 2018 and Mr. Subhash Jha, learned counsel for the Applicant-intervener in Application No. 550 of 2018.

Perused the entire record produced before this Court.

3 The prosecution case in brief is that, the first informant Shri Santosh Khedekar, a Police Naik attached to the N.M. Joshi Marg Police Station as Bit-Marshal, when was on night duty on 29th December 2017 at about 00.25 hours received a message from mobile vehicle No.1 that, the Restaurants namely “1-Above” and “Mojo's

Bistro” situated on the terrace of Trade House Building within the premises of Kamala Mill compound had caught fire and therefore, he was directed to rush to the said spot. He, rushed to the said spot immediately and noticed that both the Restaurants namely “1-Above” and “*Mojo's Bistro*” have been engulfed in fire and the magnitude of the said fire was enormous. He thereafter, immediately on his walky-talky gave message to the Chief Control Room and Central Zone Control Room and requested them to send Fire-Brigade immediately. Shortly thereof, the additional police force, fire-brigade officers and their personnel arrived at the spot and started rescue operation. After few hours, the fire-brigade was successful in dousing the fire.

It is the further prosecution case that, after the said fire was doused/subsided, the investigating agency along with the officers from the Fire-Brigade inspected the premises and it was noticed that, there were lot of illegal constructions erected by both the said establishments and there was no emergency exit available in the premises. That, in both the said establishments, Hookah was being provided without any permission in that behalf. As the emergency exit was not available and the routes available for the same were closed by illegal constructions, the concerned persons i.e. the owners

of the said establishments, having knowledge that in case of any untoward incident, it would cause loss of human life. That, in the said incident, 14 persons have lost their lives and 31 persons have suffered minor to major and grievous injuries.

4 Mr. Shirish Gupte, the learned Senior counsel for the Applicant, in his elaborate arguments took me through the entire record available before this Court. He submitted that, the Applicant is one of the partners along with Mr. Yug Pathak in the said establishment known as Hotel "*Mojo's Bistro*". He submitted that, the incident in question took place between 00.15 to 00.20 hours on 29th December, 2017, when the Applicant was at Vashi, Navi-Mumbai. He submitted that, the Applicant was having all the necessary licenses such as (i) License from the Health Department of Municipal Corporation of Greater Mumbai; (ii) License under Shops and Establishment Act; (iii) License from the Food and Drugs Administration Department, State of Maharashtra and (iv) 'No Objection Certificate' for the use of LPG from the Fire-Brigade Department and therefore, it cannot be said that the Applicant was running the said establishment/hotel illegally and without any license. He submitted that, as a matter of fact, the Applicant had given a

contract to M/s. Nirvana owned by Mr. Utkarsh Pandey for conducting the activity or business of Hookah Parlour in his premises. He further submitted that, the employees of Mr. Utkarsh Pandey of M/s. Nirvana are responsible for the said fire, as the workers of Mr. Utkarsh Pandey indulged into an act of negligence and the Applicant is nowhere concerned with the said incident. He submitted that, due to the negligence of the co-accused Mr. Sayyad Ali, the entire incident of fire has taken place. He further submitted that, the name of the Applicant is not mentioned in the First Information Report, as obviously he was not present at the scene of offence on the date of the incident. He further submitted that, Section 304 and in particular Section 304 Part-II, is not at all applicable to the Applicant and at the most, Section 304-A of the Indian Penal Code can be made applicable *qua* to the Applicant in the present crime. He further submitted that, admittedly no overt act, either of inaction or knowledge is attributed to the Applicant and therefore, Section 304 Part-II cannot be made applicable to the Applicant. Mr. Gupte, by placing reliance on various circulars issued by the Mumbai Municipal Corporation submitted that, a license to conduct Hookah Parlour is not at all necessary under the law. Mr. Gupte, by relying on the interim order passed by the

Honourable Supreme Court in the case of Utkarsh V. Pandey Vs. The State of Maharashtra, dated 19th March, 2018, in Special Leave Appeal (Cri.) No. 2185 of 2018, submitted that the said Accused has been similarly situated and has been granted interim bail by the Honourable Supreme Court and in view thereof, the present Applicant may be granted bail. In support of his contentions, Mr. Gupte, the learned Senior counsel relied on the following decisions-

- i) Keshub Mahindra Vs. State of M.P., reported in (1996) 6 SCC 129;
- ii) Shamsher Khan Vs. State (NCT Of Delhi), reported in (2000) 8 SCC 568;
- iii) Sushil Ansal Vs. State Through Central Bureau of Investigation, reported in (2014) 6 SCC 173;
- iv) Sanjay Chandra Vs. Central Bureau of Investigation, reported in (2012) 1 SCC 40 and;
- v) Abdul Salim Shaikh Vs. State of Maharashtra reported in 2014, AllMR (Cri) 4381=(2015) 1 BomCR (Cri.) 138.

Mr. Gupte, in rejoinder further reiterated his submission that, no permission to run Hookah Parlour at all is necessary, under

the law. He submitted that, the Police have completed investigation and have filed charge-sheet. He therefore, prayed that the Applicant may be released on bail.

5 Mr. Shetty, the learned Special P.P., per contra, vehemently opposed the Application. He submitted that as per the statements of witnesses, the fire originated from the establishment of the Applicant. That, the co-accused Mr. Sayyad Ali was entrusted with the work of igniting the coal and putting it in the Hookah pot/funnel. For increasing the flames, a fan was provided. He submitted that, the Applicant and co-accused Mr. Yug Pathak were running the said establishment wherein, Mr. Utkarsh Pandey of M/s. Nirvana was given contract to provide Hookah to the customers. That, the Applicant and co-accused Mr. Yug Pathak had knowledge about the fact that due to the embers from the coal, which was used in the said Hookah pot, there was every likelihood that it may cause fire, which would endanger the life of the customers of the said Restaurant. He further submitted that the Applicant was granted permission to conduct business in 3300 sq. fts. of premises and an area of about 6000 sq. fts. of open terrace was also given on lease to the Applicant. However, the Applicant and his partner carried out illegal construction on the

said 6000 sq. fts. open area. He submitted that, the persons who actually erected the illegal structures on the said open area under the directions of Applicant and his partner namely Mr. Michale D'Counha, Mr. Conrad and Mr. Sohil Shah, in their statements have stated that, they had expressly told the Applicant to take necessary permission from the Municipal Corporation for erecting such structures. That, the Applicant has not taken any permission for erecting the said structures and therefore, the said structures of the said Restaurants were illegal. He submitted that, the construction carried out by the Applicant at the said place was illegal construction. He further submitted that, the BMC officer namely Dr. Badgire in his statement has categorically stated that from time to time action was taken on illegal structures erected by the Applicant, however, the Applicant reconstructed the said structures.

Mr. Shetty, further submitted that the Applicant did not take permission for establishing the smoking zone in his hotel from the Corporation. He submitted that, a permission for establishing smoking zone and for conducting smoking activity is necessary under the rules and regulations and the Applicant without obtaining any such permission, brazenly indulged into conducting the said activity.

He further submitted that, the Applicant had illegally closed the exit ways by erecting unauthorized construction and therefore, there was no proper emergency exit way for the customers of the said Restaurant. He further submitted that all the permissions which were granted by the concerned departments to the Applicant were for 3300 sq. fts. of area only and the Applicant was not permitted to conduct any other activities in the open terrace. He submitted that, on the date of incident there were about 35 customers in *Mojo's Bistro*, Restaurant however, in the Restaurant namely *1-Above* there were about 250 customers and therefore, the staff of the Applicant was successful in evacuating its own customers.

He further submitted that, the inquiry report submitted by the Commissioner of the Municipal Corporation duly corroborates the investigation and the same is also a part of charge-sheet. He submitted that, in the said report the Commissioner of Municipal Corporation has reiterated the fact that, the Applicant was carrying out the activity of Hookah Parlour *inter-alia* permitting his customers smoking of Hookah in the said premises without any lawful permission. Mr. Shetty, contended that the knowledge of the Applicant and co-accused Mr. Yug Pathak has to be inferred from his act and the

Applicant cannot be permitted to shrug off the responsibility of the incident in question. He submitted that, in view of the evidence available on record, the applicability of Section 304 Part- II of the Indian Penal Code is clearly made out by the prosecution. He further submitted that, the Applicant is highly influential person and there is every possibility of tampering with the evidence if he is released on bail. Mr. Shetty, lastly submitted that, the social interest should outweigh the personal interest of the Applicant and therefore, the contention of the learned Senior counsel for the Applicant that the personal liberty of the Applicant is being jeopardized, has no substance in it. In support of his contentions, he relied on the following decisions.

- i) Virupakshappa Gouda & Anr. Vs. State of Karnataka & Anr., reported in (2017) 5 SCC 406;
- ii) State of Bihar Vs. Rajballav Prasad Alias Rajballav Prasad Yadav Alias Rajballabh Yadav, reported in (2017) 2 SCC 178;
- iii) Masroor Vs. State of Uttar Pradesh & Anr., reported in (2009) 14 SCC 286 and;

Mr. Shetty therefore, prayed that the present Application may be rejected.

6 Mr. Maneshinde the learned counsel appearing for the Intervener in Application No. 435 of 2018 submitted that, the definition of “*smoking*” contained in Section 3(n) of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production, Supply and Distribution) Act enumerates that, it includes smoking of tobacco in any form with the aid of pipe, wrapper or any other instrument which would obviously include the Hookah. That, for conducting smoking activities, a permission under the rules framed by the Municipal Corporation was necessary. He further submitted that, in the present case, the Applicant did not earmark the smoking zone, as there was no permission granted by the Corporation to him. He submitted that, the Supreme Court in the case of Narinder S. Chadha & Ors. Vs. Municipal Corporation of Greater Mumbai & Ors., reported in AIR 2015, SC 756, did not disturb the conditions of having smoking zone of a specific area and the rules incidental thereto. He submitted that, the Applicant in utmost violation of all the rules and regulations framed for conducting Restaurant and without having facility of smoking

zone, was conducting the said business and it is due to the ultimate act of the Applicant, the disaster in question has taken place. He submitted that, the Applicant was having clear knowledge about the fact that his said activity would likely to cause death of innocent persons, who visit his premises and therefore, Section 304 Part-II of the Indian Penal Code is squarely applicable to the present crime. He therefore prayed that, the present Application may be rejected.

7 Mr. Subhash Jha, the learned counsel appearing for the intervener in Application No. 550 of 2018, submitted that when the Applicant was conducting the said business of supply of Hookah to his customers, he had knowledge of its dangerous character and the likely effect of the act and result to be in death, falls in the category of culpable homicide not amounting to murder and thereby attracts Section 304 Part-II of the Indian Penal Code. He further submitted that, while considering the Application under Section 439 of Cr.P.C., the criteria is the nature and gravity of the accusation. He submitted that, due to the acts of omission and commission of the Applicant, 14 persons have lost their lives. He further submitted that, ultimately this is a matter of public accountability by the investigating agency i.e. State. In support of his contentions, he relied upon the following

decisions.

- i) Alister Anthony Pareira Vs. State of Maharashtra, reported in (2012) 2 S.C.C. 648;
- ii) Kunwar Pal Vs. State of Uttarakhand, reported in (2014) 12 SCC 434;
- iii) Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation, reported in (2013) 7 SCC 439;
- iv) Central Bureau of Investigation, Hyderabad Vs. Subramani Gopalakrishnan & Anr., reported in (2011) 5 SCC 296 and;
- v) Nimmagadda Prasad Vs. Central Bureau of Investigation, reported in (2013) 7 SCC 466.
- vi) Ajay Naik Dessai Vs. Police Inspector, reported in MANU/MH/0681/2014;
- vii) Kailash Babulal Wani Vs. The State of Maharashtra, Anticipatory Bail Application No. 1710 of 2016 and other connected matters dated 23rd December, 2016 of this Court;

Mr. Jha, therefore, prayed that the present Application be rejected.

8 At the outset, it is noted here that the co-accused Mr. Utkarsh Pandey has been granted interim bail by the Honourable Supreme Court on the ground that, his matter was not being listed before the High Court for quite some time and till the matter is being taken up by the High Court, he has been released on bail and therefore, the Applicant cannot claim parity with him.

9 At this stage, a useful reference can be made to paragraph No. 24 from the decision of Nimmagadda Prasad (supra), which reads as under-

“24. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

10 The material available on record in the form of statements

of witnesses would clearly indicate that, for the purpose of use of smoking of Hookah a special quality of coal is required, however, in the hotel/establishment of the Applicant, ordinary coal was being used and after it was ignited, it used to discharge embers. That, the Applicant was not having any permission from the Competent Authority to conduct smoking activity in the said premises. In view of the decision of the Supreme Court in the case of Narinder S. Chadha & Ors. (Supra), it was necessary for the Applicant to obtain permission from the Municipal Corporation for establishing a smoking zone for carrying out the activity of smoking, which the Applicant has failed to do. The statements of witnesses clearly indicate that, at least on three earlier occasions, the Corporation had taken action against the establishment of the Applicant for constructing illegal structures therein, however, the Applicant in connivance with the BMC Officers, had carried out demolition of part of it and again re-constructed the illegal structures in his premises. The evidence on record would further indicate that, the Applicant by erecting illegal construction had either narrowed down the emergency exit way or had practically closed the emergency exit. That, the Applicant also failed to put boards/placards thereby pointing out the way to the emergency exit

to the customers, in case of any untoward incident. The material available on record further indicates that, the Applicant while erecting unauthorized structures had used inflammable and combustible material such as various types of bamboos, plywood sheets, cotton cloth and nylon cloth curtains, plastic sheets, and tarpaulin sheets.

11 The staff employed in the said establishment used to light charcoal from a sigari and transfer the ignited charcoal into the Hookah pot/funnel. The flames of the charcoal were enhanced by fanning it by use of a table fan due to which, embers used to emerge. The Applicant was aware of all these procedures used by the staff employed for providing Hookah in his establishment. The evidence further indicates that, the Applicant was aware of the fact that the burning charcoal sigari would come into the contact with combustible cloth material used for curtains, in his Restaurant and would catch fire.

As noted earlier, the evidence on record clearly indicates that, the Applicant did not take any permission from the Municipal Corporation for conducting smoking activities in his premises. That, the Applicant also did not provide any fire-fighting system in his establishment, in case of any emergency. The statements of eye-

witnesses would indicate that, even the security personnel employed by the Applicant, were not aware of the emergency exit routes and therefore, even one of the security personnel has been found dead in the toilet. The material on record further indicates that the owners of the two Restaurants i.e. “*1-Above*” and “*Mojo's Bistro*” were negligent about the fire safety issues and have shown disregards to the rules and regulations framed therein. The evidence on record however, clearly reveals that the fire started from “*Mojo's Bistro*” Restaurant due to the fire embers emanating from the charcoal for its use in Hookah. The statements of witnesses indicate that, the said activity conducted by the Applicant for sale of Hookah was dangerous and was posing threat to the life and the property and the rampant unauthorized use of the Hookah on the terrace, covered illegally by the Applicant, was the major contributing factor in the said disaster. The evidence further indicates that, the staircase was closed by unauthorized construction and was made inaccessible for the customers by creating a gate, which was locked. That, the steps between the passage and the outer wall of the terrace structures was used for the storage of Restaurant material, which ultimately caused a death trap for the users of the Restaurant. The record of investigation further indicates

that, there was rampant violation of rules by the Applicant while erecting illegal construction on the open space of the terrace. The statements of witnesses discloses that, on certain occasions though the Corporation demolished part of illegal structures of the Applicant's establishment, he along with co-accused Mr. Yug Pathak immediately re-constructed it. The record reveals that, on one occasion i.e. on 2nd August, 2017, the action of demolition of unauthorized structures by the staff of the Corporation was stopped midway, on the telephonic orders of the then Assistant Commissioner, G/South Ward and the said order was passed at the instance of the Applicant. This shows that, the Applicant is a highly influential person. The record further clearly indicates that, the Applicant was sharing of 70% of revenue from the contract given to M/s. Nirvana of which, Mr. Utkarsh Pandey is the owner.

12 As noted earlier, the Applicant along with co-accused was conducting the business of Hookah Parlour without any lawful permission of having a smoking zone therein. As per the record of investigation, the Applicant has committed various illegalities and/or violations in erecting/constructing the structures of the said Restaurant. The Applicant was providing Hookah to his customers

and smoking of Hookah requires embers of coal. After taking into consideration the entire material available on record, it can be safely presumed and/or inferred that the Applicant was having express or implied knowledge that the embers from the Hookah funnel/pot would cause fire thereby, endangering the life of its customers. The Applicant, being the owner of the said Restaurant, has clearly failed to take necessary steps in preventing the main cause of fire. As noted earlier, it is the acts of omission and/or commission of the Applicant along with co-accused, which has resulted into the death of 14 innocent persons and had caused minor to major and/or grievous injuries to 31 persons.

13 It is the settled position of law that, there is a presumption that a man knows the natural and likely consequences of his acts. Moreover, an act does not become involuntary act simply because its consequences were unforeseen. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission or commission indicating his state of mind. There may be knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known. Reliance is placed on the decision of the Supreme

Court in the case of Alister Pareira (*supra*).

14 It is to be noted here that, it cannot be lost sight of the fact that, in the present case 14 human beings have lost their lives and 31 persons have suffered minor to major and/or grievous injuries and therefore, the Applicant being co-owner of the said Mojo's Bistro cannot be permitted to shrug off his responsibility, by adopting a spacious plea that, he is not concerned with the entire incident. Ultimately, it is a matter of public accountability and therefore, the accusations are to be considered much of grave and serious nature especially on the background of the causality taken place.

15 The material available on record would clearly lead to draw an irresistible inference that, the Applicant had implied knowledge that the incident of fire may occur or take place due to the unauthorized and illegal use of charcoal embers for Hookah. The contention of the Applicant that, he had given contract to M/s. Nirvana for conducting the Hookah business, does not hold any substance in it, as the services of Mr. Utkarsh Pandey of M/s. Nirvana were out-sourced by the Applicant with a profit sharing ratio of 70%. The Applicant and co-accused were running the said hotel and were providing all the services to its customers, including Hookah and was

drawing profits from the sale of it.

As noted earlier, the material available on record clearly indicates and needs to draw irresistible inference that, the Applicant had implied knowledge that his act of providing Hookah and use of charcoal embers in it, was likely to cause death of persons and therefore, the prosecution has rightly applied Section 304 and in particular 304 Part-II of the Indian Penal Code to the present crime.

16 As noted earlier, the evidence on record indicates that the Applicant is highly influential person. The prosecution has expressed apprehension that if released on bail, the Applicant may tamper with the evidence. After taking into consideration the serious allegations against the Applicant and the gravity of the offence, this Court is of the considered view that the Applicant does not deserve to be released on bail.

The Bail Application is accordingly rejected.

17 In view of the order passed in the Bail Application No. 931 of 2018, the Application Nos. 435 of 2018 and 550 of 2018 for intervention are accordingly disposed off.

(A.S. GADKARI, J.)