

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.904 OF 2017

Naresh Jagumal Karda,
Age : 45 years, Occu.: Business,
R/of.: Second Floor, SaiKrupa
Complex, Tilak Path, Opp. Muktidham
Temple, Nashik Road, Nashik. ... **Appellant**

V/s.

- 1 The State of Maharashtra
(At the instance of the P.I. -
Upanagar Police Station, Nashik)
- 2 Nilesh Balu Jadhav,
Age : 27 Years, Occu.: Business,
R/at. Gosavi Wadi, Backside of
Vasco Hotel, Near Shramik Hall,
S.M.Peth, Nashik Road, Nashik. ... **Respondents**

.....

Mr.Aniket U. Nikam i/b. Mr.Piyush Toshnival, Advocate for the
Appellant.

Mr.S.V.Gavand, APP for the Respondent/State.

Ms.Rekha D. Satpute, Advocate for the Respondent No.2

Mr.Pravin B. Bakale, PSI, Upanagar Police Station, Nashik City is
present in person.

....

CORAM : A.M.BADAR J.

DATED : 23rd AUGUST 2018.

ORAL JUDGEMENT :

1 Heard.

2 Admit.

3 Heard finally by consent of parties.

4 By this appeal under Section 14-A of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, (hereinafter referred to as 'Atrocities Act' for the sake of brevity) appellant Naresh Karda – accused in Crime No.I-463 of 2017 registered with Upanagar Police Station, District Nashik for offences punishable under Sections 406, 504 and 506 of the Indian Penal Code as well as under Section 3(1)(x) of the Atrocities Act on the basis of Order passed under Section 156(3) of the Code of Criminal Procedure in Criminal Misc. Application No.188 of 2017 by the learned Assistant Sessions Judge – 2, Nashik; is challenging the Order dated 03/11/2017 passed by the learned Additional Sessions Judge – 9, Nashik in Criminal Misc. Application No.1489 of 2017. By this impugned Order dated 03/11/2017, prayer for grant of pre-arrest bail made by the appellant/accused came to be rejected.

5 Heard the learned Counsel appearing for the appellant/accused. He drew my attention to the private Criminal

Complaint bearing Cri.Misc.Appln.No.188 of 2017 moved by the respondent No.2 and argued that averment in this complaint shows that cheque for Rs.10,00,000/- was given by the appellant/accused to respondent No.2/complainant Nilesh Jadhav on 19/09/2016 towards security for refund of the amount paid by him for booking a flat. By drawing my attention to the report lodged with Senior Police Inspector, Upanagar Police Station, Nashik on 25/08/2017 by respondent No.2 Nilesh Jadhav, it was argued that the respondent No.2/complainant had modulated his version by stating that cheque for Rs.10,00,000/- was given to him by the appellant/accused after 01/09/2017. My attention was drawn to intimation letter dated 01/09/2016 to the Business Co-operative Bank Limited given by the appellant/accused so also complaint dated 25/09/2017 given to the Assistant Commissioner of Police intimating theft of the cheque given to the courier on 17/08/2016. With this, it is argued that in fact by using a stolen cheque, a story is created to show that a flat was booked and subsequently that booking was cancelled by giving castiest abuses by intentionally insulting the respondent No.2. The learned Counsel argued that in fact the Flat No.301 was booked much earlier to the alleged incident in the name of Vijaya Bhalerao. It is further argued that even if the averments made in the first complaint made to the police are accepted as it is, then also it is not shown that the alleged incident took place within public view. To buttress this contention, reliance is placed on Judgment of this

Court in the matter of *Balu s/o. Bajirao Galande v. State of Maharashtra*¹.

6 As against this, the learned Additional Public Prosecutor opposed the appeal by contending that the appellant/accused had given castiest abuses to respondent No.2 by refusing to deliver possession of the Flat No.301 to him.

7 I also heard the learned Counsel appearing for the respondent No.2/complainant. By taking me through the affidavit-in-reply as well as documents annexed thereto, it is argued that on behalf of respondent No.2 that there are affidavits of several persons, who have stated about intentional insult to the respondent No.2/complainant, who belongs to the Scheduled Castes by the appellant/accused. It is further argued that the affidavits also show that respondent No.2/complainant is being pressurized for withdrawal of his complaint by the appellant/accused. The learned Counsel for the respondent No.2/complainant further argued that the letter dated 25/09/2017 itself shows that the appellant/accused is acquainted with the respondent No.2/complainant. In submission of the learned Counsel for the respondent No.2/complainant, this communication is not believable because it states that cheques were signed without mentioning the names of the parties thereon. This complaint also shows that the cheques were stolen from the

¹ 2006 (6) AIR (Bom)(R) 251.

office. The averments in this complaint to the Assistant Commissioner of Police is not substantiated by the CCTV footage, etc. It was pointed out that the respondent No.2/complainant arranged the amount of Rs.10,00,000/- and booked the flat with the Scheme of the appellant/accused. However, though possession was promised by 01/09/2017, it was not handed over. On the contrary, when the respondent No.2/complainant went for ascertaining the facts, castiest abuses were given to him.

8 I have carefully considered the submissions so advanced and perused the case diary as well as documents made available.

9 First version of the incident of the respondent No.2/complainant can be found in the report lodged to the Senior Police Inspector, Upanagar Police Station, Nashik on 25/08/2017. Averments in this report to police made on 25/08/2017 are relevant. Respondent No.2/complainant Nilesh Jadhav has stated in this report to police that on 19/09/2016, he had paid the amount of Rs.10,00,000/- towards booking amount of flat No.301 in Hari Amantran Scheme of Karda Construction Limited owned by the appellant/accused and obtained a receipt. It is further averred that possession was promised on 01/09/2017. It is further averred in this police complaint that as possession was promised by 01/09/2017, the respondent No.2/complainant had

been to the premises of the building and requested the appellant/accused for possession of the Flat and execution of documents. Upon that, the appellant/accused informed him that he has decided to sell out the said flat to some another person and the respondent No.2/complainant should take back the deposited amount. That is how, according to the respondent No.2/original complainant, the appellant/accused had handed over cheque bearing No.5006000 on the Business Bank for an amount of Rs.10,00,000/-. It is further averred that when the respondent No.2/complainant refused to accept that cheque, the appellant/accused uttered that he is not intending to give the flat to '*bhimtya*' (person belonging to the Scheduled Castes). If Flat is given to him, other Flats will not be sold and persons belonging to caste "dherpat" do not know how to reside in the society, etc.

10 This complaint dated 25/08/2017 to police was followed by private criminal complaint dated 04/09/2017 lodged in the Special Court under S.C. & S.T.(Prevention of Atrocities) Act, Nashik and it came to be registered as Cri.Misc.Appln.No.188 of 2017. In this criminal complaint before the Special Court, there is material change in the averments by the respondent No.2./complainant. This private criminal complaint contains a pleading that on 19/09/2016, the respondent No.2/complainant arranged the amount of Rs.10,00,000/- and paid it to the appellant/accused in presence of witness Aniket Balu Bagul and

on receipt of this amount, the appellant/accused had handed over a cheque bearing No.500600 amounting to Rs.10,00,000/- to him as a security. Thus version gets modulated by stating that the cheque of Rs.10,00,000/- was in fact handed over to the respondent No.2/complainant at the time of booking of Flat itself and not when he had gone to the appellant/accused for getting possession.

11 On this backdrop, contemporaneous documents which are not disputed by the prosecution are relevant. On 01/09/2016, the appellant/accused lodged complaint to the Business Co-operative Bank Limited alleging that two cheques bearing No.500599 and 500600 are lost from the Courier Service and payment of those cheques should be stopped. This complaint to the Bank was followed by another complaint to the Assistant Commissioner of Police made by the appellant/accused on 25/09/2017. It is further averred in this complaint that the appellant/accused has business relations with Lucky Nandwani and Ramesh Chawala and, therefore, he sent two cheques bearing Nos.500599 and 500600 to these persons for an amount of Rs.20,00,000/- and Rs.10,00,000/- through Priority Express & Logistics System Courier Services Limited on 17/08/2016. It is further averred in the complaint that packet containing these cheques might have been lost by the Courier Services or from the office of the appellant/accused.

12 Record of the investigation contains statement of Mahesh Arun Kamble, Proprietor of Franchise of DTDC Courier Service namely Priority Express & Logistics System Courier Services Limited, Nashik. This witness has stated that two packets collected from Karda Construction Limited were found missing. He has stated about communication of this fact to M/s.Karda Construction. Arvind Yashwant Joshi, Branch Manager of the Business Bank, Nashik Road, Branch has also stated to the Investigator that the Bank has received complaint of the appellant/accused regarding loss of two cheques. Thus, it is seen that even prior to filing of the private complaint by the respondent No.2/original complainant, the appellant/accused had intimated to the concerned Bank about loss of two cheques. The subject cheque bearing No.500600 was also reported to be lost by the appellant/accused to the Bank. To crown this all, averments in the private complaint as well as the police complaint shows that the respondent No.2/original complainant had been to the appellant/accused for getting possession of Flat No.301 and executing proper documents. This averment is there in paragraph No.3 of the private complaint so also in paragraph No.3 of the police complaint. The reply filed by the respondent No.2/original complainant shows that the total cost of the Flat is Rs.67,36,377/-. It does not stand to the reason that by paying an amount of Rs.10,00,000/- to the Builder, the customer will approach the Builder for getting possession and for executing the necessary

documents without payment of rest of the amount. The case diary does not show that the respondent No.2/complainant had deposited balance payment with the Builder.

13 The Investigating Officer in his report to the Public Prosecutor has categorically stated that cellphones of the appellant/accused and the respondent/original complainant were tracked by ID Tracker Kit and it was found that on the date and time of the alleged incident, the appellant/accused and the respondent No.2/complainant were not present at one place.

14 Averment in the police complaint dated 25/08/2017 shows that when the alleged incident took place, there was nobody with the respondent No.2/complainant. The place of the incident is stated to be premises of the apartment constructed by the appellant/accused.

15 In the matter of **Balu s/o. Bajirao Galande** (*supra*), it is held thus in paragraph No.19 :

“Considering the judicial pronouncements on the subject, the expression within public view must be construed to mean that the insult or humiliation must take place in the presence of or in the proximity of at least one independent person. The test of audibility and visibility can be taken to

have been satisfied if an independent person is actually present or is at a place where the utterances are clearly audible and reaches the scene of occurrence while the incident is still in progress.”

If averments made in the police complaint are concerned, then it makes it clear that the incident did not take place in presence of or in the proximity of at least one independent person.

16 In the matter of *Dr.Subhash Kashinath Mahajan v. State of Maharashtra & Anr.*¹, the Honourable Apex Court has held thus in paragraph No.59 :

“59. There can be no dispute with the proposition that mere unilateral allegation by any individual belonging to any caste, when such allegation is clearly motivated and false, cannot be treated as enough to deprive a person of his liberty without an independent scrutiny. Thus, exclusion of provision for anticipatory bail cannot possibly, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. If this interpretation is not taken, it may be difficult for public servants to discharge their bona fide functions and, in given cases, they can be black mailed with the threat of a false case being registered under the Atrocities Act, without any protection of law. This cannot

1 Criminal Appeal No.416 of 2018, Decided on 20th March 2018.

be the scenario in a civilized society. Similarly, even a non public servant can be black mailed to surrender his civil rights. This is not the intention of law. Such law cannot stand judicial scrutiny. It will fall foul of guaranteed fundamental rights of fair and reasonable procedure being followed if a person is deprived of life and liberty. Thus, literal interpretation cannot be preferred in the present situation.”

This makes it clear that when allegations are found to be patently false and malicious, then bar of Section 18 is not applicable.

17 Considering the totality of circumstances emerging on record, I am of the considered opinion that bar of Section 18 is not applicable to the case in hand and, therefore, the learned Special Court erred in rejecting the application for grant of anticipatory bail to the appellant/accused. His custodial interrogation in the light of material on record is not warranted. As such, the Order :

ORDER

- (i) The Appeal is allowed.
- (ii) Impugned Order dated 03/11/2017 passed by the learned Additional Sessions Judge – 9, Nashik in Criminal Misc. Application No.1489 of 2017 rejecting the application for anticipatory bail is quashed and set aside.

- (iii) The application for anticipatory bail moved by the appellant/accused is allowed.
- (iv) In the event of his arrest in Crime No.I-463 of 2017 registered with Upanagar Police Station, Nashik, for the offences punishable under Sections 406, 504 and 506 of the Indian Penal Code as well as under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the appellant/accused be released on bail on his executing P. R. Bond of Rs.15,000/- and on furnishing surety in the like amount.
- (v) As a condition of this Order, the appellant/accused shall not extend inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.
- (vi) The appellant/accused should attend the concerned Police Station as and when required for the purpose of investigation by the Investigating Officer.
- (vii) The Appeal is disposed of accordingly.

(A.M.BADAR J.)

Raju
Dattatraya
Gaikwad

Gaikwad RD

12/12

Digitally signed by
Raju Dattatraya
Gaikwad
Date: 2018.08.24
11:25:32 +0530