

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (ABA) NO.193/2018
WITH
CRIMINAL APPLICATION (APPP) NO.521/2018
Omprakash @ Munna Nanku Yadav

..vs..
State of Mah., thr. PSO PS Dhantoli, Nagpur

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

.....
Shri S.P. Dharmadhikari, Senior Counsel with Shri M.P. Khajanchi & Shri N.P. Singhania, Advocates for the applicant.

Shri R.R. Vyas, Counsel to assist the prosecution.

Shri N.S. Rao, Additional Public Prosecutor for the State.

CORAM : V.M. DESHPANDE, J.

DATED : APRIL 6, 2018.

CRIMINAL APPLICATION (APPP) NO.521/2018

1. This is an application for grant of permission to assist the prosecution. The said application is by Smt. Geeta Yadav who is one of witnesses in the crime.

2. Heard learned counsel for the parties.

3. For the reasons stated therein, the application is allowed.

4. Learned counsel Shri R.R. Vyas is permitted to assist the prosecution.

CRIMINAL APPLICATION (ABA) NO.193/2018

1. This is an application under Section 438 of the Code of

Criminal Procedure for grant of anticipatory bail.

2. Heard learned senior counsel Shri S.P. Dharmadhikari for the applicant, learned Additional Public Prosecutor Shri N.S. Rao for the State, and learned counsel Shri R.R. Vyas to assist the prosecution.

3. This application is a second attempt on the part of the applicant to obtain discretionary relief from this Court in the nature of pre-arrest bail in connection with Crime No.226/2017 registered with Police Station Dhantoli, Nagpur.

Earlier application filed on behalf of the applicant was registered as Criminal Application (ABA) No.889/2017. At the time of filing of the said application, the investigation was in progress. After hearing learned senior counsel, who was appearing at that time and learned Additional Public Prosecutor, when this Court expressed its opinion that the Court is not inclined to grant relief of pre-arrest bail, upon instructions from the applicant, the said application was withdrawn.

4. It appears that subsequently the investigating officer completed his investigation and filed final report before the Court of law.

5. After submission of the final report, the applicant renewed his request for relief under Section 438 before learned Sessions Judge. However, his plea was not found favour with learned Judge of the Court below. Therefore, the present application is filed.

6. Learned senior counsel Shri S.P. Dharmadhikari for the applicant submitted that much water has flown below the bridge. He submitted that though initially Section 307 of the Indian Penal Code was

applied in Crime No.226/2017, at the time of filing of the chargesheet before the Court, the investigator has deleted the said provision and has filed chargesheet under Section 326 of the Indian Penal Code. He submitted that for good or bad reasons, the applicant, till today, is not apprehended by the investigating machinery. He submitted that the applicant is a politician and a Chairman of the Maharashtra Labour Welfare Board. He submitted that there is a counter case also in which the first informant in Crime No.226/2017 is one of the accused. Therefore, it is his submission that relax standard should be applied for considering the present application. He submitted that the applicant is having deep roots in the society and there is no reason that he will not be available to the course of justice. It is his submission that for the purposes of collecting blood samples of the applicant, the applicant is ready to cooperate with the investigating agency. He also submitted that strict conditions can be imposed upon the applicant that he shall not enter the territorial jurisdiction of the Nagpur city. He submitted that since entire chargesheet is filed, custodial presence of the applicant is not necessary. He submitted that the application, therefore, be allowed.

7. *Per contra*, learned Additional Public Prosecutor Shri N.S. Rao for the State vehemently opposed the application for pre-arrest bail. He submitted that from the date of recording of the First Information Report (FIR) against the applicant, he and his brother Bala are absconding. He submitted that though the weapon is already recovered from other co-accused, custodial presence of the applicant is necessary since the investigator wants to conduct in depth investigation in the

matter. He submitted that looking to the position of the applicant in the society, there is a possibility that the applicant may tamper and/or influence the prosecution witnesses. He, therefore, submitted that the application be rejected.

8. Learned counsel Shri R.R. Vyas for witness Smt. Geeta Yadav, stated that by filing chargesheet only under Section 326 of the Indian Penal Code, in fact the investigator himself has taken the powers of the Court to himself and has decided that what should the offence. He submitted that looking to past record and his active involvement, the application be rejected.

9. At the outset, I would like to place it on record that no precedent, either of the Honourable Apex Court or of this Court, was relied upon by any of the contesting parties before me. The applicant and the non-applicant put forth their case only on the basis of the facts.

10. Right from the decision of the Constitution Bench of the Honourable Apex Court in the case of Shri Gurbaksh Singh Sibbia and others vs. State of Punjab, reported at (1980)2 SCC 565, the Honourable Apex Court has ruled that if an application for anticipatory bail is made to the High Court or the Court of Sessions, it must apply its own mind to the question and decide whether the case has been made out for grant of such relief. Thus, the Constitution Bench of the Honourable Apex Court has left it for the Courts to use its discretion either to grant or not to grant anticipatory bail in the given set of facts.

11. The provisions of Section 438 of the Code of Criminal Procedure make it clear that powers of the High Court or the Sessions

Court under this Section are extra ordinary in character and it is to be exercised only in exceptional cases, is the settled principle of law.

12. The case of the applicant, who claims relief for pre-arrest bail, is required to be adjudicated in the light of the facts of such case, since there cannot be a *straight jacket formula* for granting or refusing relief of anticipatory bail. It would be useful to reproduce hereinbelow the provisions of Section 438 of the Code of Criminal Procedure:

“Section 438 : Direction for grant of bail to person apprehending arrest . —

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

- (i) the nature and gravity of the accusation;***
- (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;***
- (iii) the possibility of the applicant to flee from justice; and***
- (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,***
either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected

the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B). The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any 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;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

From bare perusal of the said provisions while considering the application under Section 438, the Court has to see the nature and gravity of the accusation and the antecedents of the applicant which includes whether he has been previously undergone imprisonment on conviction in respect of any cognizable offence, the possibility of the applicant fleeing from justice and whether the accusation has been made with an object of injuring or humiliating the applicant by having him so arrested.

13. The applicant has not taken a plea of *alibi* nor he has denied his presence on the spot at the time of occurrence. In fact, according to the applicant, there exists a counter case against rival group. In that view of the matter, the presence of the applicant on the spot is firmly established for considering this application for anticipatory bail.

14. It was not submission of learned senior counsel Shri Dharmadhikari for the applicant that the applicant is falsely implicated in the crime. His submission is that there is a family fight between two branches and such type of incidents many a time occurred in lanes and by-lanes of the city. In that view of the matter, it is his submission that when a counter case is there, the application has to be considered sympathetically, by applying relax standard.

I am afraid that the submission of learned senior counsel can be accepted at least to the extent that such things routinely occur in lanes and by-lanes and, therefore, the application needs to be considered favourably, by applying relax standard. The Court cannot remain a mute spectator. The duty of the Court is to uphold the rule of law. The law always takes its own course. Therefore, I am not ready to accept the submission made by learned senior counsel for the applicant for sympathetic consideration of the present application on that count.

15. Another submission of learned senior counsel for the applicant is that the punishment for graver offence is not found favour with the investigator himself and he submitted the chargesheet for lesser offence, looking to the opinion given by the doctor.

16. It appears that initially the crime was registered against the applicant and others for the offences punishable under Sections 452, 307, 323, 324, 325, 141, 143, 147, 148, and 149 of the Indian Penal Code and under Sections 4 and 25 of the Arms Act. However, at the time of filing of the chargesheet, the investigator has submitted chargesheet thereby deleting only Section 307 of the Indian Penal Code and instead the

chargesheet is filed for Section 326 of the Indian Penal Code along with other Sections of the Indian Penal Code. It would be useful to reproduce hereinbelow the recitals in that behalf in the chargesheet.

“Injury Report च्या आधारावर वैद्यकीय अधिकारी शासकीय वैद्यकीय अधिकारी महाविद्यालय यांनी वैद्यकीय अहवाल दिला. त्यानुसार फिर्यादी व त्याचे कुटुंबियांना झालेल्या दुखापती हया (“one injury in each of two patients are grievous and all other injury are simple as described, Hence , they may not be sufficient in ordinary course of nature to cause death”) अशाप्रकारच्या आहेत. सदर गुन्ह्यात कलम 307 भादवी चे दोषसिद्ध होइल असे पुरावे मिळून आले नसल्याने गुन्ह्यातुन कलम 307 भादवी कमी आले आहे त्यासोबतच अधिक पुरावे मिळून आल्याने गुन्ह्यात कलम 326, 294, 506 ब भादवी अन्वये वाढ करण्यात आली.”

17. It is trite law that injury is not a *sine quo non* for the offence punishable under Section 307 of the Indian Penal Code. What is important to note is, intention and knowledge.

18. In the present case, there is a sufficient evidence available on record that the applicant was holding sword in his hand and assaulted in company of his other companions on injured persons.

19. Using deadly weapon like sword and causing injuries on the vital parts of the injured person, show that at initial stage the investigator applied the correct provision of law. The Court can never be guided only by the opinion of the doctor in isolation. The case of the prosecution has to be evaluated as a whole. The case of the prosecution

cannot read in bits and pieces. It is always open for the Court to apply correct provision of the Penal Code on the basis of available evidence collected during the course of investigation.

20. Further, maximum punishment under Section 326 of the Indian Penal Code, after its amendment can be extended to life imprisonment. Therefore. The offence even under Section 326 of the Indian Penal Code is also very serious in nature.

21. In the present case, 6 persons are injured. There are, first informant-Awdhesh, Mangal, Sagar, Manju, Pradeep, and Karan Mudliyar. The injury reports of these 6 persons are available on record. Even, the doctor has found that, insofar as two persons are concerned, the injuries are grievous in nature. Insofar as simple injuries are concerned, it is always open for the Court which shall be trying the case to determine quantum of punishment. However, when there is material that 6 persons are injured, the application for anticipatory bail cannot be considered only on that basis that some of them suffered only simple injuries. Though there is no *straight jacket formula* for deciding the application, it is for the Court to consider the entire prosecution case and in the backdrop of the prosecution case, the nature of injuries is one of the factors amongst others.

22. The FIR about the occurrence is immediately lodged with the police. The incident has occurred though on very minor issue of bursting crackers on the day of “Bhau-Beej”, one day of Diwali Celebration, it is culminated into ghastly attack on prosecution witnesses. The name of the present applicant is specifically mentioned in the FIR. In

the FIR, first informant who is one of the injured has ascribed the role played by the applicant in the incident.

23. During the investigation, statement of injured Mangal is recorded. Mangal has received 3 injuries on his person viz. fracture, which according to the doctor is grievous injury and incised wound 5'x2'x1' cm.. Though injury is shown as simple but it existed on right parietal area of Mangal and one contusion 4'x'4 cm on the right fore arm. From the chargesheet it appears that Mangal was indoor patient, as it could be seen that his statement is recorded in Dande's Hospital. In his statement, he has specifically stated not only the presence of the applicant but also the role which has played vis-a-vis this prosecution witness. He has stated as under:

“मुन्ना यादव च्या हातात तलवार होती व त्याने माझ्या डोक्यावर वार केला त्यामुळे मी गंभीर जखमी झालो.”

From this, it is clear that at the time of incident the applicant was armed with deadly weapon sword and he has assaulted on the head of Mangal. This particular statement of Mangal is corroborated by the medical evidence since the doctor has noticed incised wound on right parietal area on his person though it may be simple.

24. The statement of Manju is also recorded. She is also injured witness. She suffered contusion on her left parietal area and tenderness to the right fore arm.

What is disturbing to note from her statement is that when Manju's mother was trying to save her from the attack, one co-accused Karan gave kick blow on the door and at that time the applicant

dragged her by snatching her Saree. This shows that this applicant has not even spared a woman and has not shown respect to womanhood.

25. Similarly, statement of Gita also shows the presence of the applicant armed with sword.

26. Apart from these prosecution witnesses, who are member of the opposite branch of family of the applicant, there is a statement of Subhash Kore. He is an independent person. He has also stated in his statement recorded during the course of the investigation that when injured Mangal came on the spot, that time applicant Munna assaulted on him on his head by means of sword in his hand and, thereafter, he handed over the said sword to Jaggu who ran away from the spot.

Thus, it is clear that even the independent witness is also corroborating the version of injured witness Mangal. Not only that, right from the beginning, it appears that, the applicant and his associates tried to cause to disappear the evidence by handing over the weapon, which he used, to some other accused who ran away from the spot; ultimately that weapon is seized from the said co-accused Jaggu.

27. The applicant is shown as an accused right from 22.10.2017. Till this date, he has not joined the investigation. On the contrary, the investigating officer has filed the chargesheet under Section 299 of the Code of Criminal Procedure. No doubt true that no step was taken by the investigating officer under Section 82 of the Code of Criminal Procedure to declare the applicant as proclaimed offender.

28. The law is well crystallized in the cases of Lavesh vs. State (NCT of Delhi), reported at (2012)8 SCC 730 and State of Madhya Pradesh

vs. Pradeep Sharma, reported at AIR 2014 SC 626 wherein the Honourable Apex Court has ruled that the benefit of anticipatory bail shall not extend in favour of the persons who are declared proclaimed offenders.

29. However, merely because for the reasons best known to the Investigating Officer he has not taken steps in that behalf. The applicant cannot be permitted to take any advantage for the lapses committed by the Investigating Officer.

30. Be that as it may, it is the statement of learned Additional Public Prosecutor Shri Rao on the basis of the instruction from Police Inspector Shri Anchal Mudgal who is personally present in the Court that whenever the search was taken at the ordinary place of the residence of the applicant he was not found present there. Even, all attempts on the part of the Investigating Officer to trace him out at other places yield no result.

31. Thus, it is clear that though the applicant is not a proclaimed offender, the applicant is not found at his place where normally he should be. Therefore, in my view, statement of learned Additional Public Prosecutor that the applicant is absconding has grain of force.

32. As per learned senior counsel Shri S.P. Dharmadhikari for the applicant, entire investigation is over and he is ready to give his blood sample and, therefore, it is his submission that the application of the applicant be considered favourably. This particular submission is also opposed by the prosecuting agency. Though in the reply no specific ground is claimed for custodial presence, as per the prosecution, his

presence is required for further in depth investigation. In the chargesheet which is presented in the Court of law, the investigating officer has reserved his right of further investigation and to file further chargesheet under Section 173(8) of the Code of Criminal Procedure. Even otherwise, the investigation is the domain of the investigator. How he should conduct his investigation, it is his prerogative. Even, the Courts should be reluctant to guide the investigating officer that in a particular way the investigation should be carried by him. Therefore, though it is not mentioned in the reply as to for what purpose the custodial presence of the applicant is necessary, in my view, it is sufficient when the application is opposed by the prosecution. Such opposition by the investigating machinery has to be considered and examined in the background of a particular case which may differ from the case to case. However, the fact remains that since October the applicant has not joined the investigation and the investigating officer is handicapped in conducting the investigation thoroughly in the crime for his absence. The Courts are always reluctant to scuttle the investigation at initial stage. In the present case, though the chargesheet is filed, there is not investigation at all vis-a-vis the present applicant is concerned. Therefore, if the application is granted, it is nothing but to deny the right of the investigating officer to conduct in depth investigation in the crime.

33. Learned Additional Public Prosecutor for the State submitted that if the anticipatory bail is granted, possibility of influencing witnesses cannot be ruled out.

34. It is an admitted position in the present case that the

applicant is a politician. Further, he is a Chairman of the Maharashtra Labour Welfare Board. Even from the chargesheet it is clear that the submission of learned Additional Public Prosecutor has some force.

35. In the statement of Mangal, he has stated as under:

“..... मी मुन्ना यादव ला म्हटले की, ‘तु फुटेज में आ गये है. आगे तुझको बताता’ यावर मुन्ना यादव म्हणाला की, तु क्या मेरे को बताता, मै फुटेज गायप कर दूंगा.”

36. Thus, right from the beginning the applicant has his arrogance that he can interfere with the available evidence in order to screen himself from the legal punishment.

37. Further, learned Additional Public Prosecutor in the reply has submitted the crime chart which shows that the applicant is facing the prosecution in 10 criminal cases registered at Police Stations Dhantoli, Ambazari, Jaripatka, Sitabuldi, and Bajaj Nagar. Learned senior counsel Shri S.P. Dharmadhikari for the applicant submitted that out of these 10 cases, in 3 cases the applicant is already acquitted by the Court and in one case at serial No.7 he is not an accused at all. Though judgments of acquittal are not filed on record, I accept the statement made on behalf of learned senior counsel for the applicant in that behalf. Still, there remains 6 offences against the applicant. Though learned senior counsel for the applicant tried to submit that these offences are outcome of political rivalry, the sections which the applicant are facing in those offences show that those are for causing bodily injuries. Thus, it is crystal clear that the applicant is also having criminal antecedents and is having tendency to repeat the same.

38. In view of the aforesaid discussions, I reach to the conclusion that the applicant is not falsely implicated in the crime to malign his image in the society. There is *prima facie* material against him. He is having criminal antecedents, and looking to the attitude as pointed out by injured witness Mangal, if the applicant is released on bail there is possibility that he may try to influence the prosecution case. That leads me to conclude and pass the following order:

ORDER

(i) The criminal application for grant of anticipatory bail is rejected.

(ii) The observations made in this order are purely for deciding the present application for grant of anticipatory bail and learned Judge of the Court below who shall be trying the case or considering the regular bail application shall not get influenced by the observations made in this order.

JUDGE

!! BRW !!