

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO.1127 OF 2019

Surendra Pathare

.... Applicant

versus

The State of Maharashtra & Anr.

.... Respondents

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- Mr.G.S. Godbole i/b. Mandar M. Goswami, Advocate for Applicant.
- Mr.Abhishek R. Avachat, Advocate for Respondent No.2.
- Mr.J.P. Yagnik, APP for the State/Respondent.
- PI Krushna Indalkar, Chandan Nagar Police Station, Pune City, present.

CORAM : SARANG V. KOTWAL, J.

DATE : 20th JUNE, 2019

P.C. :

1. The Applicant is seeking anticipatory bail in connection with C.R.No.145/19 registered with Chandan Nagar Police Station, Pune City, under sections 376, 377, 498-A, 406, 504, 323, 506 r/w 34 of the Indian Penal Code.
2. The FIR is lodged by the prosecutrix on 06/04/2019.
She has stated that she got married with her husband on

30/11/2008. She has mentioned that she was reluctant to get married with him, but she was persuaded by her parents. Her parents had spent a substantial amount at the time of marriage. She further mentioned in her FIR that her husband was illtreating her and was assaulting her on petty issues. She was sometimes assaulted on very small matters. On one occasion, her head was banged on a cupboard, due to which she had suffered a bleeding injury. According to the first informant, her husband was having an extra-marital affair.

3. The present Applicant is the brother of her husband. In the FIR it is mentioned that even the present Applicant used to illtreat her. In her FIR there are allegations against her husband regarding unnatural sex and forcible intercourse etc. Insofar as the present Applicant is concerned, it is her case that in the last week of July 2013, her husband had gone out of station. At that time, in the midnight, the Applicant committed rape on her. Her young daughter of 3 years of age was in the room. On the next day, when she complained about the incident to her in-laws,

they simply ignored her. It is her case that even thereafter the Applicant committed rape on her on many occasions and he has even recorded one of such incidents. It is her case that on the threat of publishing that recording, he continued committing rape on her on various occasions. It is her case that, she could not inform her parents about this, because she was under the threat issued by the Applicant that the video recording would be made public. It is her further case that she became pregnant because of such incidents of rape and at that time her husband assaulted her. Due to the assault, her pregnancy was terminated. She has further mentioned in her FIR, that in August 2016, the present Applicant, at the Gun point made her sign divorce papers. Based on these allegations, the FIR was lodged.

4. Heard learned Counsel Mr.G.S. Godbole for the Applicant, learned Counsel Mr. Abhishek R. Avachat, Legal Aid Counsel, appearing for the first informant and learned APP Mr.J.P. Yagnik for the State.

5. Learned Counsel Mr. Godbole submitted that the allegations in the FIR are highly improbable. She has implicated not only the family members of the Applicant, but also her own parents and has made allegations against them. Thus, according to Mr. Godbole, it is unnatural and it shows that the first informant is involving everybody unnecessarily. He further submitted that though there are allegations of commission of rape on many occasions, prosecutrix has not given a single date of such incidents. Though, the prosecutrix has referred to Video recording, there is no such recording in existence as there was no such incident. It is a concocted story. He further submitted that, for recovery of the weapon, custodial interrogation is not necessary because weapon was belonging to the Applicant's father and it was deposited with the police station during implementation of Code of Conduct during the elections. He further submitted that for presenting Petition for Divorce with mutual consent, parties have to remain present before the Family Court and at that time, the prosecutrix had made no such grievance. She had remained silent for more than six months

and thereafter those proceedings were withdrawn. This also shows that her allegations are not true.

6. He further submitted that the incidents have allegedly taken place in the year 2013 and the FIR was lodged in April 2019. Therefore there is gross delay which points to an afterthought on her part and the Applicant is falsely implicated.

7. Mr.Godbole invited my attention to the email dated 02/02/2019, which she had sent to various authorities. In that email there was no reference to any such act of commission of rape on her. He further submitted that the first informant had approached State Women's Commission, Mumbai before the FIR was lodged and there were efforts for reconciliation. He further submitted that in the complaint, to the State Women's Commission, the allegations which she had made are not consistent with the story of the FIR. He further submitted that even after the alleged incidents of rape, she continued residing with the husband, which also is unnatural and shows that her story was improbable.

8. Mr.Godbole relied on the judgment of the Hon'ble Supreme Court in the case of ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat & Anr., reported in (2016) 1 Supreme Court Cases 152***. He particularly relied on paragraph Nos.22, 23, 24, 25.1, 25.2, 25.10, which read thus;

“22. Though the Court observed that the principles which govern the grant of ordinary bail may not furnish an exact parallel to the right to anticipatory bail, still such principles have to be kept in mind, namely, the object of bail which is to secure the attendance of the accused at the trial, and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. The Court has also to consider whether there is any possibility of the accused tampering with evidence or influencing witnesses etc. Once these tests are satisfied, bail should be granted to an undertrial which is also important as viewed from another angle, namely, an accused person who enjoys freedom is in a much better position to look after his

case and to properly defend himself than if he were in custody. Thus, grant or non-grant of bail depends upon a variety of circumstances and the cumulative effect thereof enters into judicial verdict. The Court stresses that any single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. After clarifying this position, the Court discussed the inferences of anticipatory bail in the following manner:

“31. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be

granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in State v. Captain Jagjit Singh, which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it

is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.”

23. *It is pertinent to note that while interpreting the expression "may, if it thinks fit" occurring in Section 438(1) of the Code, the Court pointed out that it gives discretion to the Court to exercise the power in a particular case or not, and once such a discretion is there merely because the accused is charged with a serious offence may not by itself be the reason to refuse the grant of anticipatory bail if the circumstances are otherwise justified. At the same time, it is also the obligation of the applicant to make out a case for grant of anticipatory bail. But that would not mean that he has to make out a "special case". The Court also remarked that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use .*

24. *Another case to which we would like to refer is the judgment of a Division Bench of this Court in the case of Siddharam Satlingappa Mhetre v. State of Maharashtra. This case lays down an exhaustive commentary of Section 438 of the Code covering, in an erudite fashion, almost all the aspects and in the process relies upon the aforesaid Constitution Bench judgment in Gurbaksh Singh's case. In the very first para, the Court highlighted the conflicting interests which are to be balanced while taking a decision as to whether bail is to be granted or not, as is clear from the following observations:*

“1. Leave granted. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest. Society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests, namely, on the one hand, the requirements of shielding society from the hazards of those

committing crimes and potentiality of repeating the same crime while on bail and on the other hand, absolute adherence to the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.”

25. *The principles which can be culled out, for the purposes of the instant case, can be stated as under:*

25.1 *The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.*

25.2 *The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the*

arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

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25.10 We shall also reproduce para 112 of the judgment in Siddharam Satlingappa case, wherein the Court delineated the following factors and parameters that need to be taken into consideration while dealing with anticipatory bail:

- (a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
- (b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;*

- (c) *The possibility of the applicant to flee from justice;*
- (d) *The possibility of the accused's likelihood to repeat similar or other offences;*
- (e) *Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;*
- (f) *Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;*
- (g) *The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because over implication in the cases is a matter of common knowledge and concern;*
- (h) *While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and*

full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail. ”

9. Mr.Godbole also relied on the same judgment for the proposition that if there is gross delay in making allegations on the part of the prosecutrix, then it is an additional factor in favour of the Applicant for seeking anticipatory bail. He therefore submitted that this is a case in which the Applicant is falsely implicated, his reputation is at stake and he will irreparably lose his reputation if he is arrested on the basis of these false allegations.

10. As against this, the learned Counsel for the first informant as well as learned APP submitted that the FIR has given sufficient reasons as to why it was lodged belatedly. They have submitted that the allegations in the FIR are serious and custodial interrogation of the Applicant is necessary. They therefore submitted that anticipatory bail should not be granted to the Applicant.

11. I have considered the contentions advanced by learned Counsel for the parties. I have perused the FIR. The FIR describes in detail those incidents which had led to lodging of this FIR. As far as the present Applicant is concerned, there is a detailed description as to how the offence was committed by him. Though exact date of any of such incidents is not mentioned, the period during which those incidents had occurred is clearly mentioned. The first incident was in the last week of July 2013. Mr. Godbole's contention that such incident was improbable, cannot be accepted because the incident had

taken place in the privacy of a room and the child sleeping in the room was only 3 years old.

12. The prosecutrix's case that, the Applicant's parents did not pay any heed to her grievance, does not appear to be unnatural as they wanted to save the Applicant, being their son. Her contention in the FIR that she did not complain about it to her parents, as she was under threats issued by the present Applicant, is also not unnatural. In fact custodial interrogation is necessary to investigate this aspect of the matter in respect of the issuance of threats by the Applicant by using a weapon.

13. Mr.Godbole's contention that the present prosecutrix had not made any grievance when the Petition was presented before the Family Court for divorce; does not have any substance because, subsequently, the Petition was not pursued by the first informant. In any case, the Petition was for divorce by mutual consent and there was no occasion for the first informant to raise her other issues before the Family Court. It is

her case that she was made to sign those divorce papers under threats.

14. The email dated 01/02/2019 which she had addressed to various authorities, does not contain specific allegations of rape against the Applicant. However, the tenor of that email, shows that she had basically made grievance against her in-laws and her husband and in respect of suffering which she had undergone during her stay in her matrimonial house. Insofar as the complaint before the State Women's Commission is concerned, there are references to the allegations of rape against the present Applicant and therefore before lodging of the FIR, she had made her grievance known to the State Women's Commission. The conciliation proceedings and efforts could not have direct bearing on the lodging of the FIR, because the first efforts are made by the Counsellors to see that the couple comes together.

15. All this history in fact shows that the prosecutrix had

waited for sufficient time either to save her marriage or because of the threats issued to her and therefore at this stage it is not possible to record any finding that the delay in lodging the FIR is fatal to her case. Applying the ratio of the Judgment of the Hon'ble Supreme Court referred to above in the context of guiding factors for deciding Anticipatory Bail Applications, in my considered view anticipatory bail cannot be granted to the Applicant. The allegations are extremely serious. The role of the Applicant is described in detail. The Applicant has not made out a case to show as to why he was specifically targeted falsely.

16. The reliance of judgment of Bhadresh Sheth (Supra) for the proposition that delay in lodging the FIR enables the accused to seek anticipatory bail is also not correct because in the facts of that case, the charges u/s 376 of the IPC, were framed after 9 years by the trial Court and prosecutrix during that period had not taken any steps. In the present case the prosecutrix has approached the police for investigation into the offence. The delay in lodging the FIR is also explained. The

offence is very serious. The prosecutrix helplessly suffered at the hands of the present Applicant for a long period, show of weapon adds to the gravity of the offence. The allegations are grave and the necessity of custodial interrogation is also made out from the allegations in the FIR.

17. In this view of the matter, I am not inclined to entertain this application for grant of anticipatory bail. The application is therefore rejected.

(SARANG V. KOTWAL, J.)