

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NO. 52 OF 2020
IN
CRIMINAL APPLICATION (BAIL) NO. 28 OF 2020

Wilson Godinho,
56 years Old, F-2,
Third Floor,
Navelkar Trade Center,
M.G. Road, Panaji,
Goa- 403 001.

...Applicant

V/s.

1. Public Prosecutor,
High Court of Bombay,
Panaji, Goa

2. Police Inspector,
Old Goa Police
Station.

... Respondents

AND

Mrs. Akshaya Audumbar Govekar,

... Intervenor

Shri Nitin Sardessai, Senior Advocate with Ms. Gautami Kamat
and Shri Siddharth Sardessai, Advocates for the applicant.

Shri P. Faldessai, Additional Public Prosecutor for the
respondents.

Shri S.G. Desai, Senior Advocate with Shri B. Prabhu Dessai,
Advocate for the Intervenor.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :- 05th February, 2020

Pronounced on: 06th February, 2020

ORDER:

This is an application for intervention at the instance of the sister of the deceased seeking to intervene in the application for bail in anticipation of arrest filed by the applicant.

2. Heard Shri S.G. Desai, learned Senior Advocate for the intervenor who submitted at the outset that Section 438 CrPC was introduced by the amendment to the Code of Criminal Procedure Code, 1973 and which was not in existence in the previous Code of 1898. The powers under Section 438 of CrPC are not fettered by Section 301 and 302 CrPC. Section 301 CrPC would also not have any bearing in a matter of bail under Section 438 CrPC since Section 301 CrPC deals with the appearance by the Public Prosecutor or Additional Public Prosecutor as the case may be in which that case is under enquiry, trial or appeal. Section 438 CrPC is independent of and not in any way fettered by Section 301 CrPC nor Section 302 CrPC which deals with the permission to conduct prosecution. He placed reliance in the Full Bench judgment of the Apex Court in **Gurbaksh Singh Sibbia and ors v/s State of Punjab** (AIR 1980 SC1632),

Chandrakannt Chandulall Bhansali v/s. Shrikat Shrikrishna Joshi and another [1992(3) BomCR 658], **Vinay Poddar v/s. The State of Maharashtra** [2009 CriLJ 896], **Kashinath Jairam Shetye v/s. Ramakant Mahadev Sawant and others** [2013(1)BomCR(Cri)782], **J.K. International v/s. State, Govt of NCT of Delhi and others** [AIR 2001 SC1142] and **Kunhiraman v/s. State of Kerala** [2005(2) klt 685], distinguished the order of this Court in **Ritesh Mahale v/s. The State of Goa** [Stm.(Appln.) No. 2161 of 2017) and submitted that this Court had not considered the Division Bench judgment in **Kashinath Shetye** (supra).

3. The anticipatory bail application moved on behalf of the applicant had been dismissed by the Sessions Judge and no any interim relief was granted in his favour. He read through the proviso to Section 438 CrPC empowering the Officer in-charge of the Police Station to arrest where the High Court or the Court of Sessions as the case may be had not passed any interim order to place a person under arrest upon the rejection of his application for the grant of anticipatory bail. The intervenor had to be allowed to intervene in these proceedings as the applicant

wielded a lot of political influence since his brother was in politics over a period of time and was currently a Panchayat Minister in the State of Goa. The application for intervention had therefore to be allowed. The intervenor would bring forth all the facts before the Court relating to the death of her brother on account of the abetment of suicide by the applicant and therefore the application had to be allowed.

4. Shri Nitin Sardesai, learned Senior Advocate for the applicant referred to Section 24 CrPC dealing with Public Prosecutor and that there had been an amendment to subsection 8 of Section 24 CrPC circumscribed by the proviso that the Court may permit the victim to engage an Advocate of his choice to "assist" the prosecution under this subsection. The intervenor could at the highest be allowed to assist the prosecution and not partake independent proceedings against the applicant viz-a-viz the State which was duly represented by the Public Prosecutor. He therefore submitted that in view of this amendment, the judgment of a learned Single Judge of this Court in **Chandrakant Bhansali** (supra) which was rendered in 1992 did not apply nor did the judgment of another learned Single Judge of this Court as

his Lordship then was in **Vinay Poddar**(supra) which was rendered on 11/09/2008 unlike the amendment to Section 24(8) CrPC which brought in the proviso permitting a victim to engage an Advocate of his choice to assist the prosecution in December,2009. Though the judgment of the Division Bench in **Kashinath Shetye**(supra) was decided in the year 2012, nonetheless the said too was clearly distinguishable as it placed total reliance on **Vinay Poddar**(supra) and did not at all referred to the proviso to Section 24(8) CrPC. He placed reliance in **Rekha Murarka v/s. The State of West Bengal and Another** [Cria No.1727 of 2019] where the Hon'ble Apex Court had clearly ruled on the role of the intervenor and besides placed reliance in **Ritesh Mahale**(supra) rendered by this Court where a similar view had been taken that the intervenor could at the highest assist the prosecution and not partake full fledged in the proceedings.

5. Shri P.Faldessai, learned Additional Public Prosecutor on behalf of the State submitted that the judgment in **Kunhiraman** (supra) was clearly distinguishable and where the question of issuing notice to the Public Prosecutor in terms of Section 438

(1a) CrPC arose only if an interim relief was granted in favour of the applicant. The intervenor was taking dual stand inasmuch as it was sought to be made out that the State through the Public Prosecutor was properly conducting itself before the Sessions Court where the Anticipatory bail application had been rejected but as far as this Court was concerned, an opposite stand was taken that the prosecution would not deliver its proper performance and would adversely impact the case of the intervenor. In any event, the State had filed its reply opposing the bail application filed by the applicant. Shri Faldessai, learned Additional Public Prosecutor in fairness however conceded that the intervenor had a right to assist the prosecution which role was limited and it was not to usurp the powers of the Public Prosecutor. In passing he submitted that the investigation in this case had already been transferred from the Old Goa Police Station to the Crime Branch and being conducted by a competent Officer and therefore there was no basis to cast any aspersions on the conduct of the investigation.

6. Shri S.G. Desai, learned Senior Advocate in reply distinguished the judgment in **Rekha Murarka**(supra) and

submitted that it did not eclipse the Division Bench judgment in **Kashinath Shetye**(supra), and that the same was clearly distinguishable on facts. Sections 301 and 302 CrPC did not apply and when Section 438 CrpC was a stand alone provision. The intervenor had therefore to be allowed to participate in the proceedings independently and to oppose the bail application of the applicant.

7. i have heard their submissions, considered the judgments relied upon and in the light thereof decide the application for intervention after discussing the judgments at the outset.

8. **Gurbaksh Singh**(supra), a Full Bench judgment of the Hon'ble Apex Court dealt with the aspect that the Code of Criminal Procedure,1898 did not contain any specific provision corresponding to the present Section 438, the suggestion made by the Law Commission was, in principle, being accepted by the Central Government and the introduction of Section 438 on the statute book pursuant to the amendment of the CrPC,1973. It considered the predicates of Sections 437, 438 and 439 CrPC, the powers of the High Court and the Court of Session with

whom the application for anticipatory bail is made, observed at paragraph 38 that they would prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do and ultimately disposed off the appeals setting aside the judgment of the Full Bench of the Punjab and Haryana High Court. This judgment did not at all take into the consideration the import of Sections 301 and 302 CrPC nor the requirements of Section 24 dealing with the Public Prosecutor appointed by the Government to conduct such cases on behalf of the State. This judgment is therefore of no consequence to the issue raised in the present application.

9. In **Chandrakant Bhansali**(supra), the learned Single Judge of this Court was seized with the question whether an order granting anticipatory bail had to be equated with a regular bail order passed by a Criminal Court and consequently whether the principles applicable to the cancellation of bail apply equally to both types of orders. The learned Single Judge at paragraph 7 disposed off the preliminary objection raised on behalf of the

accused that the complainant had no locus standi to move the Court because the State was the prosecuting authority and that if the State had not challenged the order of the Court of Sessions, the complainant was precluded from doing so in that context. The learned Judge went further to observe that the Court will shut out a busybody, but it is equally correct to state that a Court will not disqualify an aggrieved citizen who desires to rectify what has gone wrong in a proceeding with which he is vitally concerned. This judgment had also considered the decision of the Apex Court in **Gurbaksh Singh**(supra), where the Court had laid down a salutary principle that anticipatory bail should not be refused merely because the Police make out a case for remand of an offender to the Police Custody and it casts a duty on the Court to judicially evaluate the material placed before it and to independently decide as to whether anticipatory bail should be granted or not. This judgment as rightly submitted by Shri Nitin Sardessai, learned Senior Advocate for the applicant was prior to the amendment to Section 24(8) CrPC which introduced the proviso entitling the victim to engage an Advocate to assist the prosecution.

10. In **Vinay Poddar**(supra), a learned Single Judge of this Court as his Lordship then was,had considered the judgment of the Apex Court in **J.K. International**(supra), the provisions of Section 302, that in **Chandrakant Bhansali**(supra), and held that some role can be played by the complainant by pointing out factual aspects. It was not possible to hold that the first informant or the complainant cannot be heard in an application for anticipatory bail. When the complainant appears before the Court in the course of hearing of an application for grant of anticipatory bail, the Court is bound to hear him. But the said right cannot be allowed to be exercised in a manner which will delay the disposal of an application for anticipatory bail. The delay in disposal of such application may adversely affect the investigation. Therefore, the right which can spelt out in favour of the first informant or the complainant is of making oral submissions for pointing out the factual aspects of the case during the course of hearing of an application for anticipatory bail before the Court of Sessions. The said right is to be exercised by the complainant either by himself or through his Counsel. This is not to say that the Sessions Court hearing the application for anticipatory bail is under an obligation to issue notice to the first

informant or the complainant. There is no such requirement of issuing notice to the first informant or the complainant at the hearing of the application for anticipatory bail. However, if the complainant or the first informant appears before the Court, he cannot be denied a right of making oral submissions either in person or through his Counsel.

11. In **Kashinath Shetye**(supra), the Division Bench of this Court considered the judgment of the learned Single Judge in **Vinay Poddar**(supra), where the learned Single Judge further held that the complainant or the first informant can appear before the Court and claim right of hearing in the said anticipatory bail application. The Division Bench further relied on the findings of the learned Single Judge who held that the complainant/first informant had a right to make oral submissions pointing out factual aspects of the case during the course of hearing of such application and such a right can be exercised either by himself or through his Counsel. The learned Single Judge further held that though the complainant or the first informant had such a right, but it was not necessary for the learned Judge to issue notice either to the complainant or the

first informant. This judgment as rightly submitted by Shri Nitin Sardesai, learned Senior Advocate for the applicant was mainly relying on the judgment of the learned Single Judge in **Vinay Poddar**(supra), in the matter of right of intervention by the complainant or the first informant though it was subsequent to the amendment to the Section 24(8) CrPC but not having considered the import of the said proviso entitling the victim to engage an Advocate of his choice to "assist" the prosecution. This judgment too is clearly distinguishable.

12. In **J.K. International**(supra), the Hon'ble Apex Court observed that looking to the general provisions of inquiries and trials and when such a role is permitted to be played by a private person, though a limited role, even in the sessions courts, that is enough to show that the private person, if he is aggrieved, is not wiped off from the proceedings in the criminal Court merely because the case was chargesheeted by the Police. It observed at paragraph no.10 that it had to be stated further, that the Court is given power to permit even such private person to submit his written arguments in the Court including the sessions court. If he submits any such written arguments the Court has a duty to

consider such arguments before taking a decision. In that view it could be said that the aggrieved private person must keep himself outside the corridors of the Court when the case involving his grievance regarding the offence alleged to have been committed by the persons arrayed as accused is tried or considered by the Court. It further went on to consider **Bhagwant Singh v/s. Commissioner of Police** [1985 CrLJ 1521] and extracted a portion of that ratio that "The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative or relatives of the deceased, but not giving of such notice

will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report.”

13. In **Kunhiraman**(supra), the main question which was at large before the learned Single Judge was whether the de facto complainant has no right to get itself impleaded in the application for anticipatory bail . The learned Single Judge had considered the predicates of Section 301 CrPC relating to the role played by the Prosecutors and their right to appear etc., in an "inquiry, trial or appeal" before a Court and also the limited role of private persons in such matters. The learned Judge observed that the said section had no application to the present case because the present proceedings was neither an "inquiry, trial or appeal" and the cases at hand were applications for anticipatory bail and no appeals, and no enquiry or trial was involved in these cases. The learned Judge further went on to observe that an aggrieved could be heard and the right of hearing of an aggrieved person by the court appears to be well-recognised. It was further held that there was no legal bar for hearing the de facto complainant in an anticipatory bail application though theoretically there was no provision in the Code for impleading a party, but nothing

prevented the Court from hearing the de facto complainant or aggrieved in an application for anticipatory bail. This judgment too was again without considering the proviso to Section 24(8) CrPC.

14. In **Ritesh Mahale**(supra), where the intervenor sought to intervene in the proceedings , this Court had on a consideration of the judgment in **Vinay Poddar**(supra), as also in **J.K. International** (supra) apart from **Sandeep Bafna** (supra), held that the intervenor was always at liberty to assist the prosecution in the conduct of the investigation and ultimately that the intervenor was allowed to assist the prosecution without any independent right of hearing.

15. **Rekha Murarka**(supra), was an appeal by special leave arising out of the judgment passed by the High Court of Calcutta affirming the order passed by the Additional District and Sessions Judge, Fast Track Court, Calcutta rejecting an application filed by the appellant, de facto complainant. In the brief facts, the appellant was the widow of one Gyan Prakash Murarka, who was alleged to have been stabbed and murdered by the respondent

No.2 and the appellant was also said to have sustained serious injuries while trying to save her husband. An offence came to be registered in the Police Station against the respondent no.1, charges were framed against him for the commission of the offences punishable under Sections 302 and 326 IPC and the respondent No.2 pleaded not guilty and the trial began before the Sessions Court. While the evidence was being recorded, the appellant sought an expeditious trial of the case and thereafter she filed another application under Section 301 read with the proviso to Section 24(8) CrPC praying for the reliefs to advance oral argument in support of the question of law and fact only after the learned Public Prosecutor, if so required; to raise objection in case any irrelevant question is put to any prosecution witness, if so required; to examine the prosecution witnesses only after the learned Public Prosecutor, if so required; to cross-examine the defence witnesses, if adduced, only after the learned Public Prosecutor, if so required; to assist the process of justice in accordance with law and for such other orders.

16. In **Rekha Murarka**(supra), the learned Additional District and Sessions Judge, Fast Track Court, Calcutta rejected the

prayer on the premise that the right of a victim or private individual to participate in the prosecution of a Sessions trial is restricted, and the prosecution is subject to the control of the Public Prosecutor. It was observed that Section 301 of the CrPC does not have an overriding effect over Section 225, which mandates that the prosecution be conducted by the Public Prosecutor. However, in view of Section 301(2) of the CrPC, the learned Judge gave permission to the de facto Complainant to furnish written arguments after the completion of the arguments of the prosecution which was challenged before the Hon'ble High Court of Calcutta. The High Court affirmed the order of the Sessions Judge, discussing the crucial role played by the Public Prosecutor in a Sessions trial. Alluding to Section 225 of the CrPC, it was held that the mandate therein that a Sessions trial shall be conducted by a Public Prosecutor is unequivocal and cannot be diluted by the proviso to Section 24(8), which allows the victim to engage a counsel to assist the prosecution. Drawing a distinction between assisting the prosecution and conducting it, the High Court took note of instances where allowing a free hand to the victim's counsel may hamper the prosecution's case and

impact the fairness of the trial, ultimately, giving rise to the appeal by special leave.

17. In **Rekha Murarka**(supra), the Hon'ble Apex Court considered Section 24(8) CrPC dealing with the role of the Public Prosecutor, Section 225 dealing with the trial to be conducted by Public Prosecutor, Section 301 dealing with the appearance by the Public Prosecutors and 302 dealing with the permission to conduct prosecution and observed on a reading of these provisions that it was clear that a Public Prosecutor was entrusted with the responsibility of conducting the prosecution of a case. It was further clear from a joint reading of Section 302 and the proviso to Section 24(8) CrPC that the two provisions were mutually complementary and there was no bar on the victim engaging a private counsel to assist the prosecution, subject to the permission of the Court. The Court further went on to elucidate on the extent to which such assistance can be accorded and in that context stated at para 12.1 being crucial and implies that the victim's counsel was only intended to have a secondary role qua the Public Prosecutor. This was supported by the fact that the original Amendment Bill to the CrPC had used the words

“co-ordinate with the prosecution”. However, a change was later proposed and in the finally adopted version, the word “ co-ordinate with” were substituted by “assist”.

18. In **Rekha Murarka**(supra), Their Lordships dealt with Section 24(8) CrPC proviso r/w 301(2) CrPC and observed that in their considered opinion a mandate that allows the victim’s counsel to make oral arguments and cross examine the witnesses goes beyond a mere assistive role, and constitutes a parallel prosecution proceeding by itself. Given the primacy accorded to the Public Prosecutor in conducting a trial, as evident from Section 225 and Section 301(2) CrPC, permitting such a free hand would go against the scheme envisaged under the CrPC. It observed as follows at paragraph 12.2, 12.3 and 12.4 as follows :

“12.2 In some instances, such a wide array of functions may also have adverse consequences on the fairness of a trial. For instance, there may be a case where the Public Prosecutor may make a strategic call to examine some witnesses and leave out others. If the victim’s counsel insists upon examining any of the left out witnesses, it is possible that the evidence so brought forth may weaken

the prosecution case. If given a free hand, in some instances, the trial may even end up becoming a vindictive battle between the victim's counsel and the accused, which may further impact the safeguards put in place for the accused in criminal trials. These lapses may be aggravated by a lack of advocacy experience on the part of the victim's counsel. In contrast, such dangers would not arise in the case of a Public Prosecutor, who is required to have considerable experience in the practice of law, and act as an independent officer of the Court. Thus, it is important to appreciate why the role of a victim's counsel is made subject to the instructions of the Public Prosecutor, who occupies a prime position by virtue of the increased responsibilities shouldered by him with respect to the conduct of a criminal trial.

12.3 At the same time, the realities of criminal prosecutions, as they are conducted today, cannot be ignored. There is no denying that Public Prosecutors are often overworked. In certain places, there may be a single Public Prosecutor conducting trials in over 2-3 courts. Thus, the possibility of them missing out on certain aspects of the case cannot be ignored or discounted. A victim-centric approach that allows for greater participation of the victim in the conduct of the trial can go a long way in plugging such gaps. To this extent, we agree with the submission made by the learned Senior

Counsel for the Appellant that the introduction of the proviso to Section 24(8) CrPC acts as a safety valve, inasmuch as the victim's counsel can make up for any oversights or deficiencies in the prosecution case. Further, to ensure that the right of appeal accorded to a victim under the proviso to Section 372 of the Cr.P.C. is not rendered meaningless due to the errors of the Public Prosecutor at the trial stage itself, we find that some significant role should be given to the victim's counsel while assisting the prosecution. However, while doing so, the balance inherent in the scheme of the CrPC should not be tampered with, and the prime role accorded to the Public Prosecutor should not be diluted.

12.4 In this regard, given that the modalities of each case are different, we find that the extent of assistance and the manner of giving it would depend on the facts and circumstances of each case. Though we cannot detail and discuss all possible scenarios that may arise during a criminal prosecution, we find that a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross examine witnesses. As stated in Section 301(2), the private party's pleader is subject to the directions of the Public Prosecutor. In our considered opinion, the same principle should apply to the victim's counsel under the proviso to Section 24(8) CrPC, as it adequately ensures that the interests of the victim

are represented. If the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the Public Prosecutor, he may route any questions or points through the Public Prosecutor himself. This would not only preserve the paramount position of the Public Prosecutor under the scheme of the CrPC, but also ensure that there is no inconsistency between the case advanced by the Public Prosecutor and the victim's counsel."

And ultimately agreed with the observations made by the Tripura High Court in Smt. Uma Saha v/s. State of Tripura that the victim's counsel has a limited right of assisting the prosecution and held that the High Court was correct in dismissing the application made by the Appellant seeking permission for her counsel to cross-examine the witnesses after the Public Prosecutor and disposed off the appeal accordingly.

19. Section 24 deals with Public Prosecutors and provides that for every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution,

appeal or other proceeding on behalf of the Central Government or State Government, as the case may be. Subsection 8 provides that the Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor provided that the Court may permit to engage an Advocate of his choice to assist the prosecution which has been introduced w.e.f. 31/12/2009 pursuant to the amendment Act of 2009. It is not singularly in dispute that it is the Public Prosecutor who conducts the prosecution on behalf of the State before the Court of Sessions and who represents the interest of the State also before this Court. Therefore it cannot at all be heard on behalf of the intervenor that the intervention application has to be seen and examined beyond the role of the public prosecutor as envisaged under section 24 CrPC nor can it be heard that the role of the public prosecutor can be erased or brushed aside only on the premise that section 438 CrPC is a stand alone provision and that the court should be all concerned with the appearance by the public prosecutor in terms of section 301 CrPC only because an

anticipatory bail is technically not an "enquiry, trial or appeal" as is canvassed on behalf of the intervenor.

20. Therefore, the contention on behalf of the intervenor that section 438 CrPC is a stand alone provision and that neither section 24 nor section 301 or 302 CrPC can apply cannot be countenanced. At the cost of repetition, the judgment in **Gurbaksh Singh** (supra) is not on the point and does not assist the intervenor in canvassing such a plea. The judgment in **Chandrakant Bhansali** and **Vinay Poddar** (supra) were both prior to the amendment of Section 24(8) CrPC and which did not deal with the mandate of the law that a victim was entitled to engage a lawyer of his choice to "**assist**" the prosecution. This court in **Ritesh Mahale**(supra) had held that the intervenor could only assist the prosecution without any independent right of hearing and which is the position reiterated by the Honorable Apex Court in **Rekha Murarka**(supra). Having considered the submission of Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the State and the fair concession made by him that the role of the intervenor was limited to assisting the prosecution, the application for intervention is partly allowed

looking to the scheme of the Code whereby the intervenor is permitted to assist the prosecution and file written arguments without any independent right of hearing. In these terms, the application stands disposed off.

NUTAN D. SARDESSAI,J.

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