

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO.1146 OF 2021

1. MOHAMMAD JAVED EJAJUDDIN FARUKI
 2. MUSHATAQ AHMED JAHIRAUDDIN FARUKI
- VERSUS
THE STATE OF MAHARASHTRA

Advocate for Applicants : Mr. Vijay B. Patil
APP for Respondents : Mr. S.B. Narwade
Advocate to assist APP : Mr. S.V. Dixit

CORAM : PRAKASH D. NAIK J.

DATE : 23rd NOVEMBER, 2021.

PER COURT:

1] The applicant has preferred this application under Section 438 of Cr.P.C. for pre-arrest bail in Crime No. 75 of 2019 (FIR No. 187 of 2019) registered at Faijpur Police Station, Dist. Jalgaon on 17.10.2019 for the offences under Sections 324, 323, 504, 506 r/w. 34 of IPC. First informant is Mohammad Nazif Hamidudin Faruki.

2] The case of the prosecution is that, the complainant and Izaz Uddin Iqbal Uddin are neighbours. On 16.10.2019, Asif Uddin Ejaj Uddin, Shadik Ejaj Uddin, Javed Ejaj Uddin and Mustaq Jahir Uddin came near the house of the complainant. The accused told complainant's son Mohammed Amir that they intend to construct house and for that, they should release 10 feet area. The accused abused, threatened and assaulted him and his brothers. The complainant came home. All the accused were abusing and assaulting his sons. When he intervened, Javed Ejaj picked up spade lying at the spot and assaulted Nakibul Islam Mohd. Nadif on his head. Mazhar Salimudin Fashruki, Nur Islamudin Farooqui, Majid Hafijuddin Faruki intervened and saved them. Nakibul Islam was

taken to hospital for treatment. The FIR was registered against Asif Uddain Ejaj Uddin, Shadik Ejaj Uddin, Javed Ejaj Uddin and Mustaq Jahir Uddin .

3] The applicants were arrested. They were produced before the court. The accused preferred an application for bail before the court of learned JMFC on 23.10.2019. The offences were bailable. The application was opposed by the prosecution. The learned Magistrate, by order dated 23.10.2019 allowed the application for bail and accused Nos. 1 to 4 were directed to be released on P.R. bond of Rs. 15,000/- each with one solvent surety in the like amount. They were directed not to tamper the prosecution witnesses and evidence and cooperate with the investigating agency.

4] Section 326 of IPC was applied by the Investigating Agency on 30.10.2019. thereafter, the investigating officer submitted report dated 11.11.2019 to the court of learned JMFC, Yawal stating that the injured was admitted to hospital for treatment. He was not in a position to make statement. On 29.10.2019, the investigating agency had visited the hospital for recording his statement. It was found that the injured was discharged from the hospital. He had left the hospital and instead of visiting his village at Marul he proceeded to Jalgaon to house of some other person. Subsequently, the investigating agency learnt that the injured Nakibul Mohd. Islam Najif is residing at Mehrun, Taluka Yawal. On 9.11.2019, the police visited Jalgaon where the injured was residing and recorded his statement. The injured had stated that the accused had attempted to kill him. Hence, Section 307 of IPC has been added.

5] The investigating agency preferred an application for cancellation of bail before the court of learned JMFC, Yawal on

15.7.2021. In the said application, it was stated that Section 307 of IPC has been added after recording statement of injured. Since serious offence has been invoked against the accused, bail granted to them by order dated 23.10.2019 may be cancelled.

6] The learned JMFC rejected the said application by order dated 3.12.2019. The complainant preferred Criminal Revision Application No. 99 of 2019 before the Sessions Court at Bhusawal. The State of Maharashtra had also preferred Criminal Revision Application No.1 of 2020 challenging the order dated 3.12.2019 passed by the learned JMFC. By order dated 21.06.2021, both the revisions were partly allowed. The order passed by the learned JMFC dated 3.12.2019 was set aside. The application filed before the learned JMFC was restored to original file. The learned JMFC was directed to decide the application as per the principles laid down in Pradip Ram Vs. State of Jharkhand and another, on its own merits, without getting influenced by the observations made by the sessions court. The I.O. and the accused were directed to remain present before the JMFC, Yawal on 15.7.2021 at 11.00 a.m. alongwith their advocates and the trial court was directed to proceed further in the said case in accordance with law.

7] On 15.7.2021, the Investigating Officer preferred application before Court of learned JMFC. In the said application it was prayed that, bail granted to accused may be cancelled since Section 326 of IPC was added on 30.10.2019 and Section 307 was added on 10.11.2019 and accused be remanded to police custody for investigation. Reference is made to statement of injured recorded on 09.11.2019. The learned JMFC cancelled bail granted to accused Nos. 1 to 4 by order dated 19.7.2021. However, the prayer of the I.O. to grant custody of the accused as per the application dated 15.7.2021 was rejected.

8] The applicant and co-accused preferred application for anticipatory bail before the Sessions Court at Bhusawal. The said application was rejected by order dated 29.7.2021 on the ground that the offences are serious and non-bailable. Proper investigation and interrogation of the accused is necessary. The accused have played prime role. Their custodial interrogation is necessary for proper investigation. The grounds and objections raised by; the prosecution are sustainable. There are no sufficient grounds to consider the anticipatory bail application at this stage.

9] The applicants have preferred this application seeking anticipatory bail in pursuance to the order rejecting their application by the court of sessions.

10] Co-accused Shaikh Mohammad Asif Ejajuddin and Mohd. Sadiq Ejajuddin had preferred application for anticipatory bail before this court. Vide order dated 15.9.2021, said application was allowed on certain terms and conditions.

11] The learned advocate for the applicant submitted that the custodial interrogation of the applicant is not necessary. The co-accused are granted anticipatory bail by this court. The alleged weapon is already recovered. Nothing to be recorded or discovered from the applicants. The learned Magistrate, while cancelling bail granted to the applicants had rejected the prayer for custody sought by the prosecution. The said order refusing custody is not set aside by the higher court. No such application was preferred challenging refusal of custody by the aggrieved party before the higher court. The applicants were arrested and granted bail. Section 307 of IPC is not attracted. Merely on the ground that section 326 and thereafter section 307 is added, the applicants cannot be subjected to custody. The contents of FIR and statement of injured are contradictory.

There is delay in recording statement of injured.

12] The learned APP submitted that the offences are of serious nature. The applicants were granted bail while the offences were of bailable nature. Subsequently, serious offences were invoked which requires custodial interrogation of the applicants. The role of the co-accused who are granted anticipatory bail by this court can be distinguished. The victim had suffered serious injuries. He was assaulted by 4 persons. There was temporal tenderness and swelling. There is fracture of right parietal bone and hemorrhagic contusion in parietal region. The learned Magistrate had rightly cancelled bail granted to the applicants. The order of cancellation of bail has not been challenged by the applicants before the higher court. The application under section 438 was not maintainable.

13] The learned Advocate for the complainant submitted that serious role is attributed to the applicants. The statement of the injured attributes overt act to the applicants. He was assaulted by spade on head. The injured was admitted to hospital. The injuries are of serious nature. Custodial interrogation of the applicants is necessary. The Police are hand in glove with the accused. Immediate steps were not initiated by them to invoke serious offences. The Sessions court has rightly rejected the application for anticipatory bail.

14] The FIR alleges that there was quarrel between the accused and the complainant. The accused Javed Ejajuddin picked up spade lying at the spot and assaulted Nakibul Islam on head. Considering the factual aspects, offences were registered under section 323, 324, 504, 506 r/w. 34 of IPC. The accused were arrested on 23.10.2019. All the accused were produced before the court of learned JMFC. They preferred application for bail. The application

was allowed by order dated 23.10.2019. The said application was opposed by the prosecution. While allowing the said application, it was observed that the offences are bailable. There is no medical certificate or document on record which shows that the offence is covered under section 326 of IPC. No purpose would be served by keeping accused in custody.

15] Apparently, thereafter Section 326 was added on 30.10.2019 on the basis of medical papers. Report dated 11.11.2019 submitted to the court of learned JMFC mentions that section 307 of IPC has been added. The report also indicates that injured was admitted to hospital for treatment. The police could not record his statement as he was not conscious. When they again visited the hospital for recording his statement on 29.10.2019, the injured had left the hospital after discharge. It is apparent that he did not go to the police to record his statement. He did not visit his residence. He went to Jalgaon to unknown location. Thereafter, his statement was recorded. Apparently, there has been delay in recording statement. The version of the injured is also reflected in the FIR lodged by the first informant. Section 307 of IPC was invoked allegedly on the basis of the statement of the injured that the assailant stated that he should be finished. The statement was recorded on 09.11.2021. The version of this witness that the accused stated that he would kill him is not reflected in statement of complainant, who is eye witness to incident. The factual aspects in that regard appearing in the FIR and the statement of the injured is similar. It is debatable whether Section 307 of IPC is attracted. The weapon used in the offence is already in custody of the investigating agency. It is relevant to note that the learned Magistrate had rejected the application for cancellation of bail by order dated 13.12.2019. Revision application was preferred by the State and the informant challenging the order of the learned Magistrate. The revisional court directed to decide

the application in accordance with law laid down in the matter of Pravin Ram (supra). Although the previous application was rejected by the learned Magistrate, by order dated 19.7.2021, the bail granted to the applicants was cancelled. The prosecution had preferred application for granting custody of the accused. The said application was rejected and NBW was issued against the accused. Thus, prayer for grant of custody of the accused was rejected. The said order had attained finality. It was not challenged by the prosecution/complainant before the higher court. While refusing a grant of custody the learned Magistrate had observed that the Investigating Officer has preferred separate application for granting custody on 15.07.2021 on the ground that weapon i.e. iron tommy is to be recovered. The court perused FIR and remand papers and observed that there is no reference to iron tommy. Eighteen months have passed after lodging FIR. There is no justifiable reason for granting custody. The court further observed that the accused were absent although directed by sessions court. The court cancelled bail and issued non bailable warrant against accused. The order also mentions that, the advocate for accused filed pursis that, the accused had reasonable apprehension that, they may be taken in custody, and if contingency arises, their application for anticipatory bail would become infructuous. It is pertinent to note that although learned JMFC refused to grant custody, prosecution had opposed application for anticipatory bail and the same was reported on the ground that physical custody of accused is required. The prosecution now insists that the custodial interrogation of the applicants is necessary. There is no justification why the custodial interrogation of the applicants is necessary.

16] Considering the factual aspects, I do not find any reason to reject this application under section 438 of Cr.P.C. The custodial interrogation of the applicants is not necessary. The custody is

sought on the ground that charge under section 307 of IPC has been added. The prosecution has contended that the order of cancellation of bail granted to the applicants ought to have been challenged by the accused. It is pertinent to note that the applicants were granted bail considering the fact that the offences were bailable. That order has been set aside because of graver charges being invoked. The charges were substituted by offence under section 307 of IPC. In these circumstances, the applicants had no other option but to apply for anticipatory bail. In the facts of this case there is no infirmity in applying for anticipatory bail. Hence, I pass the following order :

ORDER

- [i] ABA No. 1146 of 2021 is allowed.
- [ii] In the event of arrest of the applicants in Crime No. 75 of 2019 (FIR No. 187 of 2019) registered with Faijpur Police Station, District Jalgaon, the applicants be released on furnishing PR bond in the sum of Rs. 20,000/- each, with one or more sureties in the like amount.
- [iii] The applicants shall appear before the I.O. on 2nd, 3rd and 4th December, 2021 between 11:00 a.m. and 1:00 p.m. and thereafter till filing of charge sheet.
- [iv] The applicants shall not tamper with the evidence.
- [v] The application stands disposed of.

[PRAKASH D. NAIK]
JUDGE

grt/-.