

10.06.2022.
20.
Ct.No.28
as/PA
(Rejected)

C.R.M. (DB) 1472 of 2022

In Re:- An application for bail under Section 439 of the Code of Criminal Procedure in connection with Panskura P.S. Case No.495 of 2019 dated 08.10.2019 under Sections 302/120(B) of the Indian Penal Code and Sections 25/27 of the Arms Act.

In the matter of : Sk. Md. Anisur Rahaman.

... Petitioner.

Mr. Kalyan Bandyopadhyay, Id. Sr. Adv.,
Mr. Gautam Dey,
Mr. Arindam Jana,
Mr. Rajesh Askar,
Mr. Diptendu Sarkar,
Mr. Pratap Bera.

...for the Petitioner.

Mr. Saswata Gopal Mukherjee, Id. P.P.,
Mr. Swapan Banerjee,
Mr. Suman De.

...for the State.

Mr. Sudipta Moitra, Id. Sr. Adv.,
Mr. Rajdeep Mazumder,
Mr. Mayukh Mukherjee,
Mr. Aniruddha Bhattacharyya,
Ms. Namrata Chatterjee.

...for the victim.

Heard the learned Senior Counsels appearing on behalf of the parties.

Mr. Kalyan Bandyopadhyay, learned Senior Advocate for the petitioner submits his client is in custody for more than 800 days. He further submits the proceedings before the trial court was stayed by the Hon'ble Apex Court at the behest of one Afjal Ali Sha @ Abjal Shaukat Sha, a relation of the deceased. Liberty has been given to pray for bail by the Hon'ble Apex Court. Elaborating his submissions Senior Advocate contends petitioner is a victim of political machinations and has

been falsely implicated in the instant case. Most witnesses have not supported the prosecution case. He also contends his client has always co-operated with the process of law and upon the prosecution being re-initiated pursuant to an order passed by a learned Single Judge of this Court in WPA 6315 of 2021 setting aside his acquittal, he surrendered before the trial court and since then he is in custody. In order to delay and dilate the proceeding, the prayer has been made before the Apex Court for transfer of the case to a different State and there is no possibility of the trial progressing in future. Hence, further detention is in breach of his fundamental right under Article 21 of the Constitution of India. Hence, he may be enlarged on bail.

For a better appreciation of the submissions made on behalf of the learned Senior Advocate, it may be apposite to set out the important twists and turns in this beleaguered prosecution:-

a) On 8.10.2019 instant case was registered under Sections 302/120B of the Indian Penal Code against the petitioner and other accused persons by one Jahar She alleging that the petitioner had entered into conspiracy with other accused persons to eliminate his political rival viz., one Kurban Sha. Pursuant to such conspiracy, on 7.10.2019 in presence of the informant some of the accused persons mercilessly

shot Kurban exhorting that he was being taught at lesson for taking up cudgels against the petitioner.

b) In conclusion of investigation, charge-sheet was filed against the petitioner and other accused persons and they were put up for trial.

c) In the course of trial Jahar Sha was examined as prosecution witness No.1 (P.W.1) wherein he narrated the incident of murder, as aforesaid, implicating the petitioner as a conspirator in the murder.

d) Notwithstanding the aforesaid evidence on record, suddenly on 26.02.2021 State of West Bengal issued a notification under Section 321 Cr.P.C. withdrawing the prosecution. Such notification came to be challenged by Jahar Sha before this Court in WPA 6315 of 2021.

e) During the pendency of the writ petition, the trial judge by the judgment and order dated 2.3.2021 mechanically acquitted the accused as the prosecution has been withdrawn under Section 321 Cr. P. C. It may be pertinent to note the withdrawal of prosecution and consequential acquittal by the trial Court Judge is contrary to observations of the Supreme Court in ***State of Kerala Vs. K. Ajith and Others*¹**.

¹ 2021 SCC OnLine SC 510 (see para 26)

f) On the self-same day, learned Single Judge coming to know of the order of acquittal quashed the impugned notification under Section 321 Cr.P.C.

g) On an appeal preferred before the Division Bench, the Bench without going into the merits of the matter, by order dated 13.4.2021 remanded the case before the learned Single Judge on a technical ground that the petitioner had not been given an opportunity of hearing. While doing so, the Bench clarified the status prevailing when the learned Single Judge passed the order shall, however, continue.

h) On 2.3.2021 petitioner was again taken into custody. During the hearing of the writ petition before the learned Single Judge, Jahar Sha, the informant and original writ petitioner sought to withdraw the petition on the ground that he was under pressure. At that juncture, Afjal Ali Sha @ Abjal Shaukat Sha, brother of the petitioner made an application to transpose himself as a writ petitioner and continue the proceeding. By order dated 28.4.2021, learned judge allowed his prayer. As petitioner had been taken into custody in the meantime, the learned Single Judge observed that he would continue in such custody unless order to

the contrary is passed by an appropriate Court till 15.6.2021 or until further orders.

i) Thereafter the State (notwithstanding supporting its stance of withdrawal of prosecution) proceeded with the trial and examined the number of witnesses. During trial, most of the witnesses turned hostile.

j) At this stage, the said Afjal Ali Sha approached the Apex Court and prayed for transfer of the prosecution to a different State. By order dated 5.10.2021, the Apex Court issued notice in the matter and stayed the prosecution conducted by the State of West Bengal. Subsequently, by order dated 2.5.2022, the Court clarified that the petitioner may pursue his bail prayer before this Court.

The aforesaid narration of events clearly discloses a prevaricating stance on the part of the State of West Bengal. While on one hand, the State proceeded to bury the prosecution by resorting to its withdrawal under Section 321 Cr.P.C., on the other hand it purported to continue the prosecution against the petitioner and other accused persons by examining witnesses. In spite of repeated queries from this Court, learned Public Prosecutor is unable to enlighten us whether the State has chosen to recall its decision to drop the prosecution or not. We chose not to make any further comment in this regard

as the issues relating to withdrawal of prosecution as well as transfer of such prosecution are subject matters in collateral proceedings.

Be that as it may, it is relevant to note in the prosecution conducted by the State, most of the witnesses have resiled from their earlier statements to police and have turned hostile. It is also pertinent to bear in mind even the informant Jahar Sha, the original writ petitioner in WPA 6315 of 2021 expressed apprehension and was unwilling to proceed with the said proceeding challenging withdrawal of prosecution.

These circumstances give rise to a serious apprehension in the mind of this Court as to the overwhelming and malevolent influence on the witnesses as well as the informant which had prompted them from either withdrawing from the writ petition or resiling from their earlier statements before police during deposition in Court.

Mr. Bandyopadhyay, strenuously contends the blame cannot lie at the door step of his client who is in custody. We are not unmindful of such fact. However, it is also apposite to note that the petitioner appears to be an influential personality having strong connections with political elements. During arguments it was brought to our notice that on 2.3.2021 i.e. when the order of acquittal was set aside by the learned Single Judge and the petitioner was arrested, his henchmen and/or associates

tried to snatch him from police custody and a criminal case came to be registered against them. These disturbing features persuade us to hold that release of the petitioner on bail pending adjudication before the Hon'ble Apex Court relating to the fate of the present prosecution may add clout to the petitioner and his henchmen who may resort to various wrongful acts including threats and/or intimidation to dissuade witnesses from coming out with the truth relating to the murder of Kurban.

We have also given anxious thought to the contention of Mr. Bandyopadhaya that detention of the petitioner at this stage when the prosecution is stayed by the Hon'ble Apex Court is in breach of his fundamental right under Article 21 of the Constitution of India. A fair prosecution requires to address not only the rights of the accused but also the rights of the victims in particular and the public confidence in criminal justice administration in general. Manner in which the prosecution is sought to be jettisoned gives rise to grave doubt with regard to the *bona fides* of the State in effectively prosecuting the petitioner and the other accused persons. As noted above, while on one hand the State chooses to support its stance of withdrawal of prosecution, on other hand it appears to be conducting a 'lip-service' trial wherein most witnesses have turned hostile.

An aura of fear and apprehension seems to pervade the minds of the witnesses and the relations of the victim.

In fact, Jahar Sha (informant in the case) was constrained to withdraw himself from the writ proceeding challenging the withdrawal of prosecution. This calls for a balancing act between rights of victim i.e., access to justice and witness protection and the right of the petitioner-accused under Article 21 of the Constitution of India.

In view of the painful state of affairs where the bias of the State is heavily loaded in favour of the petitioner-accused, it would be prudent for us to tilt in favour of protection of the witnesses and family members of the deceased and ensure a fair and just prosecution. Hence, we are not inclined to release the petitioner on bail.

On merits too we are not impressed to release the petitioner on bail. We have gone through the evidence on record. Evidence of the informant of Jahar Sha as well as P.W.8, Uttam Mondal @ Bapi Mondal show the miscreants who fired at the victim had taken the name of petitioner. Hence, evidence has come on record in support of the charge of conspiracy.

For these reasons, we are of the opinion that this is not a fit case to grant bail to the petitioner at this stage.

Accordingly, the prayer for bail of the petitioner is rejected.

We clarify that the observations made by us in this order are for the purpose of disposal of this bail application and shall not have any bearing in collateral

proceedings or in any ensuing trial as may be directed by the Apex Court.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)