

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ANTICIPATORY BAIL APPLICATION NO.753 OF 2022

**SHAIKH NASER S/O SHAIKH ABDUL WAHED PATEL
VERSUS
THE STATE OF MAHARASHTRA**

WITH

CRIMINAL APPLICATION NO.2025 OF 2022

IN ABA NO.753 OF 2022

**JAVED S/O SAJED PATEL
VERSUS
SHAIKH NASER S/O SHAIKH ABDUL AND ANOTHER**

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Advocate for Applicant : Mr. V. D. Sapkal (Senior Counsel) i/b
Mr. S. S. Kazi.

APP for Respondent-State : Mr. G. O. Wattamwar.
Advocate for Applicant in application to assist APP : Mr. Govind
A. Kulkarni.

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CORAM : S. G. MEHARE, J.

**RESERVED ON : 23.06.2022
PRONOUNCED ON : 04.07.2022**

ORDER:-

1. Heard the learned senior counsel Mr. Sapkal for the Applicant and the learned APP along with Mr. Kulkarni assisting the learned APP for the respondent-State at length.
2. The Applicant is an Advocate is arraigned as an accused in Crime No.28 of 2022 for the offences punishable under Sections 302, 143, 147, 148 and 149 of the I.P.C. It has been

alleged that on 15.01.2022, at about 9.00 p.m., the deceased left home to attend the birthday ceremony of his friend on a bullet. His phone was replying as switched off. Therefore, the first informant went to search for him. He found him in front of a pan shop smoking cigarettes. At that time, all accused rushed to the deceased. One co-accused Taleb Sultan Chaus stabbed the deceased with a knife, and the other co-accused have also stabbed him and beat him with kicks and blows. The applicant was one of the accused amongst them. He was seen on the scene of the occurrence and stabbed the deceased. The deceased succumbed to the injuries caused to him by the accused.

3. The learned senior counsel would submit that one Shaikh Yunus Shaikh Sikandar Patel and his brother Shaikh Zakir assaulted the accused with the intent to kill him. In the said attack, the applicant suffered serious injuries. He lodged a report, and F.I.R. bearing No.273 of 2020 was registered against them on 01.08.2020 for the offences punishable under Sections 307, 120-B, 427, 323, 504, 143, 147, 148 and 149 of the I.P.C. The accused in the said crime were released on bail by the Sessions Court. The applicant has moved an application for cancellation of bail before the High Court. However, those

accused had threatened the wife of the applicant and tried to pressure him to withdraw the application for cancellation of bail. They had also threatened the applicant that if he would not take the cancellation of his bail application back, then they have the next plan of acid attack. A report of that incident was also lodged. On the said report, N.C. was registered against them. He also argued that said person, namely Shaikh Younus, with some anti-social elements, had assaulted the applicant and tried to take his life thrice. Therefore, an offence under Section 307 of the I.P.C. was registered against them. On 30.11.2021, the applicant gave one representation to the Commissioner of Police, stating that the said persons were pressurizing him to withdraw the application for cancellation of bail.

4. Learned senior counsel Mr. Sapkal would further argue that the applicant has been falsely implicated in the crime. At the time of the alleged incident, he was in his home along with his family members. He sent various messages through Whatsapp to the Commissioner of Police expressing apprehension of implicating him in a false crime, as threats were given to him. His father made an application on 20.01.2022 addressed to the Commissioner of Police to collect

the data from the C.C.T.V. camera at the time of the alleged murder. But neither the Commissioner of Police nor the Investigation Officer took care and collected the evidence showing that he was not present on the spot of the incident and has been falsely implicated in the crime. The President of the District Bar Association and other advocates also requested the Commissioner of Police to conduct the proper inquiry. The Commissioner of Police was informed that the applicant was falsely implicated. The Commissioner of Police assured them that he would personally look into the matter and see that innocents may not be arrested.

5. In a nutshell, the arguments of the learned senior counsel for the applicant the Commissioner of Police and Investigation Officer did not pay heed to the request of the applicant to collect the data from the C.C.T.V. camera from the house of the applicant, showing that he was in his house at the alleged time of the incident. The copies from the said C.C.T.V. camera were also placed before the learned Sessions Judge. The learned Sessions Judge has watched the C.C.T.V. footage and observed that the accused is seen at home at the relevant time. However, the C.C.T.V. footage was the personal footage of the house of the applicant; therefore, at this stage, it is difficult

to rely on the C.C.T.V. footage. It was a material piece of evidence. It was the duty of the Investigation Officer to collect the evidence from the accused to unearth the truth and protect innocents from implicating in the crimes. He has also referred to the various Whatsapp messages sent to the zonal A.C.P. as well as the print of the C.C.T.V. footage. He also vehemently argued that the distance between the house of the accused and the alleged spot of the incident is around 5 to 6 k.m. Therefore, it is impracticable to manage the time at the hands of the applicant. Section 120-B of the I.P.C. would not attract in this case. No notice under Section 160 of the Cr.P.C. is yet served to the applicant to remain present for investigation. The Investigation Officer is unfair. He has not done a fair investigation but is bent on implicating the applicant in a false crime. A person may lie, but the circumstances do not. The applicant is never absconded or fled away. He also relied on the case of *Babubhai Vs. State of Gujarat and others, Criminal Appeal No.1599 of 2010 (Arising out of S.L.P. (Criminal) No.2077 of 2010) Supreme Court dated 26.08.2010*. It has been observed in this case that the investigating agency should be fair and conscious so as to rule out any possibility of fabrication of evidence, and his impartial conduct must dispel any suspicion as to its genuineness.

6. The learned APP and learned counsel, Mr. kulkarni have strongly opposed the application. They have vehemently argued that this Court cannot direct the Investigation Officer to collect the C.C.T.V. footage as proposed by the accused. Such a direction is impermissible. Hon'ble Apex Court in *Prashant Dagajirao Patil Vs. Vaibhav @ Sonu Arun Pawar and another etc. in Criminal Appeal Nos.55-56/2021 (Special Leave Petition (Criminal) Nos.5038-5039 of 2020) dated 19.01.2021*. In the said case, the High Court had directed the Investigating Officer to examine the C.C.T.V. footage and submit a report before this Court.

7. Against the above directions, the Hon'ble Apex Court observed that when only the limited issue of grant of regular bail to the accused is pending consideration before the High Court, it was not appropriate for it to pass the aforesaid directions, which will have a direct bearing upon the trial. As against this argument, the learned senior counsel, Mr. Sapkal, would argue that the applicant is not seeking direction to examine the C.C.T.V. footage and submit the report before the Court. The applicant is barely requesting the Investigating Officer to collect the C.C.T.V. footage of the date of the incident as a part of the investigation.

8. The question to be answered is whether the applicant/accused may insist on the Investigating Officer collect the evidence available to him in relation to the incident, and is it the duty of the Investigating Officer to consider the evidence tendered to him by an accused ?

9. The direction to the Investigating Officer to collect the evidence by the Court and supplying/providing the evidence by the accused are two different and distinct issues. Undoubtedly the investigation should be fair. The Investing Officer must examine the entire evidence he collected or produced before him to unearth the truth.

10. The Investigating Officer has produced a page of Chapter V of the Maharashtra Police Manual. Rule 137 of the said Manual reads thus;

“137. Investigation to be impartial and local.- (1) Police enquiries should always be impartial. It is the duty of the Police to do all they can to find out the truth. An investigating officer is to aim at discovering the actual facts and arresting the real offender. He ought not prematurely to commit himself to any view of the facts for or against any person. He should consider carefully any evidence tendered to him on behalf of an accused person. He should not make up his mind to be influenced by evidence only.”

11. The above provision is explicit that the Investigating Officer must receive the evidence tendered on behalf of the accused. However, the Investigating Officer did not collect the C.C.T.V. footage from the house of the accused though he requested to collect it. In his reply dated 23.06.2022, he explained that from time to time, Police went to the house of the accused, but his house was locked. He has disappeared and did not co-operate in the investigation. Therefore, he could not enter his home and verify whether there was a C.C.T.V. camera. On 15.03.2022, again, Police went to his house. At that time, his wife was present. She told them that the accused did not turn up home from 15.01.2022. She does not know where he is. He made an inquiry about the passwords of the C.C.T.V. camera. She replied that she did not know the passwords. Therefore, they could not see and seize the C.C.T.V. camera. The house search was taken, and a panchnama was drawn. The defence of the accused that at the time of the incident, he was in his home is concocted. There is a great possibility of tampering with the C.C.T.V. footage to flee away from a serious crime. Therefore, also the C.C.T.V. footage was not seized from his house.

12. The provision of the Maharashtra Police Manual *supra* is clear that the accused may tender the evidence to the Investigating Officer. Collecting the evidence by the Investigating Officer and tendering the evidence on behalf of the accused are two distinct things. The accused may tender the evidence to disprove the charges under section 315 of Cr.P.C. It is not a mere duty of the Investigating Officer to bolster up the prosecution case with such evidence as may enable the Court to record the conviction but to bring out the truth. To bring out the truth, the Investigating Officer has to evaluate the evidence collected by him and tendered to him. Even the Court has no control over the investigation of cognizable offences. Then how the accused can ask the Investigating Officer to collect the evidence. Clause 137 of the Maharashtra Police Manual speaks about tendering of the evidence on behalf of the accused. On tendering such evidence, the Investigating Officer has powers to examine the veracity of the said evidence. The accused or his relative did not tender the C.C.T.V. footage to the Investigating Officer, but instead of tendering the C.C.T.V. footage, they insisted the Investigating Officer visit their home and collect the C.C.T.V. footage from their home. The electronic evidence may be tampered with various devices available in the market. Therefore, until the

Investigating Officer tests the veracity of such evidence, such evidence cannot be received directly without tendering it to the Investigating Officer, and the accused cannot insist the Investigating Officer collect the evidence as requested by the applicant. However, the accused has the liberty to tender such evidence before the Investigating Officer. However, where the evidence is tendered on behalf of the accused, it must be received in the investigation. Bare receiving such evidence is not sufficient. The Investigating Officer has to consider such evidence carefully. Obviously, such evidence should be part of the investigation papers and the charge sheet if filed against the accused, tendering the evidence on his behalf. The purpose behind the provision appears to have a fair opportunity for the accused to give the evidence that may have a bearing on the alleged offence and the incident. Merely tendering the evidence on behalf of the accused does not bind the Investigating Officer to accept the evidence as gospel truth. He has the power to examine the veracity of such evidence.

13. From the submissions made by the learned senior counsel Mr. Sapkal, it appears that the applicant has come with the defence of alibi. The question is whether such a defence can be considered at the stage of hearing the bail application.

14. Section 11 deals with the doctrine of a plea of alibi. In order to prove the alibi, such facts must be established by reasonably conclusive evidence, and it must, when established, accord a reasonable presumption or inference as to the matter in dispute. The evidence of the alibi should be inconsistent with any fact in issue or relevant fact. The fact of the presence of the accused elsewhere is essentially inconsistent with the presence at the place and time of the alleged incident. The Hon'ble Apex Court, in the case of *Mukesh and another Vs. State of N.C.T. of Delhi and others A.I.R. 2017 Supreme Court 2161* has observed that the plea of "alibi" has to be weighed against the positive evidence led by the prosecution i.e. not only the substantive evidence of the witness and dying declarations but also against the scientific evidence viz. the D.N.A. analysis, fingerprint analysis and by bite marks analysis, the accuracy of which is scientifically acclaimed. It is well settled that the plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of the occurrence.

15. The Applicant has come up with the case that at the time and date of the alleged incident, he was watching T.V. in his

home, and his presence was recorded on the C.C.T.V. camera. We have already discussed tendering such evidence with the Investigating Officer. Section 103 of the Indian Evidence Act provides that the burden of proof as to any particular facts lies on the person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person. Section 11 of the Evidence Act raises no doubt that the burden to prove the alibi is on the applicant/accused. He has to produce the evidence to weigh against the positive evidence led by the prosecution. Herein the case, the F.I.R. is lodged by the brother of the accused, who was the eyewitness. He has specifically alleged the role played by the applicant. The truthfulness of the electronic evidence is subject to various tests.

16. Under Section 233 of the Code of Criminal Procedure, where the accused is not acquitted under section 232, the Court shall call the accused to enter upon his defence and adduce any evidence he may in his support. He may request the Court to issue summons to any witness. Another provision is Section 315 of Cr.P.C. that provides that the accused may give evidence on oath in disproof of charges made against him or any person charged together with him at the same trial.

Such opportunity is available to the accused after his statement, if any, is recorded under Section 313 of Cr.P.C. Section 169 Cr.P.C. enables the Officer-in-charge of the police station to release the accused when there is not sufficient evidence on his executing a bond to appear when required before a Magistrate. Reading the above provisions of Cr.P.C. together, it is explicit that the accused has the opportunity to disprove the charges against him at different stages of trial and investigation. Further reading clause 137 of the Maharashtra Police Manual gives one more opportunity to disprove the allegations against him. However, it is subject to the satisfaction of the veracity of the Investigating Officer. Though the various stages have been incorporated in Cr.P.C. and the Maharashtra Police Manual, there appears no bar to raising a plea of alibi at the time of anticipatory bail.

17. The law is also settled that the plea of alibi has to be established on the basis of cogent and convincing material, which is usually considered at the time of trial. An equal opportunity should be made available to the prosecution to rebut the evidence submitted by the accused by way of the plea of alibi.

18. The learned counsel assisting the learned APP placed reliance on *Prashant Singh Rajput Vs. State of Madhya Pradesh and another 2021 S.C.C. Online S.C. 919*. Referring to the judgment, the learned APP would submit that while granting anticipatory bail, the Court has to consider the nature of the offence, the role of the person, and the likelihood of his influencing the course of the investigation, or tampering with the evidence (including intimidating the witnesses), the likelihood of fleeing from justice. The gravity of the offences should also be borne in mind by the Court while considering the application for anticipatory bail. It has also been added by the learned APP that the applicant is a practising lawyer and belongs to the political party. He has a good influence and is likely to tamper with the prosecution witnesses.

19. The Court has to consider the material before it. Considering the papers of investigation produced before the Court, besides the serious offence of committing murder is registered against the applicant. There are eyewitnesses, and direct evidence of stabbing with a knife has been levelled against him by the eyewitnesses. Therefore, the recovery of the weapon and other evidence is necessary in the crime.

20. I have gone through the entire papers filed by the applicant and the investigation papers. The applicant has also made a representation to the Commissioner of Police through the members of the District Bar Association. It is alleged that he has political connections. Therefore the possibility of tampering with the evidence, including intimidating witnesses, cannot be ruled out. As far as the role played by him is concerned, the first informant has specifically stated that the applicant stabbed the injured with a knife. Considering factual aspects and the law laid down by the Hon'ble Apex Court as regards anticipatory bail, this Court is of the view that the applicant cannot be released on anticipatory bail. Hence, the application stands dismissed.

21. Criminal Application No.2025 of 2022 to assist the APP is allowed and accordingly disposed of.

22. Learned counsel for the applicant would pray for interim protection for four (4) weeks. No interim protection was granted to the applicant earlier. The offence is serious and there are no grounds to grant him protection as prayed. Hence, his request is declined.

(S. G. MEHARE., J.)

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