

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.623 OF 2022

Mrs.Sonali Jayesh Desai, Age 41 years,
Occ.House wife, R/o.C/o.Madhukar H. Belosay,
C-101, Vaibhav Condominium Apartments,
Prabhadevi, Mumbai-400025.

Petitioner

versus

1. State of Maharashtra.
2. Jayesh K. Desai,
3. Kashiram S. Desai,
4. Mrs.Sunita K. Desai,
Respondent nos.2 to 4 R/o.Flat No.15,
Vaibhav Apartment, Agar Bazar,
S.K.Bole Road, Dadar (W), Mumbai-400 028.

Respondents

Mr.Mikhail Dey h/for Mr.Dinesh Tiwari, Advocate for petitioner.
Mr.Jenish Kansara i/by Mr.Manoj Mhambrey, Advocate for
respondent nos.2, 3 and 4.
Mr.S.R.Agarkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 26th August 2022

PC :

1. The petitioner is the first informant in CR No.745 of 2021 registered with Dadar Police Station on 11th August 2021 for offences punishable under Sections 498-A, 313, 324, 506 r/w 34 of Indian Penal Code.

2. Apprehending arrest in connection with CR No.745 of 2021 the respondent nos.2 to 4 preferred Anticipatory Bail Application No.1890 of 2021 before the Sessions Court. The petitioner being the first informant preferred application for intervention/reply on 23rd

September 2021, opposing application for anticipatory bail and prayed that the application be rejected and accused be taken into custody. Respondent nos.2 to 4 preferred application for deciding the question whether intervenor/first informant or her advocate can orally argue in the anticipatory bail application or can file written arguments and assist the public prosecutor.

3. Learned Sessions Judge vide order dated 25th January 2022 allowed the application preferred by respondent nos.2 to 4 below Exhibit-12 in Anticipatory Bail Application No.1890 of 2021, and informant was permitted through her advocate to file written submissions only in Anticipatory Bail Application. The learned Sessions Judge held that considering facts and nature of application for seeking relief of anticipatory bail, principle held by the Hon'ble Apex Court, it is not justifiable to allow, original informant to make oral submissions while deciding application for anticipatory bail. The original informant has a limited right to assist the prosecution by herself or through her advocate with the permission of the Court to file written submissions in anticipatory bail application. Original informant through her advocate has no right to advance oral arguments in anticipatory bail application.

4. Learned advocate for petitioner Mr.Tiwari submitted that petitioner being the first informant is required to be given audience while adjudicating the application for anticipatory bail. The petitioner has provided information to police. She was required to make complaints with regards to shoddy investigation conducted by police. The investigation was transferred to another police station. The petitioner forwarded complaint to Deputy Commissioner of

Police and Joint Commissioner of Police on 24th August 2021. Investigation was transferred to V.B.Nagar Police Station. The petitioner had also filed application before Court of Magistrate for transfer of investigation. Prior to registration of FIR, detailed written complaint was filed by petitioner with regards to ill treatment and harassment meted out to her by respondents and offences committed by them. The petitioner would be in a position to highlight the harassment, cruelty meted out to her. Learned Sessions Judge has committed error in refusing audience to the petitioner and only permitting the petitioner to file written submissions through advocate. Learned Sessions Judge has relied upon decision of this Court in the case of **Wilson Godinho Vs. Public Prosecutor and another**¹. The reliance on the said judgment was misplaced. The reply filed by concerned police station indicate that the police are not touching upon critical points. Amendment to Section 24 of Code of Criminal Procedure does not take away right of informant/complainant to make oral submissions before the Court opposing anticipatory bail application. The Court did not take into consideration the decision of this Court in the case of **Vinay Poddar Vs. The State of Maharashtra**² and the decision in the case of **Smt.Sharada Dattatray Choudhari Vs. State of Maharashtra and another**³. Learned counsel for petitioner also placed reliance on decision of Hon'ble Supreme Court in case of **Jagjeet Singh and others Vs. Ashish Mishra @ Monu and another**⁴.

5. Learned advocate for respondent nos.2 to 4 Mr.Mhambrey submitted that the decision in the case of Vinay Poddar (supra) and

1 Cri.Misc.Application No.52 of 2020 in Cri.Bail Application No.28 of 2020 of Goa Bench, decided on 6th February 2020

2 2009-Cri.L.J.-896

3 Criminal W.P.No.3455/2014, decided on 2nd February 2015

4 2022-SC Online-SC-453

Smt.Sharada Choudhari (supra) do not apply in the present case. Those decisions were delivered prior to the amendment to Section 24(8) of Cr.P.C. By way of amendment to Section 24(8), proviso has been incorporated which indicate that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section. In view of the said amendment, the Court is empowered to permit the victim to engage an advocate of his/her choice to assist the prosecution. The judgments relied upon by learned counsel for petitioner were delivered prior to amendment to Section 24 of Cr.P.C. Decision of this Court in case of Wilson Godinho (supra) is squarely applicable in this case. This Court has taken note of the proviso added to Section 24(8) of Cr.P.C and also distinguished earlier decisions including the decision in the case of Vinay Poddar (supra) on the ground that it was prior to the proviso incorporated to Section 24(8) of Cr.P.C by way of amendment which came into force in 2009.

6. In the case of Vinay Poddar (supra), the applicant before this Court was aggrieved by order passed by Sessions Court rejecting his application seeking declaration that original complainant and/or the advocate for the complainant have no right of audience in the anticipatory bail application. The contention of applicant/accused before this Court was that there is no provision in the Cr.P.C under which Sessions Court hearing an application for anticipatory bail can allow the original complainant to appear and to oppose grant of anticipatory bail. The Sessions Court has no power to allow intervention by the complainant in an application for grant of anticipatory bail filed by the accused. This Court has observed by referring to decision of Supreme Court in the case of

J.K.International Vs. State (Govt. of NCT of Delhi) (2001-2001-SC-1142) and several other decisions that provisions of Code do not specifically recognize the right of intervention. However, role which the first informant or the complainant can play, has been considered by Supreme Court in case of J.K.International. In paragraph no.10 of the said decision, the Supreme Court has observed that even before the Sessions Court the role of a private person who is aggrieved by the offence is not altogether wiped out merely because the accused was charge sheeted by police. The Supreme Court has observed that the relevant provisions of said Code permits written arguments to be filed by a private person before the Sessions Court and the Court is duty bound to consider the written arguments. The aggrieved private person or complainant is not altogether eclipsed from the scenario when a criminal Court takes cognizance of the offence based on the report of the police. Paragraph 15 of the said decision is important, which reads as follows :

“15. When an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases is at a preliminary stage. Therefore, some role can be played by the complainant by pointing out factual aspects. In the circumstances, it is 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 be 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 Session. 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. It must be noted here that the legal position on this aspect in the case of an application for regular bail may not be the same.”

7. In the case of Smt.Sharada Choudhari (supra), the petitioner was the complainant. The respondent preferred an application under Section 438 of Cr.PC. The complainant filed an application for intervention. The Sessions Court permitted the petitioner-complainant to submit written notes of arguments. The Sessions Court refused to give oral hearing to the advocate for complainant. The petitioner relied upon decision of this Court in Vinay Poddar Vs. State of Maharashtra (supra). The learned advocate for accused relied upon decision of Supreme Court in the case of Sundeep Kumar Bafna Vs. State of Maharashtra and another. This Court had observed that decisions of this Court were prior to Supreme Court decision in the case of Sundeep Kumar Bafna. This Court referred to observations in paragraph 25 of said decision and observed that from the judgment of Supreme Court it is clear that informal hearing can be given to the complainant either in criminal case or in bail application if the Court harbours the opinion that the prosecution is likely to fail. As such, there is no complete bar on the oral hearing to be given to the complainant or aggrieved party during the course of

hearing of criminal case or bail application including anticipatory bail application. Sufficient discretion is given to the Judge while hearing the criminal case or bail application. It is necessary to give finding whether the Court harbours any opinion that prosecution is likely to fail. This Court directed the course to be adopted in such situation. The counsel for applicant and public prosecutor to conclude their arguments. The learned Judge, at that stage can consider the written arguments, if any, filed by the complainant or by the aggrieved party and may decide whether situation warrants informal hearing by the complainant or aggrieved party or the advocate. Permission to address the Court obviously will be given only when the opinion of the Judge is recorded in writing. Such a hearing, if any, given by the Judge shall also be for a limited period.

8. The decision of Apex Court in the case of Sundeep Kumar Bafna is undisputedly subsequent to the decision of this Court in the case of Vinay Poddar (*supra*) and other decisions referred therein. The Court was considering right of hearing to complainant (informant in application for bail). At the stage of hearing application for anticipatory bail the investigation is at primary stage. The accused is sought to be arrested. The investigation proceeds on the basis of information or inputs given by complainant. There is no occasion for interrogating accused since he is not in custody. The investigation is at preliminary stage. Even otherwise in the present case the oral submissions were not denied to complainant by giving any finding as spelt out in the decision of this Court in the case of Sharda Chowdhary (*supra*).

9. In the case of Wilson Godhino (*supra*), the sister of deceased

sought intervention in the application for bail in anticipation of arrest. The Court analyzed several decisions and held that there had been amendment to sub-section 8 of Section 24 of Cr.PC circumscribed by the proviso that the Court may permit the victim to engage an advocate of his choice to 'assist' the prosecution under this sub-section. The Court permitted intervenor to assist the prosecution and file written arguments without any independent right of hearing. It was observed that contention of intervenor that Section 438 of Cr.PC is stand alone provision and neither Section 24 nor Section 301 or 302 can apply, cannot be accepted. The decision in the case of Vinay Poddar (supra) and Chandrakant Bhansali Vs. Shrikant Shrikrishna Joshi and another 1992(3)-Bom.C.R.-658 were prior to amendment to Section 24(8) of Cr.PC.

10. The amended Section 24(8) incorporated proviso to Section 24, which reads as follows :

“24. Public Prosecutors-

(1)

(2)

(3)

(4)

(5)

(6)

(7)

(8) 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 the victim to engage an advocate of his choice to assist the prosecution under this sub-section).

(The proviso was added by amendment with effect from 31st December 2009.)

11. The Division Bench of this Court in the case of Kashinath Jairam Shetye Vs. Ramakant Mahadev Sawant and others (supra) considered the judgment of learned Single Judge of this Court in Vinay Poddar (supra), where the learned Single Judge 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 relied upon findings of 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. In the case of Wilson Godhino (supra), it was observed that the Division Bench did not consider the import of amendment to Section 24(8) of Cr.P.C.

12. It is pertinent to note that Section 2 of Cr.P.C has been amended by providing definition of Victim u/s.2(wa) with effect from 31st December 2009 and victim has been defined as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir.

13. In the decision of Jagjeet Singh and others (supra) one of the issue for consideration is whether a victim, as defined under Section 2(wa) of the Code of Criminal Procedure, is entitled to be heard at the stage of adjudication of bail application of an accused? It was observed that until recently criminal law had been viewed on a dimensional plane, wherein the Courts were required to adjudicate between the accused and the stage. The 'victim' - the defacto sufferer of a crime had no participation in the adjudicatory process

and was made to sit outside the Court as a mute spectator. However, with the recognition that the ethos of criminal justice dispensation to prevent and punish crime had surreptitiously turned its back on the victim, the jurisprudence with respect to the rights of victim to be heard and to participate in criminal proceedings began to positively evolve. On the domestic front, recent amendments to CrPC have recognized a victim's rights in the Indian criminal justice system. The genesis of such rights lies in the 154th Report of the Law Commission of India, wherein radical recommendations on the aspect of compensatory justice to a victim under a compensation scheme were made. Thereafter a Committee on the reforms of Criminal Justice System in its report in 2003, suggested ways and means to develop a cohesive system in which all parts are to work in co-ordination to achieve the common goal of restoring the lost confidence of the people in the criminal justice system. The committee recommended the rights of the victim or his/her legal representative 'to be impleaded as a party in every criminal proceeding where the charges punishable with seven years' imprisonment or more'. It was further recommended that the victim be armed with a right to be represented by an advocate of his/her choice, and if he/she is not in a position to afford the same, to provide an advocate at the State's expense. The victim's right to participate in criminal trial and/ his/her right to know the status of investigation and take necessary steps or to be heard at every crucial stage of the criminal proceedings, including at the time of grant or cancellation of bail, were also duly recognized by the committee. Repeated judicial intervention, coupled with the recommendations made from time to time as briefly noticed above, prompted the Parliament to bring into force the Code of Criminal Procedure

(Amendment) Act, 2008, which not only inserted the definition of a 'victim' under Section 2(wa) but also statutorily recognized various rights of such victim at different stages of trial. The Legislature has thoughtfully given a wide and expansive meaning to the expression 'victim' which means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir.

14. Learned counsel for respondents submitted that decision of Hon'ble Supreme Court relates to grant or cancellation of bail. Although it was an petition for cancellation of bail granted to the respondent by High Court, the issue for consideration is also about victim's right to be heard at the time of adjudicating application for bail, which according to victim was denied to him. The observations in paragraphs 23, 24, 25, 26 and 27 are important, which reads as under :

“23. It cannot be gainsaid that the right of a victim under the amended Cr.P.C are substantive, enforceable, and are another facet of human rights. The victim's right, therefore, cannot be termed or construed restrictively like a brutum fulmen. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the Cr.P.C. The presence of 'State' in the proceedings, therefore, does not tantamount to according a hearing to a 'victim' of the crime.

24. A 'victim' within the meaning of Cr.P.C cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a 'victim' has unbridled participatory rights from the stage of

investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that 'victim' and 'complainant/ informant' re two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a 'victim', for even a stranger to the act of crime can be an 'informant' and similarly, a 'victim' need not be the complainant or informant of a felony.

25. The above stated enunciations are not to be conflated with certain statutory provisions, such as those present in Special Acts like the Scheduled Cast and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. Instead, what must be taken note of is that; First, the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged; Second, where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.

26. Adverting to the case at hand, we are constrained to express our disappointment with the manner in which the High Court has failed to acknowledge the right of the victims. It is worth mentioning that, the complainant in FIR No.219 of 2021, as well as the present appellants, are close relatives of the farmers who have lost their lives in the incident dated 03.10.2021. The specific stance taken by learned Senior Counsel for the appellants that the counsel for the 'victims' had got disconnected from the online proceedings and could not make effective submissions before the High Court has not been controverted by the Respondents. Thereafter, an application seeking a

rehearing on the ground that the 'victims' could not participate in the proceedings was also moved but it appears that the same was not considered by the High Court while granting bail to the Respondent-Accused.

27. We, therefore, answer question (A) in the affirmative, and hold that in the present case, the 'victims' have been denied a fair and effective hearing at the time of granting bail to the Respondent-Accused."

15. Considering the observations of Hon'ble Supreme Court in the decision of Jagjeet Singh and others (supra), the informant/victim/complainant cannot be deprived of right of audience. If a victim can be heard during adjudication of bail application for all the reasons stated above, such hearing will have to be given to victim/aggrieved person at the time of hearing of anticipatory bail application. In the present case, the petitioner is the first informant/victim aggrieved person. The learned Sessions Judge has committed an error in denying permission to advance oral submissions to advocate for petitioner. In the light of aforesaid decision of the Apex Court, the decision in the case of Wilson Godinho (supra) cannot be considered to deprive the petitioner the right to be heard in the anticipatory bail application preferred by respondent. Even otherwise, I do not find that amendment to Section 24(8) of Cr.PC would prevent the petitioner from advancing oral submissions to oppose application for anticipatory bail. It is made clear that the hearing could be given to such person provided he or she appears before the Court to oppose application for anticipatory bail and it is not necessary that Court is required to issue notice to them.

ORDER

- (i) Writ Petition No.623 of 2022 is allowed and disposed off;
- (ii) The impugned order dated 25th January 2022 passed by

Additional Sessions Judge, Greater Bombay below Exhibit-12 in Anticipatory Bail Application No.1890 of 2021 is quashed and set aside;

(iii) The petitioner's be permitted to advance oral submissions at the time of adjudication of Anticipatory Bail Application No.1890 of 2021;

(iv) In the event petitioner's advocate decides to make oral submissions opposing Anticipatory Bail Application No.1890 of 2021, they may be permitted to do so.

(PRAKASH D. NAIK, J.)

MST