

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

ANTICIPATORY BAIL APPLICATION NO.1036 OF 2023

**SHAIKH ATIKH S/O SHAIKH BASHIR
VERSUS
THE STATE OF MAHARASHTRA**

Mr. W. H. Shaikh, Advocate for the applicant
Mr. V. S. Badakh, APP for the respondent/State

CORAM : R. M. JOSHI, J.

DATE : 30th AUGUST, 2023

P.C. :-

1. The question arises in this application for determination is as to whether the applicant who is instrumental for causing pre mediated assault on informant with help three other persons armed with cricket bat, sticks can be extended pre arrest bail, on the ground that the co-accused are enlarged on regular bail and the weapon of assault is allegedly recovered.

2. Applicant apprehends arrest in connection with with C.R. No. 121 of 2023 registered with Purna Police Station, Dist. Parbhani for the offences punishable under Sections 326, 507 and 34 of the Indian Penal Code (for short 'IPC').

3. FIR is lodged by informant Tatyarajan alleges that on 22.04.2023 he bought vibrator needle from Atik Shaikh Bashir (Applicant), who is

contractor by profession, and returned back to him after its use. Informant returned the said needle to Atik within 15 days and thereafter Atik took the said needle for his use. On 03.06.2023 at about 10.30 am Atik gave phone call to informant stating that the vibrator needle used by him is damaged and asked to give new vibrator needle to him. On this, informant stated that he had given back vibrator needle to him while it was in working condition and the same is damaged after its use by him. When informant stated that he will repair it, Atik told that he wanted new vibrator needle. When informant refused to give new vibrator needle, Atik abused him in filthy language over phone. Within 15 minutes thereof, when informant was chit-chatting with Shrinivasrao on his site near BSNL Office, Atik, Vikrant, Shaikh Shehbaz and one unknown person came there with cricket bat, stick in their hands. They assaulted informant on his left hand with bat. So also Vikrant and Shaikh Shehbaz assaulted informant with wooden stick on his left knee. Accused persons fled from the spot on seeing Shrinivasrao, Mallikarjun Reddy G. Shrikant, Sheer H. Vasu were coming there.

4. Learned counsel for the applicant submitted that the offence punishable under Section 326 of IPC does not get attracted as the weapon used for causing of assault is not instrument for shooting, stabbing or cutting or any instrument which used as a weapon of offence is likely to cause death. To support his submission he placed reliance on

the judgment of this Court passed in case of ***Jagannath Narayan Nikam and others Vs. State of Maharashtra, 1994 Mh.L.J.*** to submit that the stick would not become a lethal type of weapon. It is submission that the allegations against the applicant in the first information report is not specific that he caused assault on the hand of the informant which has resulted into causing of fracture to him. It is his further submission that causing of fracture to the informant does not constitute offence punishable under Section 326 of IPC. It is specifically submitted that unless the injury caused to the sufferer results into severe bodily pain for the space of 20 days and he is unable to follow ordinary pursuits then only the offence under Section 326 of IPC may get attracted. It is his further submission that for the reason that the weapons of assault are seized the applicant is entitled for the pre arrest bail. To support the said submission the order passed by this Court in ABA No.640 of 2023. Lastly it is submitted that the anticipatory bail should not be refused merely because prosecution claims that they want the accused in police custody for the purpose of investigation and that the accused has failed to show any enmity. To support this submission reliance is placed on judgment of this court in case of ***Jagannath V. State of Maharashtra, 1982 Cri.L.J. 1808.***

5. Learned APP opposed the said submission by relying upon the investigation papers. It is his contention that apart from the statement

made in the first information report, the allegation against the present applicant for the causing the injury to the informant resulted into the fracture is supported by the statements of eye witnesses. It is further submitted that injury certificate placed on record clearly indicates causing of fracture to the informant in the said assault, which is covered by Section 320 of IPC explanation Seventhly. It is further submitted that the allegation against the present applicant are not restricted to the date of occurrence of incident however even thereafter he has obstructed the work of the informant and which according to the prosecution shows conduct of the applicant and tendency to involve in the crime.

6. It is needless to record that the first information report cannot be encyclopedia. Perusal of the first information report in the instant case clearly shows that necessary/required avernments are certainly found therein. It shows that there was some dispute between the applicant and informant over causing of damage to the vibrator needle which was borrowed by the informant from applicant. The said needle was claimed to have been returned to the applicant within 15 days and it was alleged by the applicant that the said needle was damaged. The report further shows that when the applicant had asked him to buy a new vibrator needle, the informant refused to do so. Applicant also refused to accept the suggestion of the informant that he will get the same repaired but insisted for new one. It is thus clear that there was no provocation on

the part of informant to cause assault on him.

7. Perusal of the report further shows that the incident of assault did not occur spontaneously. According to the informant discussion took place between them on phone wherein he was abused by the applicant. Immediately after 15 minutes of the said call the applicant along with three other persons came to the spot with cricket bat and wooden sticks. After arrival at the spot, without wasting any time, straight away, assault was caused on the informant.

8. Perusal of the investigation papers shows that the eye witness to the extent has categorically stated about actual assault being caused by the present applicant on the hand of informant with cricket bat. There is injury certificate to corroborate the said version of the informant and eye witness showing causing of fracture to the hand of the informant. The said injury therefore is attributable to the applicant. In order to constitute an offence under Section 326 of IPC the causing of grievous hurt as defined by Section 320 of IPC is condition precedent. In Section 320 of IPC defines grievous hurt and fracture is grievous injury. Hence this Court is not able to accept the submission of the learned counsel for the applicant that unless the informant was in severe pain for 20 days or more or was unable to follow ordinary pursuit, it is not grievous hurt. The instrument for causing of the said injury with the cricket bat. The Section

326 of IPC shows that the voluntary causing of the grievous hurt by means of any instrument which use an weapon of offence is sufficient to attract the said offence. The judgment relied upon by the learned counsel for the applicant in case of ***Jagannath Narayan Nikam and others Vs. State of Maharashtra*** (supra) pertains to the case of appeal against conviction. By appreciating the the evidence on record it is observed therein that some evidence is necessary to show that the sticks were of lethal type, to prove that it was an instrument which is used as a weapon of offence is likely to cause death. Hon'ble Apex Court in case of ***Jaswinder Singh vs Navjot Singh Sidhu, (2022) 7 SCC 628*** has held that in given case, hand also can become a weapon. The applicant therefore is not entitled to get any benefit of judgment in case of ***Jagannath Narayan Nikam and others Vs. State of Maharashtra*** (supra). Needless to record that instrument i.e. bat can be certainly used as a weapon for causing assault which may even result into the causing of death of any person.

9. The bail is also sought on the ground that the weapons are seized. To support his submission the order of this Court passed in case of ***ABA No. 640 of 2023*** (supra) is relied upon. As far as the present case is concerned, the facts on record indicate that the incident in question did not occur at the spur of the moment. The incident was preceded by the phone call between the applicant and informant wherein the applicant

had abused him. It is thereafter he came to the spot with three other accused armed with cricket bat, sticks. Immediately after coming there, informant was assaulted. It clearly shows that the act of assault was pre mediated and applicant after preparation for commit crime came there to cause assault on the informant. In the order relied upon such facts applicable were totally different. It was the case wherein the agent of finance company went to the house of applicant No.1 and at that time incident of assault took place. It was not case of premeditation and assault was spontaneous. In the instant case since the assault is pre planned, the facts involved in both cases differ completely and hence there is no application to the said order to the present case.

10. As far as the judgment in case of ***Jagannath Vs. State of Maharashtra, 1981 CRI.L.J.1808***, it is pertinent to note that in the said case no custodial interrogation of the applicant was necessary and hence it was held that merely because the prosecution seeks the custody, it cannot be given . In the present case however since there was premeditation and obviously premeditation has to follow planning for the commission of offence. In such circumstances irrespective of the fact that any weapon is seized or not, custodial interrogation of the applicant is necessary to unearth the crime.

11. The aforesaid peculiar facts and circumstances of the case,

applicant is not entitled for pre arrest bail. Hence application stands dismissed.

12. Learned counsel for the applicant on after rejection of the application he seeks extension of interim order for six weeks. He submits that as per judgment of Division Bench of this Court, in case of ***Balasaheb Babanrao Nagawade Versus State of Maharashtra, 2017 DGLS (Bom.) 2144***, six weeks time must be granted after rejection of application. This request is opposed by learned APP by submitting that not only act of the applicant of commission of crime offence in question but also subsequent conduct disentitles him to seek continuation of interim protection.

13. Since the liberty of the applicant is protected by interim order, to enable him to approach the Hon'ble Apex Court, liberty is so granted is extended for the period of two weeks from today.

(R. M. JOSHI, J.)

ssp