

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO. 1455 OF 2023

Rohit Ramchandra Kad ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Harshad Nimbalkar, a/w Shyam Taori, Satyam
Nimbalkar, Omkar Chitale and Abhishek Arote, for the
Applicant.

Mr. S. V. Gavand, APP for the State/Respondent.

CORAM: N. J. JAMADAR, J.

DATED: 15th SEPTEMBER, 2023

ORDER:-

1. Heard the learned Counsel for the applicant and the learned APP for the State.
2. This is an application for pre-arrest bail in connection with CR No.417 of 2022 registered with Khalapur Police Station, District Raigad, for the offences punishable under Sections 304(II), 286, 337 and 338 read with Section 34 of Indian Penal Code, 1860 ("the Penal Code") and Section 9B of the Explosives Act, 1884.
3. Mumbai Railway Vikas Corporation Ltd. (MRVCL) is laying Panvel – Karjat Rail Line. MRVCL has awarded the contract to Railcon – SREPL (JV) to execute the said project.

Railcon – SREPL has, in turn, awarded the contract to “Adit Infra” of which the applicant is a proprietor. In order to lay the railline it was necessary to have excavation. The applicant awarded the contract of excavation, which involves blasting operation as well, to Jai Ambe Drilling, of Ajay Satyanarayan Ladda, accused No.5. Applicant had appointed and entrusted the work at site to Pritam Thorat, accused No.1; Rajendra Khandare, accused No.2 and other co-accused.

4. On 23rd December, 2022 at about 4.30 pm. blasting was done at the work site, which was at a distance of about 50 meters from Chowk – Karjat road.

5. The prosecution alleges the said blasting was carried out by making use of excessive explosives and without adhering to safety standards. The applicant and other co-accused did not take adequate safety precautions. The criminal negligence on the part of the applicant and other co-accused resulted in stones (flyrock) flying of far areas. Those stones hit Devkabai Badekar and Sachin Badekar, who were passing Chowk – Karjat road on a motorcycle. Other persons also sustained injuries. Properties in the vicinity were also damaged. Devkabai succumbed to the injuries at the spot.

Sachin passed away while under treatment at Karjat Hospital. Keshav Kalekar, the cousin of Sachin lodged the report leading to registration of CR No.417 of 2022.

6. Apprehending arrest, the applicant approached the Court of Session. By an order dated 29th April, 2023, the learned Additional Sessions judge, Panvel, declined to exercise the discretion in favour of the applicant, opining, *inter alia*, that the offences were of grave nature and there was *prima facie* negligence on the part of the applicant and the persons who carried out the blasting. Hence, this application.

7. When this application was listed before this Court on 24th May, 2023, the Court was persuaded to grant interim bail.

8. Mr. Nimbalkar, the learned Counsel for the applicant, submitted that the offence punishable under Section 304(II) is not *prima facie* made out. The accusation against the applicant singularly lacks element of *mens rea* for the offence of culpable homicide not amounting to murder. The applicant had appointed a contractor to carry out the blasting. Under the terms of the work order dated 17th June, 2022, no liability would fall on Adit Infra on account of any damage due to controlled blasting. It was for the contractor

to take all the necessary safety precautions. It was submitted that in the site accident report, submitted by the competent officer of MRVCL, no negligence was found on the part of the applicant. It was, *inter alia*, opined that despite all precautions having been taken the incident in question had occurred and it was possible that on account of unknown geological factor there can be flyrock beyond design calculation parameters.

9. Mr. Gavand, the learned APP, countered the submissions of Mr. Nimbalkar. It was urged that criminal negligence on the part of the applicant is writ large. The fact that the applicant was not present at the work site when the blasting was carried out was of no significance. It was incumbent upon the persons, who carried out the blasting to take all the safety precautions. The subject road could have been temporarily closed. Taking the Court through the situation depicted in the scene of occurrence panchnama dated 24th December, 2022 Mr. Gavand would urge that in the totality of the circumstances, the applicant cannot be permitted to wriggle out of the situation by asserting that he had appointed a contractor. Hence, the applicant does not deserve the relief of pre-arrest bail, urged Mr. Gavand.

10. To being with, the distance between the work site where the blasting was carried out and the road on which the flyrock hit the deceased. In the spot panchnama, the distance is shown to be about 100 meters. Mr. Gavad would urge that a distance of 100 meters cannot be said to be adequate while considering the impact which the blasting may have. It was submitted that the applicant and the authorities could have temporarily closed the road itself to ensure the safety of the persons using the said road.

11. The aforesaid submission may carry substance while determining the aspect of the degree of negligence on the part of the concerned persons. However, in this proceedings, it has to be *prima facie* evaluated as to whether offence punishable under Section 304(II) is made out. There is material on record to indicate that MRVCL appointed Railcon – SREPL (JV) to execute the railways project. Railcon, in turn, appointed the applicant who, in turn, gave the contract of blasting to Jay Ambe. In this backdrop, the aspect of intention or knowledge to cause death deserves to be considered. *Prima facie*, such criminal intent or knowledge cannot be attributed to the applicant as the applicant was executing the work in discharge of contractual obligation.

12. A useful reference in this context can be made to a judgment of the Supreme Court in the case of *Shantibhai J. Vaghela and another vs. State of Gujarat and ors*¹, wherein the ingredients of the offence of culpable homicide not amounting to murder punishable under Section 304 were postulated as under:

“24. Section 299 IPC defines culpable homicide as causing of death by doing an act with the intention of causing of death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that by such act death is likely to be caused. Under Section 300 IPC all acts of culpable homicide amount to murder except what is specifically covered by the exceptions to the said Section 300. Section 304 of Indian Penal Code provides for punishment for the offence of culpable homicide not amounting to murder.

25. Commission of the offence of culpable homicide would require some positive act on the part of the accused as distinguished from silence, inaction or a mere lapse. Allegations of not carrying out a prompt search of the missing children; of delay in the lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, which are the principal allegations made in the FIR, cannot make out a case of culpable homicide not amounting to murder punishable under Section 304 IPC. To attract the ingredients of the said offence something more positive than a mere omission, lapse or negligence on the part of the named accused will have to be present. Such statements are conspicuously absent in the FIR filed in the present case.”

(emphasis supplied)

13. The Supreme Court has in clear and explicit terms explained the ingredients of the offence under Section 304 of the Penal Code. Something more positive than a mere omission, lapse or negligence on the part of the accused will

¹(2012) 13 Supreme Court Cases 231.

have to be present. Negligence by itself may not furnish the necessary *mens rea*.

14. The aforesaid pronouncement was followed by a Division Bench of this Court in the case of *Pavneet Singh Sethi and ors. vs. The State of Maharashtra and ors.*², wherein the ingredients of the offence punishable under Section 304(II) of the Penal Code were enunciated as under:

“10. Thus, it is clear that commission of the offence, of culpable homicide under Section 304(II) IPC require some positive act on the part of the accused as distinguished from silence, inaction or mere lapses. The allegations of not carrying out the repair of the road cannot, thus, make out a case of culpable homicide not amounting to murder punishable under Section 304(II) IPC. Such statements of positive act are conspicuously absent in the FIR filed in the present case. Conversely, the cause of accident is clearly attributed in the FIR itself to the rash and negligent driving of the truck, in a fast speed.”

15. Reverting to the facts of the case, even if the site accident report submitted by the Deputy Chief Project Manager – 1, MRVCL adverting to the possibility of accidental flyrock of despite all precautions, is eschewed from consideration as self-serving, *prima facie*, there is no positive material to bring the acts and conduct of the applicant within the dragnet of Section 304 of the Penal Code. I find substance in the submission of Mr. Nimbalkar that *prima*

22018(3) BCR (Cri) 180.

facie the element of *mens rea* to cause death appears to be absent.

16. In any event, the investigation seems to be complete for all intent and purpose. Charge-sheet has been lodged. The applicant appears to have roots in society as he has a fixed place of abode and avocation. Possibility of fleeing away from justice and tampering with evidence also seems to be remote. I am, thus, inclined to make order of interim bail absolute.

17. Hence, the following order.

: O R D E R :

- (i) Application stands allowed.
- (ii) The order of interim bail is made absolute on the terms and conditions incorporated therein with the modification that the applicant shall not leave India without the prior permission of the jurisdictional Court of Session and the applicant shall regularly attend the proceedings before the said Court.
- (iii) It is clarified that these *prima facie* observations are confined to determine entitlement to pre-arrest bail only.

[N. J. JAMADAR, J.]