

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.1866 OF 2023

Atharva Rajendra Nangare

...Applicant

vs.

The State of Maharashtra

...Respondent

Mr. Zaid Qureshi i/b. Hulyalkar & Associates, for the Applicant

Mrs. A.A. Talekar, APP, for the Respondent/State.

Mr. Bhausahab Dhole, Dy. SP. Haveli police station present.

CORAM : N. J. JAMADAR, J.

DATE : SEPTEMBER 5, 2023.

P.C.:

1. This application is preferred seeking pre-arrest bail in connection with C.R. No. 21 of 2023 registered at Velha police station, Pune for the offences punishable under sections 302 read with 34 of Indian penal Code, 1860 and sections 3 read with 25 and 4 read with 27 of Indian Arms Act, 1959 and sections 3(1), 3(2) and 3(3) of the Maharashtra Prevention and Eradication of Human Sacrifice and Other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.

2. Suresh Renuse, the first informant, lodged a report that on 4th March, 2023 he was informed by his cousin Ashok @ Lala that the first informant's brother Navnath @ Pappu Renuse (the deceased) was killed by Laxman Renuse (accused No. 1) and his four

associates in front of Visava Hotel, Velhe, the native place of the first informant, deceased and accused No. 1. The first informant reached the said spot and found that the deceased was lying in a pool of blood. These were injuries on the face with sharp edged weapon. A knife and blood stained Cleaver (Sattur) were laying thereat. Four to five empty cartridges were also strewn.

3. The first informant alleged that Dnyaneshwar @ Laxman (accused No. 1) had a grudge against the deceased as accused No. 1 suspected that the deceased was taking the side of the parties with whom the accused No. 1 had a dispute over the land situated at Maral Awad. Thus, the deceased was done to death by accused No. 1 and his associates. In a supplementary statement, the first informant further alleged that Vishal Renuse, the son of accused No. 1 Dynaneshwar had passed away due to jaundice. However, accused No. 1 suspected that the deceased and his cousin Lala had practiced black magic and thus accused No. 1 Dnyaneshwar had proclaimed that he would eliminate the deceased and Lala.

4. Eventually, accused Nos. 1 to 8 came to be arrested and the applicant was shown as absconder. The prosecution alleged that the applicant was the co-conspirator. The applicant had procured the

pistol and cartridges from Madhya Pradesh. The co-accused also named the applicant as one of the members of the unlawful assembly in the prosecution of the common object of which the deceased was killed. The prosecution relied upon the transcript of the conversation between the co-accused.

5. Apprehending arrest, the applicant approached the Court of Session. By an order 30th May, 2023 the Additional Sessions Judge rejected the application holding inter alia that the applicant had hatched the criminal conspiracy to eliminate the deceased and had also procured the firearm which was used in the crime. Evidently, no submissions were canvassed on behalf of the applicant and the said order came to be passed upon perusal of the material on record.

6. Mr. Zaid Qureshi, learned counsel for the applicant, submitted that the learned Additional Sessions Judge ought not to have rejected the application without providing an effective opportunity of hearing. Nonetheless, according to Mr. Qureshi, the prosecution has failed to bring any material on record to connect the applicant with the crime. Laying emphasis on the fact that in the first information report and the remand report dated 11th March, 2023

the applicant was not named as one of the conspirators or members of the unlawful assembly, Mr. Qureshi submitted that the implication of one Gopal @ Gopya Nangre in the remand report dated 15th March, 2023 was by way of afterthought. It was submitted that even the transcript of the telephonic conversation does not indicate that the applicant was a co-conspirator. There is a serious dispute about the identity of the applicant as Mr. Gopal Nangre to whom the co-accused have referred to and whose name finds mention in the telephonic conversation. In such circumstances, as the investigation is complete for all intent and purpose and charge sheet has been lodged against the co-accused, the applicant deserves the exercise of discretion, submitted Mr. Qureshi.

7. Per contra, learned APP submitted that there is a strong prima facie case against the applicant. The firearms were procured by the applicant. He was the principal conspirator in hatching the conspiracy to cause death of the deceased. Having regard to the nature of the accusation and the brutal manner in which the deceased was killed, this is not a case where the discretion can be exercised in favour of the accused, submitted Mrs. Talekar, the learned APP. Learned APP further submitted that since a

proclamation under section 82 of the Code has already issued against the applicant by the learned Magistrate, the applicant is not entitled to be released on pre-arrest bail. Even otherwise, the antecedents of the applicant dis-entitle him from the relief of pre-arrest bail.

8. As the applicant is declared a proclaimed offender, the learned counsels were heard on the point of entitlement to pre-arrest bail, post the applicant being declared a proclaimed offender.

9. Mr. Qureshi, the learned counsel for the applicant submitted that there is no absolute bar to grant pre-arrest bail to an accused against whom proclamation has been issued. Mr. Qureshi further urged that the stage of issue of proclamation also assumes significance. In the case at hand, the proclamation has been issued on 11th August, 2023 while this Court is seized of the matter. The prosecution cannot be permitted to defeat the statutory remedy of seeking pre-arrest bail by obtaining an order of proclamation when the pre-arrest bail application is subjudice. The issue of proclamation while the applicant has all along been pursuing the remedies cannot defeat the right of the applicant, submitted Mr. Qureshi.

10. To lend support to this submission, Mr. Qureshi placed a strong reliance on the judgment of the Allahabad High Court in the case of **Siddharth Kapoor vs. State Of U.P. And Another**¹ wherein the Allahabad High Court held that where the accused has preferred an application for pre-arrest bail and it came to be rejected by the Court of Session and thereupon the accused moved the High Court and if in the interregnum any proclamation under sections 82 & 83 of the Code is issued, it may be considered as a circumventive exercise undertaken by the Investigating Officer.

11. Evidently, the applicant has been pursuing the remedy under section 438 of the Code. It seems that the application for pre-arrest bail was filed in the Court of Session on 18th April, 2023. The proclamation was ordered to be issued on 11th August, 2023. It was preceded by non bailable warrant. This fact deserves to be taken into account.

12. The legal position as regard the entitlement to pre-arrest bail of an accused who is declared a proclaimed offender is fairly crystallized. The fundamental premise of refusing to entertain the prayer for pre-arrest bail under section 438 of the Code is that a person who made himself scarce and has been avoiding the arrest,

1 Cri. Misc. Anticipatory Bail Application u/s 438 CRPC No.4040 of 2022

despite the issue of non-bailable warrant against him, does not deserve the discretionary relief.

13. In the case of **Lavesh vs. State (NCT of Delhi)**², where it was discernible that the appellant therein was not available for interrogation and was declared as an “absconder”, the Supreme Court held that normally, when the accused is “absconding” and declared as a “proclaimed offender”, there is no question of granting anticipatory bail. The Supreme Court observed in paragraph 12 as under:-

12] From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and declared as “absconder”. Normally, when the accused is “absconding” and declared as a “proclaimed offender”, there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled the relief of anticipatory bail.

(emphasis supplied)

14. The aforesaid pronouncement was followed in the case of

² (2012) 8 Supreme Court Cases 730.

State of Madhya Pradesh vs. Pradeep Sharma³. In the facts of the said case, where the accused were arraigned for the offences punishable under sections 302 and 120B of the Penal Code, the Supreme Court after adverting to the aforesaid observations in the case of **Lavesh** (supra) enunciated that in such serious offences where the respondents/accused were proclaimed offenders, the High Court ought not to have granted anticipatory bail. It was held, the High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail.

15. A three Judge Bench of the Supreme Court had an occasion to consider this aspect in the case of **Vipan Kumar Dhir vs. State of Punjab and Another**⁴. In the said case, the Supreme Court also adverted to the contentions as regards the irregularity in declaring a person as proclaimed offender and the circumstances in which the pre-arrest bail can be granted to a person against whom the proclamation has been issued. The Supreme Court observed as under:-

14] Even if there was any procedural irregularity in declaring the

3 (2014) 2 Supreme Court Cases 171.

4 (2021) 15 Supreme Court Cases 518.

respondent-accused as an absconder, that by itself was not a justifiable ground to grant pre-arrest bail in a case of grave offence save where the High Court on perusal of case diary and other material on record is, prima facie, satisfied that it is a case of false or over-exaggerated accusation. Such being not the case here, the High Court went on a wrong premise in granting anticipatory bail to the respondent-accused.

(emphasis supplied)

16. The aforesaid pronouncement of the Supreme Court enunciates in a clear and explicit terms two propositions. One, a mere procedural defect in the issue of proclamation can not be a ground to deviate from the ordinary rule that when a proclamation has been issued against a person, he does not deserve the relief of pre-arrest bail under section 438 of the Code. Two, even where the proclamation has been issued against a person, the High Court can grant pre-arrest bail if it is satisfied upon perusal of the relevant material that it is a case of false or exaggerated accusation. The latter principle emphasizes the nature of the power vested in the Court under section 438 of the Code where the Court upon analysis finds that the accusation itself is false, vexatious or exaggerated. In such a situation, the fact that a proclamation has been issued against the accused does not impinge upon the power of the Court to

grant relief under section 438 of the Code to protect the cherished personal liberty.

17. In the case of **Abhishek vs. State of Maharashtra and Others**⁵ explaining the implication of a declaration of a proclaimed offender, the Supreme Court enunciated as under:-

68] As regards the implication of proclamation having been issued against the appellant, we have no hesitation in making it clear that any person, who is declared as an 'absconder' and remains out of reach of the investigating agency and thereby stands directly at conflict with law, ordinarily, deserves no concession or indulgence. By way of reference, we may observe that in relation to the indulgence of pre-arrest bail in terms of Section 438 CrPC, this Court has repeatedly said that when an accused is absconding and is declared as proclaimed offender, there is no question of giving him the benefit of Section 438 CrPC.....

(emphasis supplied)

18. Lastly, in the case of **State of Haryana vs. Dharamraj**⁶ delivered on 29th August, 2023, after considering the aforesaid pronouncements, the Supreme Court reiterated the position in law as under:-

⁵ (2022) 8 Supreme Court Cases 282.

⁶ Cri.Appeal out of SLP (Cri.) No. 2256/22 Dt.29/08/23.

16] The respondent, without first successfully assailing the order declaring him as a proclaimed offender, could not have proceeded to seek anticipatory bail. Looking to the factual prism, we are clear that the respondent's application under section 438, Cr.P.C. should not have been entertained, as he was a proclaimed offender. We may note that in *Lavesh vs. State (NCT of Delhi)*, (2012) 8 SCC 730, this Court was categorical against grant of anticipatory bail to a proclaimed offender. In the same vein, following *Lavesh (supra)* is the decision in *State of Madhya Pradesh vs. Pradeep Sharma*, (2014) 2 SCC 171, where this Court emphasized that a proclaimed offender would not be entitled to anticipatory bail. Of course, in an exceptional and rare case, this Court of the High Courts can consider a plea seeking anticipatory bail, despite the applicant being a proclaimed offender, given that the Supreme Court and High Court are Constitutional Courts. However, no exceptional situation arises in the case at hand. Following *Pradeep Sharma (supra)*, in *Prem Shankar Prasad vs. State of Bihar*, 2021 SCC Online SC 955, this Court was unequivocal that the High Court therein erred in granting anticipatory bail ignoring proceedings under sections 82 and 83, Cr.P.C.

(emphasis supplied)

19. In view of the aforesaid enunciation, the broad submission of

Mr. Qureshi that the order of declaring the applicant as proclaimed offender, having been passed during the pendency of the application for pre-arrest, does not constitute an impediment in considering the prayer for pre-arrest bail, does not merit acceptance, unreservedly. As noted above, in **Vipan Kumar Dhir** (supra), a three judge Bench of the Supreme Court has clearly enunciated that even if there was any procedural irregularity in declaring the accused as an absconder, that by itself, can not be a justifiable ground. It is a different matter that if the Court finds that the order of proclamation was obtained to defeat the right of the accused to seek relief under section 438 of the Code. It is quite possible that an application for pre-arrest bail may be preferred and not diligently pursued, and simultaneously the applicant evades the arrest successfully and eventually when the proclamation is issued, the accused may urge that an application for pre-arrest bail having been filed prior in point of time he is not precluded from seeking the said relief. Thus, an absolute proposition that the proclamation issued during the pendency of pre-arrest bail application loses significance, can not be countenanced.

20. I am, therefore, inclined to consider the prayer of pre-arrest bail in the light of the second proposition enunciated by the

Supreme Court in the case of **Vipan Kumar Dhir** (supra) namely whether it is such a rare and exceptional case that the Court can upon perusal of the material on record form an opinion that the accusation against the applicant is false, vexatious and exaggerated. If the material on record lends such assurance, despite the issue of proclamation, the Court would be justified in granting pre-arrest bail as the matter would then be in the realm of protecting the personal liberty of the applicant.

21. As noted above, the applicant was undoubtedly not initially named as one of the assailants and co-conspirator. The prosecution primarily relies on the telephonic conversation to fix the identity of the applicant as one of the co-conspirator. There is prima facie material to show that the applicant was allegedly instrumental in procuring the firearm. The Court also finds that there is prima facie material to show that the applicant was a privy to the alleged conspiracy. It is trite conspiracy is hatched in secrecy. Direct evidence is seldom available. In view of the provisions contained in section 10 of the Evidence Act, the doctrine of agency comes into play and a statement made by one of the co-conspirator becomes admissible against another where the conspiracy is afoot. The telephonic conversation is required to be appraised through the

aforesaid prism. At this stage, it would be rather audacious to draw an inference that the accusations against the applicant is false or exaggerated.

22. The antecedents of the applicant indicate that the applicant had been prosecuted for the offences punishable under section 354 of the Penal Code (C.R.No. 332 of 2017, Khadak police station); section 376 of the Penal Code (C.R.No. 409 of 2017, Khadak police station) and section 3 read with 25 of Arms Act (C.R.No. 358 of 2021, Khadak police station). Mr. Qureshi joined the issue by canvassing a submission that the applicant has been acquitted in Special (Posco) Case No. 22 of 2018 and in R.C.C. No. 258 of 2018 and therefore the antecedents cannot be pressed into service to deprive the applicant the relief of pre-arrest bail.

23. Mr. Qureshi may be justified in dislodging the objection on the ground of antecedents, to a large extent. However, in the totality of the circumstances, having regard to the gravity of the offences, charge of conspiracy, nature of the involvement of the applicant coupled with fact that the applicant allegedly kept himself away from the investigating agency and that necessitated the issue of non-bailable warrant and proclamation, I am not inclined to exercise the discretion in favour of the applicant.

Hence, the following order.

ORDER

- 1] The application stands rejected.
- 2] It is clarified that these prima facie observations are confined to determine entitlement to pre-arrest bail only.

(N. J. JAMADAR, J.)