



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 2101 OF 2023

Aqdas Masud Ahmad Ansari

...Applicant

vs.

The State of Maharashtra

...Respondent

Mr.Sumit Kothari i/b. Mr.G.J.Jain – Advocate for Applicant.

Mr.S.R.Agarkar – APP for Respondent – State.

Mr.R.P.Alhat – Head Constable – Nizampura Police Station.

CORAM : S. M. MODAK, J.

DATED : 19TH AUGUST 2023

P. C. :

1. I have already heard learned Advocate Shri.Kothari for the Applicant and learned APP

2. On 17th August, 2023, time was sought to place reliance on few of the judgments. Today, Shri.Kothari has relied upon following two orders :-

(a) Raju Jokhanprasad Gupta V/s. State of Maharashtra¹

(b) Arif P. S/o Muhammed V/s. State of Kerala²

3. It is true that Hon'ble Supreme Court in case of *Arnesh Kumar*

¹ Bail Application No. 1406 of 2022 : 14th July, 2022 : Bombay High Court

² 2018 SCC OnLine Ker 1446

*V/s. State of Bihar and Another*³ and recently in case of *Md. Asfak Alam V/s. The State of Jharkhand & Anr.*⁴ has reiterated the abuse of power by the Police to arrest the suspects indiscriminately. Even though Section 41 of the Code of Criminal Procedure, 1973 [“Cr.PC.”] was incorporated in the Code of Criminal Procedure in the year 2009, after a gap of 15 years, still the Hon’ble Supreme Court is required to deal with a grievance of indiscriminate arrest.

4. As per the provisions of Section 41, a Police Officer can arrest a suspect without order or warrant from a Magistrate in certain contingencies. One of the contingencies is, if the arrest is required for carrying out an investigation, it is justified. Those parameters are mentioned in clause No.(a), clause No. (i) to Section 41 of Cr.PC. Clause No.(b) is relevant. It lays down the parameters (i) and (ii). Clause (b) will be applicable only when the offence is punishable with imprisonment upto seven years. That is to say, it will not come into picture if the offence is punishable with more than seven years imprisonment.

5. In the present case, the offence is under Section 379 of Indian Penal Code, 1860 [“IPC”] and admittedly, the punishment is below

³ (2014) 8 Supreme Court Cases 273

⁴ 2023 LiveLaw (SC) 583

seven years. The Police claims that for proper investigation of the offence, arrest of the Applicant is required. Whereas, Section 41-A is incorporated in the Code by way of 2009 amendment. It mandates the Police Officer to issue a notice. It comes into picture only when arrest of a person is not required under Sub-section 1 of Section 41 of the Code.

6. In this case, Section 41-A of the Code will not be applicable, because Police claims that for further investigation, arrest of the Applicant is required. So, contention about non compliance of the observations in case of *Arnesh Kumar (supra)* and subsequent judgment is not accepted.

7. The issue involved is about right of the Police to carry on investigation on one hand and liberty of an individual who is the Applicant aged about 20 years old is not having a criminal background. The FIR is registered at Nizampura Police Station on 22nd March, 2023 at C.R. No. 102 of 2023 on the complaint of one Mohammad Hingora. His tempo was stolen by an unknown person. He had parked it in front of Nishan Hotel, Nijampura Bhivandi on 17th March, 2023 at about 10.00 p.m. He found the tempo missing on next date i.e. 18th March, 2023 at about 9.00 a.m. The offence

under Section 379 is registered against an unknown person.

8. During investigation, Police have arrested 2 Accused persons by name Abdul Sakib and Kashif Ansari. One such remand report is dated 25th June, 2023. None of the Accused is shown as wanted Accused. There is subsequent remand report dated 30th June, 2023. Apart from the original 2 Accused, one Sarfaraj alias Akib also came to be arrested. In that report, for the first time, Police have mentioned the name of one Akdas and Kamran (full names not given) as suspected persons. There is one more remand report dated 3rd July, 2023 reiterating the same position. It is true that the tempo is seized. It costs about Rs.50,000/-. However, it was found without a body. The valuation of the body is Rs.5,000/-

9. During interrogation with Accused - Kashif Ansari, the Police found that in this theft, the present Applicant is also involved while carrying on the tempo and also while disposing off the body of that tempo. He has brought a purchaser who has purchased the body and Accused have shared the purchase value.

10. Following contentions are raised on behalf of the Applicant :-

- (a) The Applicant is aged about 20 years.
- (b) There are no criminal antecedents.
- (c) Even Applicant can be asked to deposit the value of

that body of the tempo.

- (d) A statement by the co-accused recorded during investigation has no evidentiary value is considered by this Court in case of *Raju Jokhanprasad Gupta* as referred above. My attention is invited to the given observations.
- (c) When the Applicant was found carrying river sand and when the lorry was stopped, the Applicant ran away. However, the High Court of Kerala in case of *Aarif P* as referred above has granted an anticipatory bail.

11. Learned APP submitted that the Accused persons are involved in a similar type of offences and certain motorcycles being a property of theft in other offence came to be recovered at their instance. He submitted that the observations in case of *Raju Jokhanprasad Gupta* (supra) are in regular Bail Application.

12. It is true that learned Advocate for the Applicant tried his level best to convince this Court for grant of an anticipatory bail. The consideration about age and absence of criminal antecedents can be considered when the regular Bail Application can be argued and not now. A statement given by the co-accused Kashif Ansari is not admissible when the trial will be conducted. At the stage of investigation, the Police required certain clues. This offence of theft is registered against unknown persons. No one has seen how the

theft is committed and by whom. So, for arresting this Applicant, this statement can be considered during investigation. The observation in case of ***Raju Jokhanprasad Gupta*** (supra) will not be applicable. Aarif was granted an anticipatory bail by the High Court of Kerala depending upon the facts of that case. He was single Accused. Herein, a group of Accused have committed theft of the tempo and the body of the tempo is not seized. So, I am not inclined to grant the anticipatory bail. Hence, it is rejected.

13. These are my *prima facie* observations. Let the trial Court need not be influenced by them.

[S. M. MODAK, J.]