

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO. 1296/2022

Wasimiddom @ Gudduraj Qutuboddin

V/s

State of Maharashtra, through PSO., P.S. Barshitakli, District Akola.

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr R.M. Daga, counsel assisted by Mr N.R. Tekade, counsel for
the applicant

Mr I.J. Damle, APP for the non-applicant/State.

Ms Maira Atteb, counsel for Assisting to Prosecutor.

CORAM : **URMILA JOSHI-PHALKE, J.**

DATE OF RESERVE : **15/06/2023.**

DATE OF DECISION : **03/07/2023**

1. Heard.

2. The present application is filed by the applicant for grant of bail under Section 439 of the Code of Criminal Procedure in respect of Crime No. 306/2021 registered at Police Station, Barshi Takli, District Akola for the offences punishable under Sections 302, 307, 326, 324, 143, 147, 148, 149, 188, 506 of the Indian Penal Code read with Sections 3/25 and 4/25 of the Arms Act. The applicant is arrested on 25/05/2021 since then he is in jail.

3. The crime is registered on the basis of a report lodged by Abdul Raheman Abdul Rahim on an allegation that the applicant and his relatives are residing in the same locality where the complainant is residing. On 20/05/2021,

when the brother of the informant had been to Shegaon for the purpose of business of Cotton and was returning the applicant restrained him and extorted Rs.2,92,000/- on the point of the knife from him. This fact is informed by his brother to him as the applicant and the complainant are residing in the same locality, and they have not lodged any report regarding the same incident. They have decided to settle the dispute. On 24/05/2021, at about 2.30 p.m. some of the respectable persons of the area gathered near the Baba Seth Ginning Factory, and in the presence of those persons, the applicant and his relatives informed him that informant shall not lodge any report and he will return the amount. However, at about 4.30 p.m. when the informant and his three brothers were in the temple which is near their house, they heard the noise. At the relevant time, the three persons namely – Aminoddin, Zulfoddin, and Tipu came in front of their house and started abusing them. They were possessing weapons.

It is further alleged that at the relevant time, two four wheelers came there, the applicant and one Shahezaad Khan Salim Khan and others alighted from the said four wheelers, and they were also possessing Guns, Knife, Pipes, and Sword in their hands. Out of them, one Mohd. Khizar has fired the Gun in the direction where the complainant and his brother were standing but the same was missed. From another vehicle, again few persons alighted, and all of a sudden, they started assaulting Mohammad Sakib Abdul Gaffar and Sheikh Nadim Sheikh Munir by means of a knife,

sword, and iron pipe. Due to the shout, people gathered there and thereafter, the applicants fled away.

4. It is further alleged that Mohd. Khizar had again fired the Gun in the direction of the complainant and the other, the said bullet hit one lady and she sustained the injuries. On the basis of said report, the Police have registered the offence against the present applicant as well as other co-accused.

5. As far as the contention of the present applicant that there is no *prima-facie* cases against him and now the entire investigation is completed and charge-sheet is filed. From the charge-sheet, it reveals that nothing is to be recovered from the present applicant. Moreover, no role is attributed to him regarding the assault by any prosecution witnesses. The injured Mohammad Sakib Abdul Gaffar, allegedly succumbed to the injuries on 23/06/2021. However, considering the allegations against the present applicant, the applicant is not responsible to cause the death of the deceased.

The other co-accused Saif Ali Asif Ali is already released on regular bail in Criminal Application No. 1254/2021, the co-accused Shaizad Khan Salim Khan, Shaikh Albakash and Zulfoodin Mohammad Khwaja as well as Abdul Shahrukh Abdul Farukh are already released on bail. The co-accused Mohd Khizar who allegedly used the firearm in the commission of the offence. His bail application is also allowed by this Court and he is already released on

bail, therefore, present applicant be released on bail on the ground of parity.

6. The said application is strongly opposed by the State on the ground that on the basis of the report lodged by the informant, the crime is registered wherein the informant Abdul Rehman has alleged that there was a serious monetary dispute between the present applicant and the complainant and due to the said dispute, the present applicant has formed an unlawful assembly of about 10 to 11 persons who were holding weapons like Gun, Iron Pipe and Sword etc.

7. It is the contention of the State that the present applicant is the main accused and since the co-accused are being released on bail, the present applicant is seeking bail on the ground of parity. During the course of the investigation, the investigating agency has collected sufficient material against the present applicant which shows the involvement of the present applicant as the main accused. The present applicant being the main accused has formed an unlawful assembly and assaulted the nephew of the complainant, out of which one had succumbed to the injury. Therefore, the ground of parity is not available to the present applicant. With this, it is prayed that the application be rejected.

8. Heard learned counsel Shri R.M. Daga for the applicant. He submitted that the co-accused are already released on bail. The applicant admittedly has not participated in the assault. There is no allegation in the FIR

that the present applicant has assaulted any of the prosecution witnesses. The persons to whom the role regarding the assault was assigned are already released on bail. Now the investigation is completed and the charge-sheet is filed, no purpose will be served by refusing bail to the present applicant.

9. Learned counsel invited my attention towards criminal application (BA)No.233/2022 by which the co-accused Shahzad Khan Salim Khan is released on bail. He further invited my attention towards the order passed by this Court in bail application (BA) No. 313/2022 by which Shaikh Albaksh Shaikh Mannan, in criminal application (BA) no. 356/2022 by which Zulfoddin Mohammad Khwaja, in Criminal Application (ABA) No. 678/2021 in which Abdul Shahrukh s/o Abdul Farooque and in the criminal application (BA) No. 963/2022 by which Mohammad Khizar s/o Shaikh Husnooddin are released on bail.

10. He submitted that as far as the allegation against Shaikh Allahabaksh Sheikh Manhan is concerned, the charge-sheet indicates that name of the applicant was not included in the FIR and therefore, he be released on bail. However, the role of Zulfoodin is concerned, who is also released on bail, and as far as the allegation as no role was attributed to Zulfoodin, therefore, he was also released on bail.

11. Learned counsel Mr R.M.Daga submitted that the prime role was attributed to accused Mohd. Khizar Shailkh

Hussunodin, to whom the firearm was assigned is also released on bail by this Court. So far as the role of the present applicant is concerned, admittedly none of the witnesses have stated that the present applicant has assaulted them. Thus on the ground of parity, the present applicant is to be released on bail. He further submitted that recently the other co-accused namely Kalimoodin @ Tipu Katuoboo is also released on bail by Sessions Court. Considering all these aspects as nothing is to be recovered from the present applicant, he be released on bail.

12. In support of his contention, he placed reliance of the order of the Hon'ble Apex Court in the case of *Empha Sk. @ Mehabub V/s The State of West Bengal in Criminal Appeal No. 194/2022 (arising out of SLP (Crl.) No. 5912/2021, dated 08/02/2022)*, wherein the Hon'ble Apex Court considered that the statement made aforesaid under Section 164 of the Code of Criminal Procedure and the final report, there was no difference between the role assigned to the appellant and the other co-accused and granted bail.

13. He further placed reliance in the case of *Sangram Bhimrao Ghorpade vs State of Maharashtra (in Special Leave to Appeal (Crl.) No. 4046/2022 dt. 30/05/2022)*, wherein also the Hon'ble Apex Court has considered that most of the accused with similar allegations have already released on bail and therefore, the applicant, in that case, was also released on bail.

14. Per contra, learned APP Mr I.J.Damle vehemently submitted that the statement of Shaikh Nadim Shaikh shows conspiracy was hatched by the present accused, who instigated the other accused to eliminate the deceased. The applicant is the person because of whom the alleged incident has taken place. The object of the present applicant is to create terror in the vicinity. The alleged Act is committed in furtherance of the common object. Considering the present applicant is the root cause, the ground of parity is not available to him. He further submitted that from recitals of the FIR itself shows that there was an allegation against the present applicant that he has snatched the amount of Rs. 2,92,000/- from the brother of the informant. All the respectable persons have decided to settle the matter, and at the relevant time, the present applicant came along with the other accused. All other accused are from Amravati. Thus, it is crystal clear that he has hatched a conspiracy and formed the unlawful assembly and in furtherance of the common object of the unlawful assembly to eliminate the deceased, assaulted the deceased.

15. Thus, the present applicant is the root cause because of whom the alleged incident has taken place, and therefore, the ground of parity is not available to him. In support of his contention, he placed reliance in the case of ***Ramesh Bhavan Rathod V/s Vishanbhai Hirabhai Makwana (Koli) and another reported in (2021) 6 SCC Cases 230*** wherein Hon'ble Apex Court held that while applying the principle of parity, the Court cannot exercise its power in a

capricious manner and has to consider the totality of circumstances before granting bail. The parity while granting bail must focus upon the role of the accused, and not only on the weapon carried by him. Merely observing that another accused who was granted bail was armed with a similar weapon is not sufficient to determine whether bail can be granted on the basis of parity.

16. In view of the above observations of the Hon'ble Apex Court, he submitted that considering the principle laid down by the Hon'ble Apex Court, in the present case also the present applicant is the person who formed the unlawful assembly and in furtherance of the common object of the said assembly, the deceased was eliminated and therefore, the applicant is not entitled to be released on bail on the ground of parity.

17. Having heard both the sides. Perused the investigation papers. The crime is registered on the basis of a report lodged by Abdul Rahman Abdul Rahim. As per his allegation on 20/05/2021, the present applicant restrained his brother and snatched the amount of Rs. 2,92,000/-. His brother had informed the said incident to him, therefore, he went to the house of the accused along with some respectable person and disclosed the said incident to his mother. The mother of the present applicant committed to them that the applicant will repay their amount after he returned home. On 25/05/2021, a meeting for settlement was held and the present applicant committed that he will

return that amount. However, on the same day, at about 4.30 p.m., the present applicant along with the other co-accused came to the spot of the incident, out of them, the accused namely Aminoddin, Julphoddin, and Tipu were abusing them, Shaizadkhan Salim Khan and others were holding gun, knife, sword and iron pipe in their hand. Out of them, one of the co-accused namely Khizar fired a bullet towards their direction and the other co-accused assaulted his two Nephews i.e. Mohd. Sakir and Shaikh Nadim Shaikh Munir. While leaving the place i.e. the spot incident said Khizar again fired the bullet, due to which one woman sustained the injuries. During the investigation, the investigating officer has recorded the statement of the relevant witnesses.

18. Learned counsel Mr R.M. Daga referred to the statement of the witnesses of Mohd Irfan Abdul Rahim and Abdul Irman Abdul Rahim and stated that the statement of the informant as well as the statement of other witnesses, nowhere discloses that it was the present applicant who was holding any weapon in his hand and assaulted any of the witnesses. This Court has considered the bail applications of the other co-accused and already released the accused on bail, who were holding the weapons in their hand. Admittedly, the present applicant was not holding any weapon in his hand and had not given a blow to any person. Thus, the role assigned to the present applicant is on better footing than the accused who are released on bail.

19. I have considered the submissions made by the learned counsel and perused the investigation papers.

20. The Initial dispute arose between the present applicant and the brother of the informant. The meeting was held to settle the dispute as there was some monetary transaction between them. On 20/05/2021, it was decided that the applicant will return the amount. However, at about 4.30 p.m., the present applicant came near the house of the informant along with weapons. All the accused persons were holding weapons, like gun, knife, sword, and iron pipe in their hands. Admittedly there is no allegation against the present applicant that he was holding any weapon in hand and he has assaulted any of the accused but the fact remains that the present applicant came along with other accused, the origin of the incident initiated at the instance of the present accused. He is the root cause of the said incident. It further reveals from the investigation papers all other co-accused are from Amravati.

21. Thus, there is a substance in the contention raised by the learned APP that the present applicant has formed unlawful assembly and called other co-accused from Amravati and in furtherance of their common object, assaulted the deceased as well as the prosecution witnesses. In the alleged incident, the injured Moha. Shakir Abdul Gaffar succumbed to the death.

It is trite law that the facts to be borne-in-mind while considering an application for bail are:

- i) Whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence;
- ii) Nature and gravity of the accusation;
- iii) Severity of the punishment in the event of conviction;
- iv) Danger of the accused absconding or fleeing, if released on bail;
- v) Character, behaviour, means, position and standing of the accused;
- vi) Likelihood of the offence being repeated;
- vii) Reasonable apprehension of the witnesses being influenced; and
- viii) Danger, of course, of justice being thwarted by grant of bail.

22. I have considered the entire investigation papers and it is revealed from the investigation papers that the alleged incident has occurred, due to the dispute between the present applicant and the informant and his brother on the monetary transaction. Thereafter, the present applicant came at the spot of the incident along with the other accused and they all came with a deadly weapon like gun, sword, knife etc. The gravity of the alleged offence reveals from the

allegations and the injury sustained by the deceased as well as other injured.

In the said incident Mohd Sakir Abdul Gaffar and Shekh Nadim Shaikh Munir sustained injuries and subsequently, Mohd Sakir Abdul Gaffar succumb to the death. All other co-accused are not from Nagpur but they came from Amravati. It shows that the present applicant has called them and formed an unlawful assembly. The Arrival of all the accused at the spot of the incident along with deadly weapons shows their intention.

23. Learned counsel Mr R.M. Daga had vehemently submitted that the persons who participated in the incident and caused the injuries to the injured, as well as the deceased, are also released on bail by this Court, therefore, on the ground of parity, the present applicant is also entitled to be released on bail. However, Learned APP vehemently submitted that the present applicant is the root cause of the alleged incident, he wants to create terror in the vicinity. The submissions made by the learned APP hold the field as from the investigation papers, the submissions made by the learned APP are substantiated.

24. The learned APP rightly placed reliance on the decision of the Hon'ble Apex Court, wherein the Hon'ble Apex Court while deciding the aspect of parity, the role attached to the accused, their position in relation to the incident, and to the victims is of the utmost importance. The Hon'ble Apex Court in the matter referred to it's

various decisions and held that while granting the bail on parity, the court must focused upon the role of the accused. Merely observing that another accused who was granted bail was armed with a similar weapon is not sufficient to determine whether the case for grant of bail on the basis of parity has been established.

25. I have considered the principle laid down by the Hon'ble Apex Court. Admittedly, the allegations are of serious nature. It also reveals from the record that it was the present applicant on whose instance, the alleged incident has taken place. Though he has not participated in the assault or no role is attributed to him regarding the assault by any weapon. However, considering that he was the root cause of the incident and he formed the unlawful assembly and in furtherance of the common object, he came at the spot and the alleged incident has taken place.

Prima-facie, material sufficiently shows the involvement of the present applicant in the alleged offence which is grievous in nature. Therefore, the criminal application of the present applicant deserves to be **rejected**. Accordingly, I proceed to pass the following order.

Criminal Application is hereby **rejected**.

JUDGE