

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPLICATION (BA) NO. 1423 /2022

Mohammad Harun Abdul Raheman (in Jail) .. Applicant

versus

The State of Maharashtra

Th: Its PSO, PS, Barshitakli, Dist. Akola.

.. Respondent

.....
Mr. Avinash Gupta, Senior Advocate assisted by Mr.Akash A.Gupta, Adv.
for applicant

Mr. V.A.Thakare, APP for the Respondent -State

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CORAM: ANIL L.PANSARE, J.

DATED : 6th February, 2023

PC:

This is an application seeking bail under Section 439 of the Code of Criminal Procedure, 1973. The applicant-father Mohammad Harun and his two sons, namely Mohammed Zubair and Mohammed Umair are accused of committing murder of Juber Ahmedkhan.

2. It appears that the applicant and the deceased were involved in some property dispute. On 15th October 2020, the applicant and his sons intercepted the victim Juber Ahmedkhan on the road and have brutally assaulted him with iron rods/ pipe and knife. As a result, Juber Ahmedkhan sustained multiple injuries and succumbed to the injuries. It appears that the victim-Juber made a oral dying declaration in front of his brother-Jamil Ahmedkhan, who lodged the first information report. Accordingly, offences

punishable under Sections 302 r/ws. 34 of the Indian Penal Code, read with Section 4/25 of the Arms Act, came to registered against the applicant and his two sons vide Crime No. 633/2020.

3. The statements of witnesses would clearly depict a picture that there was a dispute regarding plot between the applicant and Juber Ahmedkhan. The applicant is said to have threatened the father of Juber so also Juber. The eye witnesses to the incident have stated that the applicant and his two sons have assaulted Juber by means of an iron rod/pipe and knife. It is categorically stated that the applicant and one of his sons, namely Mohammed Zubair assaulted Juber by means of iron pipe and the other son, Mohd.Umair by knife. One of the witnesses, namely, Vasiullah Khan shouted for help, to which the applicant and his sons showed him iron pipes and knife and threatened him that he will be dealt with similarly if he intervenes. There is, thus, no dispute on the point of identity of the accused persons or the role played by each of the accused.

4. Learned senior counsel has drawn my attention to the order dated 29th November, 2021 passed by this Court in Criminal Application (BA) No.1115/2021, wherein Mohd. Zubair, one of the sons of the applicant, has been released on bail. It is argued that Mohd.Zubair has played a similar role as that of the applicant, in as much as he had also assaulted Juber by means of iron pipe. This Court, while granting bail to Mohd.Zubair, in Paragraph 4 has

observed as under :

“4. In so far as the present applicant is concerned, he is apparently attributed the role of assaulting Mr Juber Khan with iron pipe. While granting bail to the co-accused I have noted that injuries 1 to 16 referred to in the autopsy report appear to have been inflicted by iron pipe and that injuries 1 to 15 are on the non-vital parts of the body, to be precise, on hand and leg. However, injury 16 which, prima facie, could have been caused by the iron pipe is on testicle, which may be an unfortunate and unintended consequence.”

Accordingly, it is argued that, on the principles of parity, the applicant too is entitled to be enlarged on bail.

5. Learned APP has, however, opposed the application tooth and nail, on the grounds that the applicant cannot claim parity. According to him, the role of the applicant is different. He is the prime accused. The dispute under question was between the applicant and Juber. According to learned APP his sons have acted at his instance. The applicant has played a larger role though the overt act of assault by means of pipe is similar to Mohd.Zubair. He submits that the applicant was absconding and therefore charge-sheet was filed against his two sons. He at the first flush, submits that the applicant was arrested on 17th September, 2021. Mr. Avinash Gupta, learned Senior Advocate, however, submits that the applicant himself has surrendered before the Sessions Court at Akola and was taken into magisterial custody. The APP further submits that the bail granted to Mohd. Umair, the another son, who has assaulted Juber Ahmedkhan by means of knife, has been cancelled by the

Hon'ble Apex Court vide order dated 15th February, 2022 in Criminal Appeal No.230/2022. Mr Gupta, learned Senior Advocate, at this stage, submits that the prosecution, however, has not challenged the order dated 29th November, 2021 passed by this Court granting relief to the Mohd.Zubair, who has allegedly played similar such role as attributed to the applicant.

6. I have minutely gone through the material placed before me so also the orders passed by this Court and the Hon'ble Apex Court. The relief is sought mainly on the ground of parity. In para no.4 of the order granting bail to Mohd. Zubair, this Court has observed about the nature of injuries as reflected in autopsy report. The reference to injuries is made *vis-a-vis* the role played by Mohd.Umair who has assaulted Juber by means of knife. Thereafter in paragraph 5 the Court observed thus:-

“5. Considering that co-accused Mohammed Umair is granted bail on the basis of certain observations, which are briefly referred to supra, the applicant herein is also entitled to bail on the principle of parity.”

7. It is thus crystal clear that while considering the bail application of Mohd. Zubair, the emphasis has been given to what has been observed by the Court while releasing co-accused Mohd.Umair, on bail. The basis of granting relief to Mohd. Zubair was the order granting bail to Mohd.Umair. This foundation itself has been quashed and set aside by the Hon'ble Apex Court in the order in Criminal Appeal cited *supra*. While doing so, the Apex Court has made the following observations :-

“ We are clearly of the view that the High Court was wrong in granting bail to the first respondent. Grant of bail, though a discretionary order, requires such discretion to be exercised in a judicious manner and on the application of certain settled parameters. More heinous the crime, greater is the chance of rejection of bail, though the exercise also depends on the factual matrix of the matter.

The reasoning given by the High Court does not take notice of the injuries mentioned in the Post-Mortem report, which are 17 in number, and include incise stab injury on the left thigh. The Report discloses fracture dislocation of both sides tibia and fibula bones, shaft in the middle. On dissection, evidence of diffuse hemorrhage in soft tissue muscles was also noticed.

As per the report, injuries No. 1 to 7, 12 to 16 were caused by hard and blunt impact. Injury No.17 was individually sufficient in ordinary course of nature to cause death. Injuries No.1 to 7 and 16 collectively were likely to cause death in ordinary course of nature. Further, death was due to hemorrhage and shock due to multiple injuries in a case of assault.

Learned counsel for the appellant and the State have drawn our attention that there are seven eye witnesses, and as per the case of the prosecution, the first respondent, along with his brother, was caught and detained by police petrol team while they were fleeing on a motorcycle after the offence. At that time, the clothes worn by the first respondent had bloodstains. As per the charge-sheet, the weapons of offence, namely, a knife and an iron rod pipe, were recovered from the first respondent and his brother. On the aspect of common intention, it is to be noted that the occurrence had taken place in the market area and as per the police version the first respondent, his brother and father had all come prepared with knife and iron rods to commit the offence.”

8. The above excerpts indicate that the evidence against the applicant and his sons is clinching and overwhelming in as much as there are seven eye-witnesses. The autopsy report shows that seventeen injuries were

sustained by the deceased. The probable cause of death is said to be hemorrhage and shock due to multiple injuries in a case of assault. Juber Ahmedkhan succumbed to the multiple injuries and not only by the injury inflicted by knife. The other injuries includes, “closed fracture dislocation of both sides tibia and fibula bones shaft in middle. On dissection evidence of diffuse hemorrhage in soft tissues muscles”.

9. These details *viz.* the probable cause of death, *vis-a-vis* the nature of injuries, appears to have been not highlighted before this Court when it considered the application of Mohd. Zubair and that therefore in paragraph 4, this Court has opined, though *prima facie*, that injuries by iron pipes were inflicted on non-vital parts of the body.

10. Be that as it may, the applicant is seeking bail on the principles of parity. On the point of the parity, an useful reference can be made to the judgment of the Hon’ble Apex Court, in the case of Ramesh Bhavan Rathod vs. Vishanbhai Makwana (Koli) and another, reported in (2021) 6 SCC 230, more particularly para No.26 thereof, which is couched in the following terms:

“26.The High Court has evidently misunderstood the central aspect of what is meant by parity. Parity while granting bail must focus 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 a case for the grant of bail on the basis of parity has been established. In deciding the aspect of parity, the role attached to the accused, their position in relation to the incident and to the victims is of utmost

importance. The High Court has proceeded on the basis of parity on a simplistic assessment as noted above, which again cannot pass muster under the law.”

11. Thus, similar role will have to be considered in context with the position of each accused in relation to the incident and the victim. Considering the totality of the circumstances, there are two reasons why the applicant will not be entitled for the benefit of parity. The order granting bail to Mohd.Umair was considered in favour of Mohd. Zubair for granting bail. The order granting bail to Mohd.Umair has been quashed and set aside by the Hon'ble Apex Court. Thus, the foundation of order granting bail to Mohd.Zubair is evaporated. Consequently, the benefit of order granting bail to Mohd.Zubair cannot be extended to the applicant. Secondly and as rightly pointed out by the learned APP the applicant is the prime accused. It is the applicant who had a tussle with Juber on the point of disputed plot. It is the applicant who has threatened Juber and his father prior to the incident. In that sense, the applicant has played a pivotal role. Further, the applicant appears to have avoided investigation. The learned senior counsel has contended that the applicant himself has surrendered before the Sessions Court on 17th September, 2021. However the incident in question is dated 15th October, 2020. The applicant has surrendered after about one year. Thus the applicant, if not absconded, has definitely avoided the investigation almost for a year. That apart, the murder has been committed in a market place, that too in a broad daylight. In the circumstances, considering the gravity of the offence,

the nature of evidence and the role played by the applicant, I am of the opinion that the applicant is neither entitled for the relief on the principles of parity nor on merit.

12. In the result, the Application fails and is rejected.

[ANIL L. PANSARE, J.]

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