

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1482 OF 2023

Mohammad Rafiq Abdul Jabbar Shaikh ...Applicant
vs.
The State of Maharashtra ...Respondent

**WITH
BAIL APPLICATION NO.1019 OF 2024**

Saizaan Wahidali Sayyed ...Applicant
vs.
The State of Maharashtra ...Respondent

Mr. Bhaskar Sarwade, for the Applicant in BA No. 1482 of 2023.
Ms. Misbaah Solkar, for the Applicant in BA No. 1019 of 2024.
Ms. Gauri Rao, APP, for the Respondent/State.
Mr. H. Shinde i/b. Mr. Rahul Kasbekar, for Respondent No. 2.
Ms. Asha Kadam, WAPI, Trombay police station.

CORAM : N. J. JAMADAR, J.
DATE : APRIL 23, 2024

P.C.:

1. The applicants, who are arraigned in C.R. No. 630 of 2022 registered with Trombay police station for the offences punishable under sections 302, 307, 326, 324, 354, 141, 143, 147, 149, 323, 504 and 506(2) of Indian Penal Code, 1860; sections 8 and 12 of Protection of Children from Sexual Offences Act, 2012; sections 4 read with 25 and 27 of Arms Act, 1959 and section 37(1)(a) read with 135 of Maharashtra Police Act, 1951 have preferred these applications for bail.

2. The first informant's parental home is at R.No.2, MH-2 Line,

Lal Maidan, Chita Camp, Trombay, Mumbai. Mohd Rafiq Shaikh (accused No. 1), the applicant in BA No. 1482 of 2023 and his family members also reside in B Sector, E-1 Line, R..No. 12, Chita Camp. On 14th December, 2022 at about 10.30 pm the first informant's younger sister (a child) returned home crying. She reported that Rian Shaikh, an absconding accused, sexually harassed her. When the first informant went to question Rian, the Saizaan Sayyed, the applicant in BA No. 1019 of 2024, Mohd. Hanif @ Annu (accused No. 4) and Umar Shaikh raked up a quarrel with the first informant. Mustafa, the brother of the first informant, came thereat and inquired about the cause of the dispute. Akhtar, Shehjan, Afridi, Rafiq, Abu, Salim, Umar and Amir started abusing and assaulting him. Thereupon, the first informant's father Hasim (the deceased), brother Hussain and Jafar, came to the scene of occurrence. Akhtar, Afridi, Saijan and Umar went away.

3. The first informant alleged after a while Mohd Hanif @ Annu (accused No. 1), Mohd Rafiq, the applicant in BA No.1482 of 2023 and Salim came at the scene of occurrence and started to abuse the deceased. In the meanwhile, the co-accused Umar and Mobin came thereat armed with iron rods. The co-accused Amir had a wooden stick. The applicant Saizaan was armed with a sharp weapon. Akhtar and Afridi were armed with swords. They exhorted that

they will not spare the members of the informant party. Fearing for her safety, the first informant went to the house of Shakila Aapa and witnessed the occurrence from the window of her house. The first informant alleged Rafiq, the applicant, Anu and Akhtar assaulted Mustafa by an iron rod. Akhtar assaulted Hussain, the injured brother of the first informant was caught hold of by Annu, Rafiq, the applicant, Akhtar, Afridi and Salima. They gave blows by means of an iron rod and sword. Hasim fell down. Thereupon, Saizaan, the applicant, sat on the legs of Akhtar took away the sharp weapon from Saizaan and assaulted Hussain by means of sharp weapon on head. The applicant allegedly assaulted Jafar by means of fist and kick blows.

4. As Hasim, the deceased went to the rescue of his sons, Akhtar, Afridi, Rafiq, the applicant, Annu, Salim, Amir and Saizaan, the applicant, assaulted the deceased by means of sword, sticks and fist blows. Due to the assault, the deceased collapsed. Somebody raised alarm that deceased passed away. Thereupon, first informant and her sister Rubina came to the spot where the deceased was lying. At that time, Abu assaulted Rubina by means of iron rod and Akhtar gave blow by means of sharp weapon. In the meanwhile, police came thereat. Thereupon, the assailants fled away. The deceased succumbed to the injuries on 19th December, 2022. The applicants

and the co-accused were apprehended.

5. Mr. Bhaskar Sarwade, the learned counsel for the applicant Mohd. Rafiq, submitted that it was a case of a free fight between two groups. In respect of the very same occurrence, the first informant has lodged a report leading to registration of C.R.No. 631 of 2022 for the offences punishable under sections 307, 326, 324, 143, 144, 147, 148, 149, 323, 504 and 506 of the Penal Code, sections 4 read with 25 and 27 of the Arms Act, 1959 and section 37(1)(a) read with 135 of Maharashtra Police Act, 1951. The applicant Rafiq was critically injured in the said occurrence and sustained multiple injuries. The applicant Rafiq has not been ascribed any specific role. The witnesses have given a contradictory account of the occurrence which dents the prosecution case. Since the applicant has been in custody since December, 2022 and the investigation is complete for all intent and purpose, further detention of the applicant is not warranted.

6. Ms. Solkar, for the learned counsel applicant Saizaan Sayyed submitted that the role attributed to the applicant is that of being armed with a sword. However, the prosecution case is belied by the fact that the first informant alleged that the applicant Saizaan sat over the hips of Hussain, the injured and thereafter co-accused Akhtar had taken away the sharp weapon and assaulted Hussain on

head. No role of assault by means of sharp weapon has been attributed to the applicant Saizaan. In any event, Hussain had not sustained any grievous injury. Therefore, having regard to the number of persons roped in and the role attributed to the applicant Saizaan in the alleged occurrence, he deserves to be enlarged on bail, submitted Mr. Solkar.

7. Ms. Gauri Rao, learned APP for the State, submitted that a clear case of murder and attempt to commit murder in prosecution of the common object of the unlawful assembly has been made out. Both the applicants Rafiq and Saizaan have been specifically named in the FIR and the statement of the witnesses as the assailants. The deceased was assaulted when he tried to intervene in the quarrel and pacify the accused who were the aggressors. Therefore, mere registration of a cross case does not imply that the applicants are not involved in the crime.

8. Mr. Shinde holding for Mr. Kasbekar, learned counsel for respondent No. 2 would submit that genesis of the occurrence deserves to be kept in view. The dispute arose as the younger sister of the first informant/child was subjected to sexual exploitation. Applicant and the co-accused had come to the scene of occurrence armed with deadly weapons. Pre- mediation is clearly evident. Therefore, the applicants do not deserve to be enlarged on bail.

9. I have perused the material on record and the report under section 173 of the Code of Criminal Procedure, 1973 and the documents annexed with it.

10. From the perusal of the postmortem report, it becomes evident that the cause of death was “cranio cerebral injury”. There were a number of injuries on the head and other parts of the body of the deceased. The internal examination revealed that there was underscalp hemorrhage on both fronto-parieto temporal region. Prima facie, the material on record indicates that the deceased met a homicidal death.

11. The injury certificate of Mustafa indicates that he had sustained CLW on right elbow, black eye with edema and swelling on right shoulder. Hussain, another son of the deceased, had also sustained six injuries. Three of which were on head. However, all the injuries were designated as simple by the medical officer.

12. It also appears that the genesis of the dispute was the alleged act of sexual harassment of the 13 years old sister of the first informant. In her statement recorded before the learned Magistrate under section 164 of the Code, the child has alleged sexual assault at the hands of Rian. The co-accused Akhtar, Afridi, Umar and Mobin teased her as her clothes were torn. As her younger brother came to her rescue, the co-accused, Annu, Akhtar, Afridi came

thereat armed with big knives. They assaulted the deceased.

13. It would be contextually relevant to note that the first informant lodged report being C.R. No. 631 of 2022 on 15th December, 2022. There is material to indicate that the first informant was examined at Brihanmumbai Mahanagar Palika, L.T.M.G. Hospital, Sion. He narrated history of assault by known persons with a sharp object. There were CLWs on the left eyebrow and parietal regions, swelling at right index finger, incised wound and swelling on the wrist joint of the person of the applicant Rafiq. It further appears that Mohd Hanif Shaikh, a member of the accused party had also sustained injuries on the head and wrist. Fatima Shaikh had also sustained injuries.

14. The situation which thus obtains is that in respect of the one and the same occurrence, there were two versions, one reported by the first informant and other by the applicant Rafiq. The genesis of the occurrence seems to be in the alleged incident of sexual harassment of the victim by an absconding accused.

15. It is in this backdrop, the submission on behalf of the applicants that no specific role has been attributed to the applicants assumes importance.

16. With regard to the applicant Saizaan though the first informant alleged that the applicant Saizaan was initially armed

with a sharp object, yet, there is nothing to show that Saizaan had assaulted the deceased/injured by means of sharp object. On the contrary, it is alleged that after Hussain fell down due to assault by means of stick and weapon by Anu, Akhtar, Salim and Afridi, the applicant Saizaan sat on the lap of Hussain and co-accused Akhtar took away the weapon and assaulted the injured Hussain. The same role has been attributed to the applicant by Mohd. Hussain.

17. Though there is an omnibus allegation in the FIR that all the accused including Akhtar, Afridi, Amit and Saizaan and Annu assaulted the deceased by means of sticks and swords, yet the allegation does not appear to be prima facie borne out by the material on record qua the weapon of offence allegedly used by Saizaan and the nature of assault. The statement of the rest of the witnesses also proceed on identical lines. It is true that overt act or absence thereof on the part of the applicants pales in significance as the applicants have been roped in by invoking the constructive criminality under section 149 of the Penal Code. However, the Court can not lose sight of the fact that it was virtually a case of a free fight. As many as five persons from the informant party have sustained injuries in the very same occurrence.

18. Prima facie, the role of having caused the death of the deceased can not be attributed to applicant Saizaan. The applicant

had barely completed 18 years of age at the time of alleged occurrence. As it was a case of free fight, the question as to whether the applicant Saizaan was also animated by the common object to commit murder of the deceased or attempt to commit murder of the injured witnesses or knew that these offences were likely to be committed in prosecution of the common object of unlawful assembly, would merit adjudication at the trial.

19. Moving forward to the case against applicant Rafiq, I find substance in the submission of Mr. Sarwade that prima facie there is an irreconcilable inconsistency in the statements of the witnesses as regards the role of the applicant Rafiq. The first informant Shabina Shaikh alleged that her brother Mustafa was assaulted by the applicant Rafiq, Annu and Akhtar. The applicant Rafiq was allegedly armed with an iron rod. Akhtar had a sword. Likewise, the applicant and other co-accused caught hold of Hussain, her younger brother, and assaulted him. Mustafa the younger brother of the first informant, in turn, stated that Akhtar was armed with a baseball stick. When he went to rescue of his father, Afridi assaulted him by means of a sword. Akhtar gave blow by means of baseball stick on his head. Rubina, his sister, was assaulted by iron rod by Abu and the applicant Rafiq assaulted her by means of a sharp weapon. Mustafa further stated that the accused Afridi, Abu, Amir, Annu

and Saizaan assaulted Mustafa's father by means of stick, fist and swords. Hussain, another injured witness, states that he was initially assaulted by Rafiq, Annu, Akhtar, Afridi and Salim. They assaulted him by means of an iron rod and sword. When he fell down, Saizaan sat on his lap and Akhtar took away the weapon from Saizaan and unleashed blows. Mohd. Hussain professes to lend support to the version of first informant that the accused Afridi, Abu, Amir, Annu and Saizaan assaulted her father by means of stick, fist and swords. It would be contextually relevant to note that Rafiq made a disclosure statement leading to recovery of an iron pipe.

20. Prima facie, there is discrepancy regarding identity of the persons and the weapons by means of which the deceased was assaulted. Indeed the deceased had sustained multiple injuries on his head. However, the prosecution witnesses have attributed the role of assault by means of fist, sticks and sword to a number of the assailants. Mustafa has not stated that Rafiq had assaulted him by means of an iron rod, the role which was attributed to Rafiq by the first informant. Instead Mustafa stated that Akhtar assaulted him by a baseball stick and Afridi by means of sword. In fact, Mustafa did not attribute any role of assault by the applicant Rafiq to him. However, Mustafa attributed assault by the applicant and other

persons to his father Hasim.

21. As it was a case of a free fight, between two groups of persons and in the said free fight members of both the groups sustained injuries, as is evident from the injury certificates of the applicant Rafiq and the co-accused and other members of the accused party, the version which Rafiq narrated in the cross FIR can be said to competing in probability with that of first informant. In these circumstances which of the parties was the aggressor would be a matter for adjudication at the trial.

22. In the aforesaid view of the matter, I am inclined to exercise discretion in favour of the applicants. However, since the applicants and the first informant and the members of the informant party are the residents of the same locality, I deem it appropriate to impose stringent conditions.

Hence, the following order.

ORDER

1] The applications stands allowed.

2] The applicants be released on bail in C.R. No. 630 of 2022 registered with Trombay police station, on furnishing a P.R. Bond of Rs. 30,000/- with one or more sureties in the like amount, each.

3] The applicants shall mark their presence at Trombay police station on the first Monday of every month between 11 am to 1 pm

for a period of three years or till conclusion of the trial, whichever is earlier.

4] The applicants shall not enter the limits of Trombay police station till the conclusion of the trial except for the purpose of marking presence at Trombay police station.

5] The applicants shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.

6] The applicants shall furnish their contact numbers and residential addresses to the investigating officer and shall keep him updated, in case there is any change.

7] The applicants shall regularly attend the proceedings before the jurisdictional Court.

8] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Applications disposed.

(N. J. JAMADAR, J.)