

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 2585 OF 2023

Mohammed Amir Mohammed Jaffar Shaikh ...Applicant
Versus
State Of Maharashtra ...Respondent

**WITH
CRIMINAL BAIL APPLICATION NO. 586 OF 2024**

Mohammed Hanif Abdul Jabbar ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. I.A. Khan a/w M. A. Khan for applicant in in BA/2585/2023.

Mr. Gaurav Shenoy i/by Misbaah Solkar for Applicant in
BA/586/2024.

Mrs. Mahalaxmi Ganapathy, APP for the Respondent – State.

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CORAM : N. J. JAMADAR, J.
DATE : 25th JULY 2024

PC.:

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 the Indian Penal Code, 1860; Sections 8 and 12 of the Protection of Children From Sexual Offences Act, 2012; 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, have preferred these applications to enlarge them on bail.

2. At the outset, the learned Counsel for the applicants submitted that the applicants are entitled to be enlarged on bail on the ground of parity as this Court had released co-accused Mohammad Rafiq Abdul Jabbar Shaikh (A1) and Saizaan Wahidali Sayyed (A9) on bail, by an order dated 23.04.2024. The applicants are similarly circumstanced. In fact, the role attributed to the applicants is of lesser degree than the role attributed to above named co-accused, who have been released on bail.

3. Ms. Ganapathy, the learned AAP for the State, submitted that the respondent No.2 was served by the Investigating Officer and intimation about today's hearing was also given to her. On 18th July, 2024, the hearing in the application was deferred as the respondent No.2 informed the Investigating Officer about her inability to appear before the Court on that day. Today, none appears for respondent No.2.

4. Ms. Ganapathy, the learned AAP resisted the prayer for bail. It was submitted that in a statement of the victim recorded

on 30th December 2022, before the learned Magistrate under Section 164 of the Code, specific role has been attributed to both the applicants. It is alleged that Mohd. Amir Shaikh (the applicant in B.A. No. 2585 of 2023) had subjected the victim to sexual assault. Mohd. Hanif (the applicant in B.A. No. 586 of 2024) had allegedly assaulted the deceased and the injured. Therefore, the applicants do not deserve to be enlarged on bail.

5. While releasing the co-accused on bail, this Court had noted the prosecution case, in a little detail, and, thereafter, recorded the following reasons.

“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 a 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 loose 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.”

6. *Prima facie*, the aforesaid reasons apply with equal force to the claim of the applicants for bail. From the perusal of the allegations in the FIR and the initial statement of the victim, it appears that the role of subjecting the victim to sexual assault was not attributed to the applicant Mohd. Amir. (A7) The victim even did not advert to the presence of Mohmd. Amir (A7) at the time of the said occurrence of alleged sexual assault, which was the cause of the subsequent fight.

7. In this view of the matter, the statement of the victim recorded under Section 164 of the Code implicating Mohmd. Amir (A7) will have to pass the muster of judicial scrutiny.

8. Qua Mohmd. Hanif @ Anu (A4), the first informant and the victim who is also stated to be an eye witness to the occurrence, have not attributed any role of assault. It was alleged that the applicant Mohd. Hanif @ Anu (A4) accompanied other named accused. It was not their case that, the applicant

Mohmd. Hanif @ Anu (A4) was armed with any weapon. In the statement recorded under Section 164 of the Code, the victim has alleged that the applicant Mohmd. Hanif @ Anu (A4) was also armed with a big knife. *Prima facie*, the said statement is at variance with the initial version of the first informant and the victim.

9. In the aforesaid view of the matter, I am impelled to hold that the applicants are entitled to claim parity with the co-accused, who have been released on bail, as the reasons, which weighed with this Court, apply with equal force to the claim of the applicants for bail. Hence the following order.

ORDER

- (i) The applications stands allowed.
- (ii) 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.
- (iii) 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.

(iv) 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.

(v) 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.

(vi) The applicants shall regularly attend the proceedings before the jurisdictional Court.

(vii) The applicants shall not enter the limits of Trombay police station, for a period of two years except for attending the proceedings before the Court or the police station.

(viii) 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 co-accused and the trial Court shall not be influenced by any of the observations made hereinabove.

(x) Applications disposed.

(N. J. JAMADAR, J.)