



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3640 OF 2024**

Rafiyah Mohd. Hanif Shaikh @ Afridi ... Applicant
versus
The State of Maharashtra and Anr. ... Respondents

Mr. S.K.Ali i/by Mr. Asif Shaikh, for Applicant.
Mr. H.J.Dedhia, APP for State.
Ms. Anandini Fernandes, ppointed Advocate for Respondent No.2. with Ms.
Mr. Umesh Karke, API Trombay Police Station present.

CORAM: N.J.JAMADAR, J.

DATE : 22 OCTOBER 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant, who is 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 24 and 27 of the Arms Act, 1959 and Section 37(1)(a) read with 135 of the Maharashtra Police Act, 1951, has preferred this application to enlarge him on bail.
3. Mr. Ali, learned Counsel for the Applicant, at the outset, submitted that the applicant deserve to be enlarged on bail on the ground of parity as this Court has released Mohd. Rqfiq Abdul Jabbar Shaikh (A1) and Saizaan W. Sayyed (A9) on bail by an order dated 23 April 2024 and Mohammad Amir

Mohammed Jaffar Shaikh and Mohammed Hanif Abdul Jabbar by an order dated 25 July 2024.

4. Mr. Dedhia, learned APP, resisted the prayer for bail. It was submitted that the applicant has been specifically named as one of the assailants who assaulted the deceased by means of an iron rod. Mohammad Mustafa, the injured, has specifically stated that the applicant assaulted him by means of sword. Therefore, the applicant cannot claim parity with the co-accused who have been enlarged on bail.

5. Learned Counsel for the Applicant joined the issue by canvassing a submission that the versions of the first informant and the prosecution witnesses are incompatible with each other. There is glaring inconsistency as to the weapon with which the applicant was armed with and also the victim whom the applicant allegedly assaulted.

6. While releasing co-accused Mohammad Rafiq Abdul Jabbar Shaikh (A1) and Saizaan Wahidali Sayyed (A9), this Court had noted the prosecution case in a little detail, and, thereafter, recorded the following reasons :

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.”

7. In the backdrop of the aforesaid reasons, if the role attributed to the applicant by the first informant and the alleged eye witnesses, is appraised, prima facie, a cleavage emerges. The first informant alleged that the applicant was armed with a sword. The first informant alleged that the applicant gave kick blows to the injured Hussain. When the deceased came to the rescue of Hussain, the applicant and co-accused including mohammed Amin and Saizaan assaulted the deceased by means of fist and kick blows, sticks and swords. Rubina Shaikh, another eye witness, stated that the applicant was armed with an iron rod and exhorted that the males were finished and it was the turn of females. Mohammed Mustafa, injured witness, however, stated that the applicant assaulted him by means of sword.

8. Prima facie, there is inconsistency in the statements of the witnesses as regards the weapon with which the applicant was armed with and the person to whom the applicant allegedly assaulted.

9. At this stage, the complicity of the applicant deserves to be appreciated in the light of the role attributed to the applicant and the injuries sustained by the deceased and the injured. From the perusal of the postmortem report, it becomes evident that the cause of death was a "cranio cerebral injury. There were 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.

10. As noted above, a number of persons have been attributed with the role of having assaulted the deceased by means of weapons, including iron rod, stick and sword.

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 injured, 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 must be noted that Ms. Fernandes, learned Counsel appointed to espouse the cause of Respondent No.2, fairly submitted that the applicant was not accused of having subjected the victim to sexual exploitation and that

the principle of parity may apply.

13. In the aforesaid backdrop, the reasons which weighed with this Court in granting bail to the co-accused, prima facie, govern the claim of the applicant as well. Having regard to the nature of the occurrence, the number of accused involved in each of the cross cases, number of witnesses prosecution may be required to examine and the large pendency of the cases, it is extremely unlikely that the trial can be concluded within a reasonable period. I am, therefore, inclined to exercise discretion in favour of the applicant, subject to stringent conditions :

14. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Rafiyan Mohd. Hanif Shaikh @ Afridi be released on bail in C.R.No.630 of 2022 registered with Trombay Police Station on furnishing a PR bond in the sum of Rs.30,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence at Trombay Police Station on first Monday of every month between 11 am to 1 pm for a period of three years or till the conclusion of the trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or

promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

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

(vii) 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.

Application disposed.

(N.J.JAMADAR, J.)