

IN THE HIGH COURT OF BOMBAY AT GOA**LD-VC-BA-22-2020**

Suhas Naik Applicant

Versus

State of Goa & Ors. Respondents

Shri S.G. Desai, Senior Advocate with Shri P.S. Shirodkar, Advocate for the Applicant.

Shri S.R. Rivankar, Special Public Prosecutor with Shri Gaurish Nagvekar, Additional Public Prosecutor for the Respondents.

Shri Arun Bras De Sa, Advocate for the Intervenor.

Coram:- DAMA SESHADRI NAIDU, J.**Date:- 24th August 2020****ORDER :****Bail**

The first accused is the nephew, and the second accused the uncle—father's younger brother. They have been charged with a heinous crime: murder. Both remaining in the judicial custody for the last eight months, now the uncle has filed this bail application under section 439 of Cr PC. His earlier attempts before the District and Sessions Court yielded no result.

The Facts:

2. The petitioner runs a restaurant. He gets the fish for that restaurant from the water body maintained by the village. In 2014 the petitioner's elder brother, that is the first accused's father, auctioned the sluice gate and had been supplying the fish to his brother's restaurant. It went on for five years. In 2019 the deceased became the successful bidder. Then, there arose disputes between the petitioner's family and the deceased.

3. The petitioner and his elder brother live separately with their respective families, but their familial bonds seem strong. 12th December 2019 was a festive day in the village. After the rituals, many villagers indulged in revelries, booze included, past midnight. At about 1230 at night, the petitioner closed his restaurant and was returning home. On the way, he met the deceased. Given their enmity, they had an altercation; in the scuffle, the petitioner is said to have sustained minor injuries. But the merrymaking villagers around intervened. The petitioner reached home and went to bed. Before going to bed, however, he narrated the incident to his wife and also the first accused over the phone as he was away at some other place.

4. Enraged at the news of assault, the first accused came over to the deceased's house, asked him to come out to the place where the first incident occurred, and clubbed him with a cricket bat. It was about 2 AM that night. Later, at about the daybreak, some villagers noticed the deceased lying unconscious on the road; they took him to the hospital. Eventually, he died.

5. To begin with, the deceased's cousin lodged a complaint with the jurisdictional police against the petitioner alone, for he was unaware of the second incident. The police registered a crime under section 307 of IPC and arrested the petitioner at 10 PM on 13th December. Later, with the victim's death, the police altered the provisions—section 302 read with 120 B of IPC—and arrayed the nephew as the first accused.

6. Earlier twice, the petitioner applied for a regular bail before the District and Sessions Court but could not succeed. Now he has come to this court, invoking section 439 of Cr PC.

Submissions:

Petitioner:

7. Shri S.G. Desai, the learned Senior Counsel, has taken me through the record, including the charge-sheet and the prosecution witnesses' statements. He has narrated the facts and, eventually, submitted thus: (1) the petitioner is unconnected with the incident that led to the deceased's death; (2) he has merely informed his nephew about the incident when the nephew himself called him over the phone; (3) the petitioner has never conspired with his nephew, as the telephone conversation, late at night, lasted less than two minutes; (4) even in the charge-sheet, it has come out that one of the villagers present during the first altercation telephoned his nephew, who in turn called him and found out the facts; (5) the petitioner, with no criminal antecedents, has already been in judicial remand for over eight months despite no material, even *prima facie*, to connect him to the crime.

8. Shri Desai has elaborated on the constitutional safeguards even a convict enjoys and urged this Court to enlarge the petitioner on bail with whatever conditions this Court deems proper. To support his contentions, the learned Senior Counsel has relied on *Sanjeev Kumar v. State of Himachal Pradesh*^[1], *Sanjay Chandra v. CBI*^[2], *Jayendra Saraswathi Swamigal v. State of Tamil Nadu*^[3], and *Zahur Haider Zaidi v. CBI*^[4].

The Public Prosecutor:

1 [] AIR 1999 SC 72

2 [] AIR 2012 SC 830

3 [] AIR 2005 SC 716

4 [] SLP (Cri.) No.2123 of 201, decided on 5th April 2019

9. Shri S.R. Rivankar, the learned Special Public Prosecutor, has vehemently opposed the bail. To begin with, he has submitted that the offence is heinous and a precious life has been lost. Next, he has drawn my attention to the call-details between the uncle and the nephew. Their frequent conversation that fateful night undoubtedly would show there was pre-meditation and conspiracy. To dispel the petitioner's arguments on the value of individual liberty, the learned Public Prosecutor wants the Court to take a balanced view keeping in mind the interests of both the victim and the Society, as well as the accused.

10. The learned Public Prosecutor has also pointed out that the petitioner is a punch member; as such, he stands in a dominant position in the village. That apart, all the witnesses, Shri Rivankar stresses, may have been related to the petitioner, who has the potential to influence them if he is released on bail. To support his contentions, the learned public prosecutor has relied on *K. Hashim v. State of Tamil Nadu*⁵, *State of U.P. v. Amarmani Tripathi*⁶, *Anil Kumar Tulsiyani v. State of U.P.*⁷, and *Jitendra Singh v. Mange Ram*⁸.

The Intervener-Respondent:

11. Shri Arun Bras De Sa, the learned counsel for the intervening respondent, too has opposed the bail with the same intensity as did the learned Public Prosecutor. First, he has drawn my attention to the statement of the petitioner's wife, whom the police examined. Then, he points out that she has applied to retract that statement on the premise

⁵ (2005) 1 SCC 237

⁶ (2005) 8 SCC 21

⁷ (2006) 9 SCC 425

⁸ (2005) 13 SCC 392

that the police never approached her. This shows, according to Shri De Sa, that the petitioner can influence the witnesses. In the end, Shri Desai, too, has drawn my attention to the call details to assert that the uncle and the nephew conspired to commit that crime. Thus, he wants the court to dismiss the bail application.

12. Heard Shri S.G. Desai, the learned senior counsel for the applicant, Shri S.R. Rivankar, the learned special public prosecutor for the respondents and Shri Arun Bras De Sa, the learned counsel for the intervenor.

Discussion:

13. Indeed, the crime is gruesome; someone paid with his life for someone else's anger. The prime accused, who allegedly perpetrated the crime, has not applied for the bail. It is the alleged accessory that has. But a legal fiction and deeming provision—section 120 A IPC—makes this accessory a co-offender, with no distinction.

14. That said, to determine the bail application, we need to fix the adjudicatory bounds. I cannot consider the merits; rather, I must appreciate the *prima facie* case. And it is only for ascertaining whether the petitioner has grounds to earn his freedom pending the trial.

15. Undisputed is the fact that the petitioner was absent when the assault took place. Earlier he did have an altercation with the deceased, but that subsided with the neighbours' intervention. He went home and slept. But before that, he narrated the incident to his wife and also to his nephew, the first accused. The petitioner and his elder brother live separately; the dispute regarding the sluice gate relates to his brother. Perhaps, his familial affinity has made him quarrel with the deceased. According to the prosecution, the murder has its origins in a

conspiracy. They accept that the petitioner was absent at the scene of offence, but they insist that he conspired with his nephew.

16. That dead night, past midnight, the petitioner spoke to his nephew over the phone. I have perused the call details. The first call originated from the first accused. In all, there are three calls. As the petitioner's counsel pointed out, the first call lasted for 40 seconds, the second call for 42 seconds, and the last call for 37 seconds. According to him, it is preposterous for anyone to conclude that in these few seconds the accused 1 and 2 could hatch a conspiracy and plan a murder. *Prima facie*, the learned Senior Counsel's view is plausible. And one of the prosecution witnesses has also stated in the investigation that he informed the first accused.

17. That apart, the petitioner has no criminal antecedents, nor has he direct involvement in the dispute between the deceased and his brother. His quarrel with the deceased, if we believed the prosecution, might have been the trigger point, but that alone—I reiterate, *prima facie*—is insufficient for us to hold that the petitioner has conspired with the first accused to kill the deceased. This view gets fortified with the fact that before the assault the first accused spoke to the petitioner only for less than two minutes. The petitioner's wife, too, stated before the police that her husband narrated the entire incident to his nephew and went to bed. Her effort to retract that statement notwithstanding, we may safely conclude that for narration of the incident and for the contemplation of a conspiracy, two minutes is hardly sufficient.

18. As the learned counsel on either side have cited authorities on the issue, let us examine them.

19. *Sanjay Chandra* provides the jurisprudential justifications for the grant of bail—under specified circumstances. According to it, while balancing the competing claims and conflicting interests, the court should also remember these aspects: (A) The object of bail is to secure the accused's appearance; its object is neither punitive nor preventive. (B) Deprivation of liberty must be considered a punishment, unless it aims to secure the accused's presence. (C) Every man is deemed innocent until he is duly tried and found guilty. (D) No person should be deprived of his personal liberty or punished for an offence an accused has not been convicted yet. (E) Such deprivation only on the suspicion that he will tamper with the witnesses if left free offends the Constitution, save in the most extraordinary circumstances. (G) Any imprisonment before conviction has a substantial punitive content. (H) It is improper for any Court to refuse bail, influenced by the accused's previous conduct whether he had, then, been convicted or not. (I) Courts should not refuse bail to an unconvicted person for giving him a taste of imprisonment as a lesson.

20. That apart, *Sanjay Chandra* has felicitously noted that “in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration”. According to it, the grant or refusal of bail lies in the Court's discretion. And this discretion is regulated, to a large extent, by the facts and circumstances of each case. That said, the right to bail is not to be denied merely because of the community's sentiments against the accused. The primary purposes of bail in a criminal case are these: to relieve the accused of imprisonment; to relieve the State of the burden of keeping him, pending the trial; and, at the same time, to keep the accused constructively in the Court's custody Court, whether before or

after conviction; to assure that he will submit himself to the Court's jurisdiction and attends the Court whenever it requires him.

21. In *Kamlesh*, there was no eye-witness to the murder; so the case hinged on the circumstantial evidence. Accused Sanjiv Kumar is the nephew of another accused, Kamlesh, being her brother's son. They both were charged with Sections 120-B, 302 and 201, I.P.C. and convicted.

22. As to *Kamlesh's* conviction, the Supreme Court has held that the offence under Section 120-B is an agreement between the parties to do a particular act. No material establishes the alleged agreement between Sanjiv Kumar and Kamlesh. Absent such evidence, Sanjiv Kumar being Kamlesh's nephew should not lead to an inference of conspiracy. The petitioner has cited this decision, perhaps, swayed by the familial parity between the two cases. But in *Kamlesh*, the Supreme Court's observations are post-conviction. Here, we are at the threshold.

23. Section 10 of the Indian Evidence Act deals with "things said or done by a conspirator in reference to a common design". Interpreting this provision, the Supreme Court in *Jayendra Saraswathi Swamigal* has held that if *prima facie* evidence about a conspiracy is given and accepted, the acts and statements made by anyone conspirator to further the common object is admissible against all. So, there should first be *prima facie* evidence that the person was a party to the conspiracy before his acts or statements can be used against his co-conspirators.

24. In *Zahur Haider Zaidi*, a three-Judge Bench of the Supreme, through a cryptic order disposed of a bail application. There, the accused, a top-ranked police official charged with Section 302 IPC, has

been in judicial custody for 19 months. The respondent CBI opposed the bail on the grounds that appellant may “intimidate and win over witnesses and influence them”. Repelling this objection, the Supreme Court has held that “bail ought not to be denied on the [grounds of tampering with or influencing the witnesses], and in the event any such conduct, the prosecution can always approach the competent court for cancellation of bail”.

25. Now, let us examine the citations the prosecution has relied on. In *Amarmani Tripathi*, the respondent, a minister, along with his wife and others, was charged with the offence of murder. The High Court released him on bail. To have that bail cancelled, the State went to Supreme Court. So essentially the adjudication in *Amarmani Tripathi* was on the question of cancelling the bail.

26. The Supreme Court has noted with disquiet the respondent’s conduct pre- and post-bail. First, he had remained at large for long before he was granted bail. The record has revealed his conspiring with the other accused. Besides, the respondent is said to have repeatedly attempted to interfere and side-track the investigation, and threaten the witnesses. So the Supreme Court cancelled the bail. In that process, it has enlisted the factors that must be considered in a bail application: (i) *Prima facie* or reasonable grounds establishing the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment the offence attracts; (iv) the chances of the accused’s fleeing the course of justice if released on bail; (v) the accused’ character, behaviour, means, position, and standing in the society; (vi) the likelihood of the offence being repeated; (vii) the chances of the accused’s tampering with the evidence or influencing the witnesses; and (viii) the prospects of the interest of justice getting affected.

27. In *Anil Kumar Tulsyani v. State of UP*, 2006 AIR SCW 4339, the Supreme Court has quoted with approval *Amarmani Tripathi*. After considering the case in the light of the *Amarmani Tripathi's* case holding, the Court has held on facts that the respondent is an advocate, and as such he is in a commanding position and standing in the society. So there remains a reasonable apprehension that the respondent may tamper with or win over, coerce, or intimidate the witnesses. So it cancelled the bail the High Court had granted.

28. In *Jitendra Singh v. Mange Ram*, (2005) 13 SCC 392, the respondent, along with others has been charged with the offences under Sections 147, 148, 149, 307, and 302 IPC. When the High Court granted bail, the appellant took the matter to the Supreme Court. On the facts, the Court has observed that there is record to show that the respondent exhorted and incited the other accused to commit the offence. So it reversed the High Court's judgment.

29. In *Hasim's* case, the offence concerns the counterfeiting of currency notes. In paragraph 22 of the judgment, the Court considered the contours of conspiracy as an offence. According to it, the elements of a criminal conspiracy are these: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the objects, (c) an agreement or understanding between two or more of the accused who are committed to accomplishing the object, and (d) in the jurisdiction where the statute required an overt act.

30. That is, essentially a criminal conspiracy is the unlawful combination of persons for an objective. The offence is, according to *Hasim*, complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need

be done to further the conspiracy; not even the object need to be accomplished. “Encouragement and support which coconspirators give to one another rendering the enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment.”

31. *Hasim* has also held that for an offence punishable under Section 120-B IPC, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, “the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra* capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.”

Conclusion:

32. As I have already noted though the offence comes under Section 302, the petitioner’s role, admittedly, limits itself to the alleged conspiracy. There is little material on record to establish the petitioner’s conspiracy—*prima facie* though. The petitioner has no criminal antecedents; he has a permanent residence and property. His chances of fleeing the course of justice are remote. That said, we must ensure that released on bail, he should not influence—by inducement or threat—the witnesses, who are his fellow villagers. For warding off that threat, his continued incarceration may not be the answer. Instead,

this Court may as well impose reasonable restrictions and grant a conditional bail. So it does.

Result:

ORDER

- (i) Criminal Misc. Appln. (Bail Application) is allowed.
- (ii) The petitioner is directed to be released on bail on his executing P.R. Bond for Rs.50,000/- and on his furnishing two sureties, each for the like sum, to the satisfaction of the learned Additional Sessions Judge, Panaji sitting at Ponda.
- (iii) The petitioner should not live in any part of District of South Goa until further orders from the Court.
- (iv) The petitioner shall not influence, induce, threaten, or coerce the witness; nor should he abuse the process.
- (v) The applicant's failure to abide by these conditions will entail the prosecution to apply for the cancellation of bail now granted to the applicant.
- (vi) Criminal Application stands disposed of.

DAMA SESHADRI NAIDU, J.

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