

2021 (0) AIJEL-HC 243306

GUJARAT HIGH COURT

Hon'ble Judges: B.N. Karia, J.

Kazi Alfaz @ Mako Yusufbhai @ Babubhai Versus State Of Gujarat

Criminal Miscellaneous Application No. 13001 of 2021 ; *J.Date :- SEPTEMBER 27, 2021

- CODE OF CRIMINAL PROCEDURE, 1973 Section - 439
- INDIAN PENAL CODE, 1860 Section - 302 , 307 , 364 , 365 , 342 , 120(b) , 34
- BOMBAY POLICE ACT, 1951 Section - 135

Criminal Law

Grant of regular bail - parity - considering fact that other co accused are released on bail, benefit of parity is required to be given to present applicant.

Code of Criminal Procedure, 1973 - S. 439 - Indian Penal Code, 1860 - S. 302, 307, 364, 365, 342, 120(b) and 34 - Gujarat Police Act, 1951 - S. 135 - application for bail - offence of murder and attempt to murder - alleged that present applicant and other persons assaulted friend of complainant - deceased succumbed to serious injuries - upon receipt of FSL report and on the basis of change of circumstances, principal accused was enlarged on bail by this Court - applicant filed application for regular bail before Sessions Court concerned on ground of parity and delay in concluding trial - Sessions Court rejected bail application - hence, present application - held, this court doubted genuineness and veracity levelled in FIR as also doubted presence of complainant who claims to be an eye witness in FIR - witnesses have also not attributed overt act to applicant except that applicant was having in his hand a wooden stick whereas those witness 'M' was having sword in his hand and he was already released on bail - present applicant being similarly situated and having been wooden stick shown to be possession - therefore, compared to sword, which was in possession of co-accused has been ordered to be released on bail - further, CCTV footage collected from hospital falsifies story of prosecution as well as other two witnesses, who are created by prosecution - therefore, perusing entire charge sheet papers of prosecution and role attributed to present applicant and having considered the fact that other co-accused are released on bail, benefit of parity is given to present applicant - application allowed subject to conditions.

Imp.Para: [6] [7] [8]

Equivalent Citation(s):

2021 JX(Guj) 518 : 2021 AIJEL_HC 243306

JUDGMENT :-

1 The present application is filed under Section 439 of the Code of Criminal Procedure by the applicant for regular bail in connection with an FIR being C.R. No. I 165 of 2019 registered with Kadi Police Station, District: Mehsana for the offence punishable under Sections 302, 307, 364, 365, 342, 120(b) and 34 of the Indian Penal Code read with Section 135 of the Gujarat Police Act.

2 Heard learned advocate for the applicant, learned advocate for the original complainant as well as learned APP for the respondent State.

3 It is submitted by learned advocate for the applicant that applicant is falsely involved in the offence by the prosecution and no specific overt act or role has been attributed to the applicant in the entire FIR. That in the charge sheet papers and during the investigation, except one set of the witnesses, who are created by the prosecution, it is alleged that when the accused persons were assaulting the victim, the applicant and one Irfan @ Gori got out of the Creta car and brought out the victim Sharifkhan from the Creta Car, and thereafter, the other accused assaulted the said Sharifkhan. It is further submitted that one of the main accused namely Malek Arbaz @ Babji Salimbhai Hamadbhai, who was alleged to be in possession of iron pipe, was ordered to be enlarged on regular bail by this Court (Coram: Hon'ble Dr. Justice A.P. Thaker) vide order dated 13.07.2021 in Criminal Misc. Application No.8912 of 2021. It is further submitted that against the

order passed by this Court in Criminal Misc. Application No.8912 of 2021 releasing Malek Arbaz @ Babji Salimbhai Hamadbhai on bail, the prosecution approached the Hon'ble Apex Court challenging the said order, which was declined by the Hon'ble Apex Court and the order passed by the Co ordinate Bench of this Court dated 13.07.2021 was confirmed. It is further submitted that the applicant being identifiably situated with the co accused, who have been ordered to be enlarged on bail and having lesser role, so far as gravity is concerned, applicant should be enlarged on bail. It is further submitted that complainant claims to be an eye witness who has witnessed the assault along with two other bogus witnesses namely Imrankhan Amirkhan Pathan and Munafbhai Akbarbhai Khokhar, who are alleged to have taken the victim Sharikhan to the hospital alongwith the above named two persons in the auto rickshaw of Munafbhai Akbarbhai Khokhar. The CCTV footage collected from the Bhagyoday Hospital clearly falsifies the story of the complainant as well as other two witnesses, who are created by the prosecution. It is further submitted that statements of other witnesses, who are shown to be eye witnesses, have also not attributed any overt act to the applicant except that applicant, was having in his hand a wooden stick. That Malek Arbaz @ Babji Salimbhai Hamadbhai having a sword in his hand is already released on bail by this Court vide order dated 13.07.2021. Therefore, prayer made by the applicant requires to be considered by enlarging on bail by imposing suitable conditions. It is further submitted that in Criminal Misc. Application No.17901 of 2020, while enlarging the main accused on bail, this Court has observed that prima facie, the story put up by the eye witness is doubtful and this court has doubted the presence of the complainant who claims to be an eye witness of the entire incident. That applicant is in jail since considerable period, therefore also, prayer made by the applicant requires to be considered as allegations are general in nature and there is no specific role attributed to the present applicant even in the investigating papers. It is further submitted that as per the prosecution story, after being assaulted, deceased was taken to the Bhagyodaya Hospital, where doctor had examined the deceased and asked the family members to admit the deceased in a better equipped hospital and during the entire process, doctor has not taken to record the case history or even a declaration in the form of dying declaration although it is stated throughout that deceased was conscious. That prosecution has tried to cook up a false story by alleging that when the deceased was being taken from Bhagyodaya Hospital, Kadi to Civil Hospital, Ahmedabad, at that time, during the transit, the deceased informed his father and other persons, who were accompanying him to Ahmedabad about the assault being caused by banging from the front of a Pickup Dalu with the swift car that was driven by the deceased. It is further submitted that there being no specific allegations nor any motive or intention or any kind of animosity attributed to the petitioner with a deceased, he should be released on bail. It is further submitted that other co accused namely Dolani Rauf Abdulrashid, Taufik @ Rubber Abdulrashid Dolani and Malek Irfan @ Giri Salimbhai are already released on bail by the learned Sessions Court, Mehsana in different applications preferred by the co accused persons. Hence, it was requested by learned advocate for applicant to enlarge the applicant on bail.

4 Learned APP for the respondent State has strongly objected the submissions made by learned advocate for the applicant and submitted that prima facie involvement of the present applicant is clearly made out by the prosecution. He has further referred the statement of prosecution witnesses namely Mohd. Moin son of Chhotumiya Karimmiya Chisti, Inayatbhai Yunusbhai Suleman Bhai Mansuri, Munafbhai Akbarbhai Parvarkhan, Imrankhan Aamirkhan Pathan and Mohd. Munaf son of Chhotumiya Karimmiya Chisti from the charge sheet papers and submitted that all the witnesses were present at the time of committing the offence. It is further submitted that these four witnesses and deceased himself has declared the name of the present applicant in his oral dying declaration. Learned APP has further referred the panchnama prepared during the course of investigation and submitted that weapon used by the applicant was also recovered as per the instruction given by the applicant himself. That weapon used in the offence was also identified by the present applicant. It is further submitted that almost 31 injuries were found on the body of the deceased and he was succumbed to the injuries. It is further submitted that considering the various statements of the witnesses and as the applicant is involved in number of criminal antecedents, no prayer made by the applicant can be granted. Learned APP has tried to distinguish the order passed by this Court in Criminal Misc. Application No.17901 of 2020 as well as order dated 13.07.2021 passed in Criminal Misc. Application No.8912 of 2021 by this Court (Coram : Hon'ble Dr. Justice A.P. Thaker) and submitted that role of the present applicant is quite different than the role played by the present applicant and no benefit of parity can be granted to the present applicant. Hence, it was requested by learned APP to dismiss the present application.

5 Learned advocate Ms. Laksha Bhavnani appearing for the original complainant has also supported the arguments advanced by learned APP appearing for the respondent State and submitted that considering the statement of the witnesses recorded by the investigating agency, prima facie, involvement of the present applicant is clearly made out by the prosecution. It is further submitted that grievous role was played by the present applicant in committing murder of the deceased Sharifkhan. That he has used the deadly weapon by committing the offence. That different witnesses have identified this person at the time of committing the offence. It is further submitted that ground of parity would not be available to the applicant as he has played different role in committing the offence, and therefore, no benefit can be given to the present applicant. In support of her case, learned advocate appearing for the original complainant has relied upon the judgment reported in 1998 Cri LJ 2374, Paragraph 18, 19 and 20 as well as Judgment of this Court passed in Criminal Misc. Application No.16894 of 2015 and Criminal Misc. Application No.17564 of 2011. She further

submitted that parity may not be a ground to enlarge the present applicant on regular bail as the role of the present applicant is graver than the role played by other coaccused, who are released on bail. Hence, it was requested by learned advocate for the original complainant to dismiss the application.

6 Having gone through the facts of the case as well as arguments advanced by learned advocate for the applicant, learned advocate for the original complainant as well as learned APP for the respondent State, it appears that present offence was registered with Kadi Police Station, Dist: Mehsana being C.R.No.I 165 of 2019, punishable under Sections 302, 307, 364, 365, 342, 120B and 34 of the Indian Penal Code read with Section 135 of the Gujarat Police Act. In the complaint, the complainant Altafmiya Aiyubmiya Imammya alleged that he is residing with his parents and is doing labour work. His father is rickshaw driver and his mother is a homemaker. He has two brothers in which Afzalmiya is the eldest, who has been married to one Rehanbibi daughter of Ajmuddin Rahemuddin Shaikh and he has one son. The complainant is a second child and younger brother of Afzalmiya whereas the youngest of the three brothers is Arbazmiya who is still studying. On 23.09.2019, at around 9.00 p.m., in the night the complainant having his dinner, at around 11.30 p.m., went to Royal General Store situated in Chabutara Chowk for consuming Masala and after buying the Masala he was standing there, at that time, one Maroon Colour Creta Car bearing registration No.5765 came near the road of Royal General Store and stopped and from the car, two persons namely Malek Ifan @ Giri Salimbhai and present applicant both came out holding the friend of the complainant namely Sharifkhan Nasirkhan Gori and brought him on the road and both of them were having iron pipes in their hands. Along with them, Malek Arbazbhai Salimbhai, Dolani Taufik @ Rabbar, Abdul Rashid, Dolani Rauf Abdul Rashid, Ghanchi Ashraf @ Aslo Ibrahimbhai get out of the car along with iron pipes in their hands and assaulted his friend Gori Sharifkhan Nasirkhan all over the body along with the iron pipes. Upon Sharifkhan raising hue and cry, the complainant Pathan Imrankhan Amirkhan and Khokhar Munafkhan Akabarkhan intervened and got their friend released. At that time, the other shop owners nearby the Chabutara Chowk also came rushing there and Malek Irfan @ Giri Salimbhai told present applicant that the work of Sharif Khan which was given had been complied with in Chabutara Chowk and asked him to inform about the same to Ghanchi Ramizbhai Mohammadbhai and after saying this, they all fled in the Creta Car towards the road leading to Sangam Hotel. Thereafter, as Sharifkhan who happened to be the friend of the complainant had sustained severe injuries, he was made to seat in auto rickshaw of Khokhar Munafkhan Akbarkhan and was taken to Bhagyodaya Hospital and upon administering primary treatment, the doctor of Bhagyodaya Hospital directed that he should be admitted in a hospital for further treatment in Ahmedabad as he has sustained serious injuries. At that time, father of Sharifkhan namely Nasirkhan Lalkhan Gori and his mother Ruksanaben reached the hospital and upon calling for the ambulance from Kadi Nagarpalika, Sharifkhan was taken in ambulance from Bhagyodaya Hospital to Ahmedabad. During the transit the complainant and Nasirkhan who happens to be the father of Sharifkhan inquired the Sarifkhan about the occurrence of the incident who in turn informed that he along with Chisti Moinmiya Kalumiya had gone to Mehsana in his swift car and were returning to Kadi from highway road via Dhanaji Alampur Bhatasasn and at around 10.00 to 10.30 p.m., when they were passing through Jasalpur village at that time one pickup van which was being driven in full speed, dashed from the front of the swift car and as a result of which the swift car got dashed with a camel cart, which was parked near a temporary building and stopped. Thereafter, one Creta Car came behind their swift car and stopped and from the said Creta Car Malek Irfan @ Giri Salimbhai, present applicant and Malek Arbaz Salimbhai, Dolani Taufiq @ Rabbar Abdul Rashid, Dolani Rauf Abdul Rashid who had come there with iron pipes in their hands and one Ghanchi Ashraf @ Aslo Ibrahimbhai had a sword in his hand and climbed on bonnet of his car and thrust the sword inside the glass and broke the glass, at that time, Chisti Moinmiya Kalumiya who was with him in the cart got out and ran away and upon Sharifkhan trying to run, he was caught and injuries were inflicted on his hands and legs by way of iron pipes and at that time, Malek Irfan @ Giri told everybody that Sharifkhan had eloped with a Ghanchi girl and had performed a love marriage with her and therefore, he should be lifted and taken to Chabutara Chowk, and there, he would be killed. As these were the orders of Ghanchi Ramizbhai Mohammadbhai. Therefore, he was kidnapped in the maroon Colour Creta Car and thereafter, assaulted. Upon Sharifkhan being admitted in Vadilal Hospital in Ahmedabad in ICU during the course of treatment, he succumbed to injury sustained by him. Thereafter, upon Kadi Police reaching Vadilal Hospital, Ahmedabad inquest Panchnama was carried out of dead body of Sharifkhan and thereafter, the complainant along with the father of the Sharifkhan went to Kadi Police Station to register the FIR. As the applicant has approached this Court by preferring Criminal Misc. Application No.15968 of 2020 which was withdrawn with a liberty to approach learned Sessions Court concerned after availability of the FSL report. Permission as sought for was granted on 27.10.2020. Thereafter, upon receipt of the FSL report and on the basis of the change of circumstances, as the principal accused namely Ramiz Mohammadbhai Ghanchi was enlarged on bail by this Court. Applicant approached the learned Sessions Court concerned with a prayer to release him on regular bail alongwith the ground of parity and delay in concluding the trial. The learned Sessions Court, Mehsana rejected the bail application of the applicant on 10.05.2021.

7 It further appears that co accused namely Dolani Rauf Abdulrashid, Ashraf @ Ashlo Ibrahim Ghanchi, Taufik @ Rubber Abdulrashid Dolani as well as Malek Irfan @ Giri Salimbhai are released on bail under Section 439 of Cr.P.C. by the learned Sessions Court, Mehsana in different applications preferred by the co

accused. It is also fact that another accused who has played grater role are also released on bail by this Court in Criminal Misc. Application No.17901 of 2020 vide order dated 24.12.2020 and Criminal Misc. Application No.8912 of 2021 vide order dated 13.07.2021. It appears that order passed in Criminal Misc. Application No.8912 of 2021 dated 13.07.2021 was challenged by the prosecution before the Hon'ble Apex Court which was declined by the Hon'ble Apex Court and order passed by this Court was confirmed. It further appears that on previous occasion dealing with the bail application of the co accused, this Court has doubted the presence of the complainant who claims to be an eye witness of the entire incident. This Court has also doubted the genuineness and veracity levelled in the FIR as also doubted the presence of the complainant who claims to be an eye witness in the FIR. The witnesses, whose statements are recorded and are claimed to be eye witnesses of the offence, have also not attributed overt act to the applicant except that applicant was having in his hand a wooden stick whereas those witness Malek Arbaz @ Babji Salimbhai Hamadbhai was having sword in his hand and he was already released on bail vide order dated 13.07.2021. The present applicant being similarly situated and having been wooden stick shown to be possession. Compared to the sword, which was in possession of the co accused has been ordered to be released on bail. The complainant who claims to be an eye witness along with two other witnesses namely Imrankhan Amirkhan Pathan and Munafbhai Akbarbhai Khokhar who have alleged to have taken the victim Sharifkhan to the hospital alongwith the above named two persons in the auto rickshaw of Munafbhai Akbarbhai Khokhar. CCTV footage collected from the Bhagyodaya Hospital clearly falsifies the story of the prosecution as well as other two witnesses, who are created by the prosecution.

8 Having perused entire charge sheet papers of the prosecution and role attributed to the present applicant and having considered the fact that other co accused are released on bail, this Court is of the considered view that benefit of parity is required to be given to the present applicant.

9 In the facts and circumstances of the case and considering the nature of allegations made against the applicant in the FIR, I am of the opinion that this is a fit case to exercise the discretion to enlarge the applicant on regular bail.

10 Hence, the present application is allowed and the applicant is ordered to be released on regular bail in connection with an FIR being C.R. No. I 165 of 2019 registered with Kadi Police Station, District: Mehsana on executing a personal bond of Rs.10,000/ (Rupees Ten Thousand Only) with one surety of the like amount to the satisfaction of the learned Trial Court and subject to the conditions that the applicant shall;

[a] not take undue advantage of liberty or misuse liberty;

[b] not act in a manner injurious to the interest of the prosecution;

[c] surrender passport, if any, to the lower court within a week;

[d] not leave the State of Gujarat without prior permission of the Sessions Judge concerned;

[e] furnish latest and permanent address of residence to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of the learned Sessions Court concerned;

11 The Authorities will release the applicant only if he is not required in connection with any other offence for the time being. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter. Bail bond to be executed before the learned Lower Court having jurisdiction to try the case. It will be open for the Sessions Court to delete, modify and/or relax any of the above conditions, in accordance with law. At the trial, learned Trial Court shall not be influenced by the observations of preliminary nature, qua the evidence at this stage, made by this Court while enlarging the applicant on bail.

12 Rule is made absolute to the aforesaid extent.

13 This order be communicated to the applicant through Jail Authorities by the registry as well as learned Sessions Court concerned.