

A.F.R.

Court No. - 69

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 50880 of 2021

Applicant :- Hargovind

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- P.K. Singh, Vijay Kumar Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Shyam Shamsery, J.

1. Heard Shri P.K. Singh, learned counsel for applicant and Shri Om Prakash, learned Additional Government Advocate for State.

2. Applicant – Hargovind has preferred second bail application, who is facing trial in connection with Case Crime No.07 of 2019, under Section 376-D, 342, 323, 120B of Indian Penal Code and Section 3/4 of POCSO Act, Police Station – Nibohara, District - Agra.

3. The first bail application was rejected by a reasoned order on facts as well as on Law. The operative portion of order dated 13.7.2021 is reproduced hereinafter :-

“8. The allegations against the applicant are consistent in FIR, statement of victim recorded u/s 161 Cr.P.C. and 164 Cr.P.C. that during entire occurrence of rape he remained at the place of occurrence. He not only locked the room from outside but repeatedly told co-accused to do it fast. Co-accused Veeru also joined him. Section 376 (D) IPC states that "Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape".

9. Considering the gravity of offence, no case of bail is made out. Accordingly, the bail application is rejected.”

4. Shri P.K. Singh, learned counsel for applicant has vehemently argued that while considering first bail application, certain material aspects of the case were not considered such as similarly situated co-accused Veeru @ Virendra was granted bail

by a co-ordinate Bench of this Court in Criminal Misc. Bail Application No.30684 of 2019, vide order dated 7.8.2019, prior to the order passed in first bail application of applicant.

5. Learned counsel further submits that applicant is a student and presently, he is pursuing M.Phil. The allegation that he has closed the door from outside and remained there, is not only improbable as victim has no opportunity to identify from inside the room. Therefore, applicant is also entitled for bail on the ground of parity.

6. Learned counsel for applicant also relied upon a judgment passed by the Division Bench of this Court in the case of **Nanha s/o Nabhan Khan vs. State of U.P; 1992 LawSuit (All) 219** wherein, the Division Bench has decided two questions referred to the Bench and in support of his submission, he read out paragraph Nos. 58, 59 and 61, which are mentioned hereinafter :-

“58. The word 'parity' means the state or condition being equal or on a level; equality; equality of rank or status (See Shorter Oxford English Dictionary 1936 Ed.). In other words it means being placed at the same footing. All the accused of a case always do not stand on the same footing. While considering bail of different accused the court has to find out whether they stand on the same footing or not. Even if role assigned to various accused is same yet they may stand on different footing. The case of Cap. Jagjeet Singh (supra) is an illustration wherein the Supreme Court distinguished the case of Capt. Jagjeet Singh on the ground that he was in touch with foreign agency and leaking out secrets. The Supreme Court in the case of Gur Charan Singh vs. Delhi Administration, AIR 1978 SC 179 : (1978 Cri LJ 129) laid down that the considerations for grant of bail are inter alia the position and status of the accused with reference to the victim and the witnesses; likelihood of the accused; fleeing from justice; of repeating offence; of jeopardising his own life, being faced with grim prospect of possible conviction in the case; of tampering with witnesses; and the like. These are additional factors which are to be judged in the case of individual accused and it may make the cases of different accused distinguishable from each accused. At the same time if there is no real distinction between the individual case of accused the principle of parity comes into play and if bail is granted to one accused it should also be granted to the other accused whose case stands on identical footing.

59. None the less the principle of grant of bail on parity cannot be allowed to be carried to an absurd or illogical conclusion so as to put a judge in a tight and straight jacket to grant bail automatically. There may be case which may require an exception; where a judge may not simply take a different view from the judge who granted bail earlier to a co-accused but where the conscience of the judge revolts in granting bail. In such a situation the judge may choose to depart from the rule recording his reasons. However, such cases would be very few.

61. My answer to the points referred to is that if on examination of a given case it transpires that the case of the applicant before court is identical, similar to the accused, on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should also be released on bail. (Exceptional cases as discussed above apart). As regards the second part of the question, answer is that it is not at all necessary for an accused to state in his bail application that the bail application of a co-accused has been rejected previously.

7. Learned Additional Government Advocate has opposed the submission of bail and submits that while rejecting first bail application, this Court has considered all the relevant factors as well as 'Law on bail' and while taking into consideration, statements recorded under Section 161 and 164 Cr.P.C. and that applicant has actively participated in offence by locking the room from outside as well as repeatedly asked the applicant to do the act of rape quickly. The Court has also taken note of Section 376(D) of Indian Penal Code and accordingly, dismissed the first bail application. He further submits that bail order, whereby, co-accused Veeru @ Virendra is granted bail is bereft of reasoning, therefore, it cannot be relied upon as well as parity alone is not a ground to grant bail and there is no subsequent event brought on record before this Court to allow the second bail application.

8. Shri P.K. Singh, learned counsel for applicant has argued the first bail application as well as present bail application. The arguments of learned counsel for applicant are noted in paragraph no.5 of order dated 13.7.2021, which are mentioned hereinafter :-

“5. Learned counsels for the applicant submitted that the age of the victim is determined to be 16 years as per radiology medical report. It is further submitted that during medical examination no injury was found on private part of the victim. Victim has narrated a different story in her statement recorded u/s 161 Cr.P.C. He further submitted that there is no allegation of rape on the applicant. Therefore, applicant is liable to be released on bail.”

9. The arguments of learned counsel for applicant in support of prayer, made in second bail application are of two folds. Firstly, he argued that co-accused Veeru @ Virendra was granted bail by this Court on 7.8.2019 i.e. even before first bail application of applicant was rejected, however, the same was not brought on record of first bail application and secondly, he relied upon concept of 'desirability of consistency' as held in **Nanha Singh (Supra)**. In this regard, it is essential to consider the reasons given by the co-ordinate Bench, while granting bail to co-accused Veeru @ Virendra that :-

“After considering the rival submissions noted hereinabove and the material brought on record, without expressing any opinion on the merits of the case and considering the facts and circumstances of the case, I am of the opinion that the applicant is entitled to be released on bail.”

10. The Apex Court in a recent judgment passed in the case of **Manoj Kumar Khokhar vs. State of Rajasthan and Another; 2022 SCC Online 30**, has retreated the 'Law on bail' as well as requirement of 'Reasoned Order' while rejecting or accepting the bail application. The Apex Court has followed the judgments passed in **Ramesh Bhawan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) & Another; 2021 6 SCC 230; Bhupendra Singh vs. State of Rajasthan and Another (Criminal Appeal No.1279 of 2021); Mahipal vs. Rajesh Kumar; 2020 (2) SCC 118**; and held that:-

“18. (l) The most recent judgment of this Court on the aspect of application of mind and requirement of judicious exercise of discretion in arriving at an order granting bail to the accused is in the case of Brijmani Devi vs. Pappu Kumar and Anr. – Criminal Appeal No. 1663/2021 disposed of on 17th December, 2021, wherein a three Judge Bench of this Court, while setting aside an unreasoned and casual order of the High Court granting bail to the accused, observed as follows:

"While we are conscious of the fact that liberty of an individual is an invaluable right, at the same time while considering an application for bail Courts cannot lose sight of the serious nature of the accusations against an accused and the facts that have a bearing in the case, particularly, when the accusations may not be false, frivolous or vexatious in nature but are supported by adequate material brought on record so as to enable a Court to arrive at a prima facie conclusion. While considering an application for grant of bail a prima facie conclusion must be supported by reasons and must be arrived at after having regard to the vital facts of the case brought on record. Due consideration must be given to facts suggestive of the nature of crime, the criminal antecedents of the accused, if any, and the nature of punishment that would follow a conviction vis-a-vis the offence/s alleged against an accused."

19. On the aspect of the duty to accord reasons for a decision arrived at by a court, or for that matter, even a quasi judicial authority, it would be useful to refer to a judgment of this Court in Kranti Associates Private Limited & Anr. vs. Masood Ahmed Khan & Ors. – (2010) 9 SCC 496, wherein after referring to a number of judgments this Court summarised at paragraph 47 the law on the point. The relevant principles for the purpose of this case are extracted as under:

"(a) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(b) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi judicial or even administrative power.

(c) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(d) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi judicial and even by administrative bodies.

(e) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision making justifying the principle that reason is the soul of justice.

(f) *Judicial or even quasi judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*

(g) *Insistence on reason is a requirement for both judicial accountability and transparency.*

(h) *If a judge or a quasi judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*

(i) *Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber stamp reasons" is not to be equated with a valid decision making process.*

(j) *It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731- 37])*

(k) *In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".*

20. *Though the aforesaid judgment was rendered in the context of a dismissal of a revision petition by a cryptic order by the National Consumer Disputes Redressal Commission, reliance could be placed on the said judgment on the need to give reasons while deciding a matter.*

21. *The Latin maxim "cessante ratione legis cessat ipsa lex" meaning "reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself", is also apposite.*

22. *We have extracted the relevant portions of the impugned order above. At the outset, we observe that the extracted portions are the only portions forming part of the "reasoning" of the High court while granting bail. As noted from the aforesaid judgments, it is not necessary for a Court to give elaborate reasons while granting bail particularly when the case is at the initial stage and the allegations of the offences by the accused would not have been crystallised as such. There cannot be elaborate details recorded to give an impression that the case is one that would result in a conviction or, by contrast, in an acquittal while passing an order on an application for grant of bail. However, the Court deciding a bail application cannot completely divorce its decision from material aspects of the case such as the allegations made against*

the accused; severity of the punishment if the allegations are proved beyond reasonable doubt and would result in a conviction; reasonable apprehension of the witnesses being influenced by the accused; tampering of the evidence; the frivolity in the case of the prosecution; criminal antecedents of the accused; and a prima facie satisfaction of the Court in support of the charge against the accused.

23. *Ultimately, the Court considering an application for bail has to exercise discretion in a judicious manner and in accordance with the settled principles of law having regard to the crime alleged to be committed by the accused on the one hand and ensuring purity of the trial of the case on the other.*

24. *Thus, while elaborate reasons may not be assigned for grant of bail or an extensive discussion of the merits of the case may not be undertaken by the court considering a bail application, an order de hors reasoning or bereft of the relevant reasons cannot result in grant of bail. In such a case the prosecution or the informant has a right to assail the order before a higher forum. As noted in Gurucharan Singh vs. State (Delhi Admn.) 1978 CriLJ 129, when bail has been granted to an accused, the State may, if new circumstances have arisen following the grant of such bail, approach the High Court seeking cancellation of bail under Section 439 (2) of the Cr.P.C. However, if no new circumstances have cropped up since the grant of bail, the State may prefer an appeal against the order granting bail, on the ground that the same is perverse or illegal or has been arrived at by ignoring material aspects which establish a prima facie case against the accused.”*

11. Fall out of above judgments is that to assign reasons to an order is not only essential but is a safeguard that discretion is exercised in a judicious manner.

12. It is also relevant to mention here a short judgment passed by the Supreme Court in the case of **Sabir vs. Bhoora @ Nadeem and Another; Criminal Appeal No.227 of 2022, decided on 15.2.2022** wherein similarly worded order as passed on bail application of co-accused, was set aside considering it to be an unreasoned order. For reference, the order is mentioned hereinafter :-

"On perusal of the impugned orders, what is noteworthy is that in the impugned orders passed by the High Court no reason has been

given for grant of bail. In the case of murder (under Section 302 IPC), it is expected that at least some reason would be given while reversing the order of the Trial Court, which had rejected the bail application by a reasoned order. What we notice is that in the impugned orders the High Court, while granting bail, has only stated that "Keeping in view the nature of offence, evidence, complicity of the accused, severity of the punishment, submissions of learned counsel for the parties and without expressing any opinion on the merits of the case, this Court is of the view that the applicant is entitled to be enlarged on bail during the pendency of the trial". In the present case, the nature of the offence is very grave i.e. murder under Section 302 IPC and if such reasons are to be accepted for granting bail, then probably in all cases bail would be granted.

Since we find that no reasons have been given in substance and there is only narration of facts in the orders impugned, we are of the opinion that the orders impugned deserve to be set aside. "

13. In the light of above judgments even considering the "desirability of consistency" as held in **Nanha (Supra)**, the parity of an unreasoned order which is against various judgments, as referred above, passed by the Apex Court, could not an order not supported by adequate reasons could not be weighed over an order passed with certain reasons after considering rival submissions and considering 'Law on bail'. While rejecting the first bail application for the sake of repeat, reasons given by this Court are mentioned hereinafter :-

"8. The allegations against the applicant are consistent in FIR, statement of victim recorded u/s 161 Cr.P.C. and 164 Cr.P.C. that during entire occurrence of rape he remained at the place of occurrence. He not only locked the room from outside but repeatedly told co-accused to do it fast. Co-accused Veeru also joined him. Section 376 (D) IPC states that "Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape".

14. In order to consider the submissions of learned counsel for applicant on merit, I have gone through the material on record and again perused it carefully. The role of applicant was specifically mentioned in the statement of victim recorded under

Section 164 Cr.P.C. that on fateful day, when victim was going to field along with her animals, Jai chand (co-accused) and Hargovind (present applicant) met her and took her to a room at their tubewell. Applicant - Hargovind locked the room from outside and remained there to guard. Meanwhile, co-accused - Jai Chand committed rape inside the room and specifically asked co-accused to complete the act of rape quickly. After the act of rape, applicant and co-accused left the room, locked from outside. Later on, room was opened by father of the applicant.

15. From the statements recorded under Section 164 Cr.P.C., the active role of applicant in commission of offence is apparent. He not only actively participated in abduction but remained with co-accused Jai Chand from starting to conclusion of act and helped co-accused Jai Chand by locking the door from outside and remained there to guard abroad to complete the offence quickly.

16. Considering the law on bail as mentioned in the order passed in first bail application as well as judgments passed by the Supreme Court (referred above) in regard to reasoned order as well as law on parity and desirability of consistency and also considering specific role of applicant in commission of the offence and keeping in view the ingredients of Section 376(D) IPC and offence under Section POCSO Act, no case for bail is made out to allow this second bail application.

17. Accordingly, the present bail application is *rejected*.

Order Date :- 29.3.2022
Rishabh

[Saurabh Shyam Shamshery, J.]