

Mangesh Vasantao Deshpande vs . on 29 February, 2012

Author: A.P. Bhangale

Bench: A.P. Bhangale

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Criminal Application (APPLN) No. 6 of 2012

(Mangesh Vasantao Deshpande
Vs.
Dr. Ganesh Shivramji Mehare and others)

Office Notes, Office Memoranda of Coram,
Appearances, Courts orders or directions
and Registrar's orders.

Court's or Judge's o

Mr. R.J. Mirza, Advocate for the applicant.
Mr. S.A. Mohta, Advocate for non-applicant nos. 1 & 2.

Mr. A.M. Deshpande, APP for non-applicant no.3/State.

CORAM : A.P. BHANGALE, J.

DATE : FEBURARY 29, 2012.

Heard.

The applicant, who is the first informant, lodged F.I.R.

No. 262/2011 at Old City Police Station, Akola, on 17/11/2011, under Sections 325, 307 read with Section 34 of the Indian Penal Code alleging that on 25/11/2011 at about 5:15 a.m., he, in order to attend his duty, had started on his motorcycle to Railway Station, as he was required to travel by Navjeevan Express to the place of his employer.

According to the first informant, while his motorcycle was near Maharana Pratap Square, three persons came across to his motorcycle from the direction of Godbole Plot and one of them assaulted the first informant by means of iron pipe.

The assailants were known to the first informant by name 2 appln.6.12.odt Ganesh Mehare, resident of Ganesh Nagar, along with Ganesh Raut was also present, who had assaulted on the hands and legs of the first informant by means of pipe. In the result, the first informant fell down. The third person, who had also assaulted the first informant by means of pipe, was unknown to the first informant by name but known to the first informant by face. The first informant could recognize the assailants because of clear visibility due to halogen lights. While the first informant was lying injured on the ground, some pedestrians rushed to save him and, therefore, all the assailants fled away on their motorcycle.

Ashu Wankhede, Sagar and other persons carried the first informant in injured condition to the Old City Police Station.

The police had referred the first informant for medical aid to "Survopchar Rugnalaya", Akola. The persons, who carried the first informant to the hospital and earlier to the Police Station, also told to the first informant that they knew the assailants. Later on, the first informant was admitted in Private Hospital of Dr. Vishal Bhagwat. During the treatment, the F.I.R. came to be registered on 27/11/2011.

According to the first informant, there was previous enmity between the families of first informant and accused Ganesh Mehare. A civil suit was pending in the Court between them in respect of dispute over a plot and on that ground Ganesh 3 appln.6.12.odt Mehare, Ganesh Raut and one more unknown person conspired together and assaulted the first informant by attempting to murder him. In the past also, Ganesh Mehare and his associates had attacked the house of first informant, and for that incident also, a complaint was lodged at Police Station. After this complaint was lodged by the first informant on 27/11/2011, police referred the first informant for medical examination to Medical College and Hospital at Akola. The Medical Officer noted history of alleged assault from the patient and observed the following injuries.

1. C.L.W. - size 8 x 1 cm on central part of parietal region.
2. Contusion - size 6 x 6 cm on left calf region.

3. Contusion - size 4 x 4 cm on right calf region.
4. Contusion - size 3 x 3 cm on left wrist.
5. Contusion - size 2 x 2 cm on left hand dorsally.

It appears that police had obtained fitness certificate from Doctor concerned in order to record statement of the injured person. Prima facie it appears from the medical certificate issued by Dr. Vishal Bhagwat, M.B.B.S, D.ORTHO., CPS Mumbai, that the first informant-Mangesh had head injury for which suturing was done at Civil Hospital, Akola.

He also noted fracture at distal 1/3 ulna left side, fracture 5th Metacarpal left side, fracture third metacarpal right side and 4 appln.6.12.odt undisplaced fibula fracture left side. The patient was admitted in the hospital of Dr. Vishal Bhagwat on 26/11/2011 and operated for fracture ulna left side by nailing on 27/11/2011. Even the statement in the nature of dying declaration was recorded by Executive Magistrate, Akola on 27/11/2011 in presence of Doctors indicating that assailants namely Ganesh Mehare, Ganesh Raut and third unknown person had assaulted the first informant on 25/11/2011 in the morning after he started from his house by motorcycle at 5:15 a.m. and was going towards the Railway Station. It was further indicated in the statement that after the incident, the assailants had ran away from the scene of crime. The previous enmity was also disclosed in the said statement. It was specifically stated by the first informant that those assailants had attempted to murder by assaulting him. In the course of investigation also, the statements of some witnesses came to be recorded, which included statements of eye witnesses.

It appears that non-applicant nos.1 & 2 had moved an application under Section 438 of the Code of Criminal Procedure before Shri A.H. Gajiyani, the learned Additional Sessions Judge, Akola. It appears that all these facts were mentioned including recording of the statements of 5 appln.6.12.odt independent eye-witnesses, who identified the accused-

applicant as assailants. An anticipatory bail application bearing no. 803/2011 was filed on 30/11/2011, to which reply was given on behalf of the respondent-state on 03/12/2011 by which the application was strongly objected on the ground that averments made in the anticipatory bail application are required to be inquired into by collecting evidence and the accused are required to be interrogated in custody to find out as to how they came to know that the complainant had left his house at early hours in the morning.

Furthermore, the Investigating Officer also stated that the weapons of assault (offence) were yet to be recovered from each of the accused and investigation is required into alleged previous enmity and the role of each of the accused in the assault as also since name and whereabouts of third assailant was unknown to the first informant, he was yet to be investigated. Furthermore, injured was admitted in Dr. Bhagwat's Hospital and was serious and not out of danger. It is the grievance of the present applicant that all these strong objections were ignored by the learned Additional Sessions Judge, Akola, who granted anticipatory bail in favour of non-

applicant nos.1 & 2. While granting anticipatory bail ordering P. R. Bonds in the sum of Rs.30,000/- by each with one surety in the like amount to be provided by each of non-

6 appln.6.12.odt applicant nos.1 & 2. The conditions were also imposed that accused shall not tamper with the evidence or hamper the investigation process and shall attend the Police Station for fifteen days everyday between 10:00 am to 12:00 noon.

It is the grievance of the present applicant, who seeks cancellation of anticipatory bail granted in favour of non-

applicant nos.1 & 2, that there were many complaints by different persons in the past regarding alleged illegal money lending by non-applicant no.1, who professes himself as Dr. Mehare and indulged in offences such as criminal trespass, threats, illegal money-lending etc. Copies of such complaints in the past, were brought to my notice. It is further grievance of the applicant that even after grant of anticipatory bail, the non-applicant no.1 indulged in threatening the first informant on 17/12/2011 at about 8:30 p.m. when Ganesh Mehare obstructed the first informant on the road and uttered the following words:

"rqgs gkrik; vxksnjp eksMys] Mkds QksMya vkgs rjhch eh vtwu ckgsjp vkgs- vkB
fnolkr fjiksVZ ekxs /ksowu vkilkr d#u Vkd ukbZrj rqys [kre d#u Vkdsu"

In respect of this threat to cause death of the first informant, the first informant had approached Civil Lines 7 appln.6.12.odt Police Station, Akola. The said complaint was treated as 'Non Cognizable Offence' vide NCR No. 1017/11 under Section 506 of the Indian Penal Code on 17/12/2011.

According to learned Advocate for the applicant, this was nothing but an attempt to tamper with the evidence and hamper the progress of investigation, which were the conditions imposed against non-applicant nos.1 & 2 while granting anticipatory bail. Thus, according to learned Advocate for the applicant, non-applicant no.1 has also violated the conditions of anticipatory bail granted in his favour by the learned Additional Sessions Judge, Akola.

The learned Advocate for non-applicant nos.1 & 2, who opposed the application under Section 482 read with Section 439(2) of the Code of Criminal Procedure for cancellation of anticipatory bail, contended that there were no serious physical injuries as claimed by the applicant, as the applicant had sought discharge from the Government hospital and later was admitted in a private hospital of Dr. Bhagwat. He disputed the nature of injuries as serious.

According to the learned Advocate for non-applicant nos.1 & 2, police station concerned submitted B-Summary report in respect of past crime alleged on the ground of illegal money lending. However, it is not disputed that the civil suit 8 appln.6.12.odt between the applicant and non-applicant no.1 regarding an immovable property is pending. He also denied that non-

applicant no. 1 gave any threat so as to violate condition of anticipatory bail as alleged on 17/12/2011 in respect of his N.C.R. No. 1027/2011 which was noted by Akola Police.

This application for cancellation of anticipatory bail was also opposed on the ground that the State has already moved for cancellation of anticipatory bail before the Sessions Judge, Akola vide Misc. Cri. Appl. No. 7/2012, pending with the Sessions Judge, Akola. It is further submitted that the learned Sessions Judge, Akola had granted anticipatory bail after hearing the parties, therefore, it ought not to be cancelled since non-applicant nos.1 & 2 had attended the police during the course of investigation. According to the learned Advocate for non-applicant nos.1 & 2, FIR No. 193/94, which was filed under Sections 447, 448, 294, 506 of the Indian Penal Code against the non-applicant no.1, in that case, the learned Judicial Magistrate First Class, Akola gave clean chit and acquitted non-applicant no.1 on 23/10/1997 (copy of order is not produced). According to the learned Advocate for non-applicant nos.1 & 2, no overwhelming grounds are made out for cancelling the anticipatory bail. As according to the learned Advocate for non-applicant nos.1 & 2, the applicant is an influential 9 appln.6.12.odt political person as also his father-in-law and they got false N.C. report registered with a view to harass the non-

applicant nos.1 & 2.

As against these contentions on behalf of non-

applicant nos.1 & 2, the learned APP submitted that even regarding pending investigation as against non-applicant no.3, the said anticipatory bail was wrongly granted in favour of non-applicant nos.1 & 2, by learned Additional Sessions Judge. The State had moved the Sessions Court, Akola with a prayer for cancellation of anticipatory bail on the ground that both the non-applicant nos. 1 & 2 though attended police station, did not cooperate with the police when questioned about the offence committed by them. The Investigating Officer also enquired about the third accused, who was unknown to the first informant by name but not by face, but both the non-applicant nos.1 & 2 did not cooperate with the Investigating Officer so as to disclose the identity of the third assailant. The weapons used in the offence, are also yet to be recovered as also the clothes of the accused (non-applicant nos.1 & 2) and for that also they did not cooperate with the Investigating Officer for furnishing their clothes and blood samples. In these circumstances, the learned APP prayed that this application for cancellation of 10 appln.6.12.odt bail be allowed and anticipatory bail granted by the learned Additional Sessions Judge, Akola, by order dated 13/12/2011 in M.C.A. No. 803/2011 be immediately cancelled in the interest of justice.

The learned Advocate for non-applicant nos.1 & 2 prayed before this Court that the question as to whether anticipatory bail is required to be cancelled or not may be left to the learned Additional Sessions Judge, Akola, who granted anticipatory bail and the matter may be remanded since the State has also moved for cancellation of anticipatory bail in the Sessions Court, Akola.

I have heard the submissions in detail. In my view, prima facie it appears that when an application is moved before the Sessions Court for anticipatory bail, it is necessary for the learned Additional Sessions Judge concerned to apply his mind prima facie as to following important factors.

(i) Nature and gravity of accusation and material alleged against the applicant-accused in the crime.

(ii) Antecedents of accused, if any, and his past history if it is brought to notice by the state opposing the bail.

(iii) Possibility of abscondence by the accused.

(iv) Likelihood of repetition of similar or other crime.

(v) Prima facie observation as to whether accusation is made to humiliate the accused by getting him arrested. Position and status of the accused in society in relation to the victim and witnesses may

11 appln.6.12.odt be relevant.

(vi) Likely impact of the anticipatory bail order upon large number of people considering the magnitude of the crime and larger interest of the society.

(vii) Evaluation of available material very carefully against the applicant-accused including the possibility of false implication endangering his personal liberty.

(viii) Balance between personal liberty and social interest so that no prejudice shall be caused to free, fair and just investigation in serious matters to book the real igculprits, if necessary by custodial interrogation It is true that it is normal rule to grant bail, but at the same time it must be remembered as held in State Vs. Anil Sharma, AIR 1997 SC 3806 that effective interrogation has tremendous advantage for the investigating agency to collect valuable and material information by means of custodial interrogation if necessary and as may be permissible. Otherwise if investigation is stultified at its infancy, the author of crime itself may remain shrouded in mystery if applicants in such serious cases are immediately armed with insulatory anticipatory bail order while Investigating Officer endeavour to unearth and detect the serious crime. The interrogation of such accused, who is armed with anticipatory bail order may remain an empty ritual or idle formality to collect material as to serious 12 appln.6.12.odt accusations levelled against the accused and prosecution may be deprived of gathering prima facie enough material which may be existing to point towards active involvement of the accused in the crime. The custodial interrogation may be permissible in order to facilitate necessary evidence against a suspect, sometimes custodial interrogation becomes useful tool with investigator to recover weapon of crime as well as incriminating articles helping skillful investigating agency to bring real culprits to book. It must, therefore, be remembered that anticipatory bail order, if granted prematurely when investigation is still at the stage of its inception or at its threshold, if anticipatory bail is granted notwithstanding the strong objections from the investigating agency in a routine manner and treating serious accusations lightly, it can frustrate the very purpose of the investigation and real culprits may never be brought to the book. Investigating police machinery, who is responsible for effective, just and proper investigation and performing their statutory right to investigate into serious crimes is performing a function which in the result is complementary to judicial function to do justice, because function of the court begins where investigation ends and a charge-sheet is laid before the Court. It is least expected that when an anticipatory bail is granted with conditions imposed 13 appln.6.12.odt along with it, such order shall

never be misused. The complainant, who is aggrieved by inaction of the police or misuse of grant of bail, can certainly approach this Court to question merits of the order on the ground as to whether order was granted on merits or not or if it is misused. Prima facie, it appears that anticipatory bail order was granted mechanically without considering pros and cons of the objections raised by the investigating agency and without due observance of factors mentioned above. Therefore, it must be said that overwhelming ground is made out for cancellation of anticipatory bail particularly when discretion appears to have been misused or used contrary to the larger interest of public, which is to book the real culprits.

In the present case, looking to the grounds made out for cancellation of the anticipatory bail and objections raised, which were taken for grant of anticipatory bail before the learned Session Judge, Akola, prima facie it appears that the learned Additional Session Judge, Akola chose to be oblivious of all the facts disclosed in F.I.R. The F.I.R. had named both these non-applicant nos.1 & 2 as well as the third person as unknown person by name, but known by face. The learned Additional Session Judge, Akola, who granted anticipatory bail, observed in the course of 14 appln.6.12.odt impugned order thus :

"Considering the previous history of two cases being filed at the instance of the wife of the injured and in both the cases the prosecution filed B- Summary, it is also clear from the police record that there is dispute as to the immovable property and the complainant appears to be aggrieved by the purchase of the immovable property by accused-applicant no. 1, under these circumstances considering the fact about non disclosure of the name of the accused at the earliest possible opportunity and considering the previous inimical relations between the complainant and the accused and that the accused previously was involved in two cognizable serious cases wherein the prosecution has filed B-Summary under these circumstances, considering these aspects, this case, in my opinion, is a fit case to grant anticipatory bail, of course subject to conditions."

Prima facie learned Judge did not examine grounds of objections raised and the effect thereof. Under the circumstances cumulative effect of all the grounds raised need to be considered for to grant or refuse the bail. While reading the order in question for anticipatory bail, prima facie it must be said that the learned Additional Session Judge did not consider the objections raised by the Investigating Officer before it on the ground of necessity of custodial interrogation of the accused named in the F.I.R., requirement of investigation so as to recover weapon of 15 appln.6.12.odt offence and recover incriminating articles and also to investigate into identity of the third person, who was unknown by name to the first informant but known by face.

Test identification during investigation may be needed to assure investigation to progress on correct lines. The learned Additional Sessions Judge appears to have been swayed by previous B-Summary report by police in the past criminal cases, but failed to note that previous enmity between the parties can be a double edged weapon which may also be a reason for crime as may be a ground for false implication. In the present case, however, the first informant had alleged physical assault upon him by three assailants and medical document reveals injury to the head as well other injuries such

as fractures as noticed by Dr. Bhagwat while treating the patient (first informant). Under these circumstances, it would be illogical to consider merely the previous enmity pleaded by non-applicant nos.1 & 2. That alone could not have been considered as fit ground for grant of anticipatory bail, as anticipatory bail in a serious crime like murder or attempt to commit murder etc. may result into disabling the investigating agency and causing helplessness or frustration to it for to book the real culprits. This is not to say that in case of murder and attempt to commit murder, anticipatory bail cannot be granted but it must be emphatically stated 16 appln.6.12.odt that sound judicial discretion has to be exercised bearing in mind the various factors stated above applying judicial mind to the objections raised and then to decide for to grant or refusal of anticipatory bail. Strong objections raised by the investigating officer can never be blanketly ignored without giving reasons to ignore them or disregard them as has been done in the present case by the learned Additional Sessions Judge. In my opinion, when serious offence like murder or attempt to commit murder is reported and names of some of the offenders are mentioned by the first informant in the F.I.R. itself, the learned Sessions Judge concerned must not have ignored the objections while lightly enlarging the accused upon anticipatory bail in a routine manner.

Particularly, when the prima facie material is disclosed before the learned Sessions Judge concerned, including the statement in the nature of dying declaration of the injured first informant, prima facie in such case, it is just and necessary that the investigation shall make progress and taken to its logical end to investigate and book the real culprits. It is a fact of common knowledge that when such offences are proved before a Court of law, they are bound to result into long imprisonment and may be life imprisonment or even death as punishment if victim died as a result of crime. Grant of anticipatory bail on the other hand 17 appln.6.12.odt prematurely when investigation is still at its preliminary stage, can itself hamper the process of investigation by nibbing it in the bud itself. Liberty of Citizen is important but it has to be balanced with larger interest of society to protect itself against crimes and also right of the police to investigate.

In the present case, it is brought to my notice that applicant nos.1 & 2, who were armed with anticipatory bail order, did not cooperate with the investigation, in the result identity of the third assailant remains shrouded in mystery till today, weapons of offence could not be recovered and no effective and proper investigation could be progressed as a result of the impugned anticipatory bail. On the other hand, non-applicant no.1, who was armed with anticipatory bail, had courage to give threat to kill the first informant as NCR (Non-cognizable Report) accordingly was noted by Akola police indicating the nature of threat to the first informant.

For all these reasons, the application must be allowed.

The impugned order, therefore, in exercise of power to cancel bail under Section 439(2) of the Code of Criminal Procedure, is liable to be set aside. Hence, the impugned order of anticipatory bail passed by the learned Additional Sessions Judge, Akola, below Misc. Criminal Application No. 803/2011, is set aside. Anticipatory bail 18 appln.6.12.odt granted in favour of non-applicant nos. 1 & 2 is cancelled.

They shall surrender forthwith before the Investigating Officer and shall be at liberty to apply for regular bail on merits in a Court of Sessions, Akola.

The learned Advocate for non-applicant nos. 1 & 2 prayed for protection from arrest on the ground that non-

applicant nos. 1 & 2 were protected since long. The learned Advocate for non-applicant nos. 1 & 2 also prayed for suspending the operation of this order for a period of four weeks. However, he has no instruction as to whether non-

applicant nos. 1 & 2 have in fact furnished their bail bonds as directed by the impugned order. While, according to learned A.P.P., no such bail bonds were furnished.

The important question of law is as to whether police by their inaction of not arresting the accused in non-

bailable and cognizable offences pose like an helpless or silent spectator to the bail proceedings to await final result of bail application which is pending in Court. The answer is emphatic 'no' to this question. The grant of interim bail is a step taken by the Court to ensure that reputation of a respectable citizen shall not suffer due to undeserving or wrong custodial arrest. The interim orders are passed in the interest of personal liberty which is protected by Article 21 of the Constitution of India. The Police Officer investigating 19 appln.6.12.odt the case has statutory power to arrest offender in cognizable case which is to be exercised in accordance with law.

Authority to investigate is obtained from the Court by producing the accused before the nearest Magistrate for seeking police custody remand. The Magistrate concerned has discretion to grant police custody or judicial custody.

Objection as to necessity of custodial interrogation is required to be considered by hearing the rival submissions and perusing prima facie material. Whenever an interim anticipatory bail order is granted at interim stage, which is always subject to final outcome of the proceedings, all the necessary arrangements must be at their place to provide for arrest and release of the accused or suspect; at the police station itself which is concerned. In the absence of any such arrangement for any acceptable or good reason, the investigating Officer having any difficulty to arrange for release from the police station itself can take the accused or suspect to the nearest Magistrate for providing essential bail bonds with or without sureties before such Magistrate concerned who is expected to act immediately upon compliance of interim bail orders passed by a Court of Session or High Court as the case may be.

Police have statutory right to arrest an offender/accused to inquire/investigate according to law and 20 appln.6.12.odt no protection from arrest can be granted bearing in mind that even if anticipatory bail order is granted, it has to operate upon the arrest of the accused, when upon arrest conditions imposed are required to be complied with by the applicant who sought release on bail. Hence for the reasons stated in this order, prayer for suspending the operation of this order is rejected.

Copy of this order be circulated to all Sessions Judges in the State of Maharashtra, for their information.

JUDGE *sdw