Star LAW JUDGMENT

Anticipatory bail: An exception, not a rule

IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)
PRESENT
Mr. Justice Mohammad Fazlul Karim, Chief Justice
Mr. Justice Md. Abdul Matin
Mr. Justice Shah Abu Nayeem Mominur Rahman
Mr. Justice A.B.M. Khairul Haque
Mr. Justice Md. Muzammel Hossain
Mr. Justice Surendra Kumar Sinha

CRIMINAL PETITION FOR LEAVE TO APPEAL NO. 28 OF 2010
The State. ..... Petitioner.
-Versus-
Zakaria Pintu alias Md. Zakaria Pintu and others. ..... Respondents.
Date of hearing : The 6th June, 2010

A.B.M. Khariul Haque, J *(As his Lord ship then was)*: This petition for leave to appeal is against the Order dated 08.12.2009, granting ad-interim bail to the respondent No.1 and directing the respondent Nos.2 to 14 to surrender before the Sessions Judge, Pabna.

The facts leading to the filing of this petition are that one Md. Mokhlesur Rahman lodged an FIR on 27.11.2009 with the Ishwardi Police Station, alleging inter-alia that due to earlier enmity, the respondent No.1 along with 20 named persons and others being armed with chinese axe, knife, rod, sticks, on the order of respondent No.1, attacked his two sons namely, Shazal and Azam on 26.11.2009 at about 9.15. p.m. in the evening, on their way home, that while some of the accuseds pushed down Azam on the ground, the respondent No.1, gave a blow on his head with his chinese axe and others also variously assaulted Azam and Shazal, as such, Azam died there while Shazal was seriously injured. The police on receipt of the FIR, started a case under Sections 143/341/324/326/307/302/34/114 of the Penal Code, which is now pending before the Chief Judicial Magistrate, Pabna.

It is alleged in the petition before the High Court Division that on 28.11.2009, the police raided the houses of the respondents, as such, after obtaining a hand copy of the FIR, filed a petition under Section 498 of the Code of Criminal Procedure, before the High Court Division, being Criminal Miscellaneous Case No.27040 of 2009, and appeared before the Court in person, praying for anticipatory bail.

The learned Judges of the High Court Division observed that upon meticulous consideration of the facts and circumstances of the case, they are satisfied that the petitioners' application should be considered in order to protect the constitutional guarantee of the accused petitioner, and he must not be victim of any physical abuse.

With these observations, the learned Judges of the High Court Division, issued a Rule upon the State to show-cause as to why the accused petitioner No.1 (the respondent No.1 herein), should not be enlarged on anticipatory bail, in connection with\ the case under reference, and in the meantime, he was enlarged on ad-interim anticipatory bail for a period of 6 (six) months or till submission of police report whichever is earlier.

The learned Judges, however, disposed of the petition of the petitioner Nos.2-14, with a direction upon them to surrender before the Sessions Judge, Pabna, within 8 (eight) weeks from date. The learned Judges also directed the police authority not to arrest the accused petitioner Nos.2-14 in the meantime with a further direction upon the Sessions Judge, Pabna, to consider their prayer for bail, if preferred by them. Being aggrieved by the above Order dated 08.12.2009, passed by the High Court Division, this petition for leave has been filed on behalf of the State.

Mr. Md. Ekramul Haque, the learned Assistant Attorney General, assails the impugned order mainly on the ground that the learned Judges of the High Court Division did not exercise their judicial discretion in accordance with law in granting anticipatory bail in favour of the respondent No.1, in the face of the direct allegations of serious offences alleged against him in the FIR.

Mr. Abdul Majid, the learned Advocate, appearing on behalf of the respondent No.1, supports the order of the High Court Division. Besides, a separate petition has been filed on behalf of the accused-respondents on 20.04.2010, praying for vacating the order dated 27.12.2009, passed by the learned Judge in Chamber of this Division, staying the operation of the order dated 08.12.2009 of the High Court Division.

We have heard the learned Advocates of both the sides, perused the order dated 08.12.2009, and other papers kept in the paper-book.

Let me remind all concerned that as Superior Court of records both the Divisions of the Supreme Court of Bangladesh, enjoy a high degree of discretion in granting relieves to the litigants but let it be known also if it is not already known that such discretion must not be arbitrary but judicial discretion, based on established legal principles, handed down to us over the centuries.

In the instant case, the FIR disclosed direct allegations of offences of very serious nature against the accused-respondent No.1 and other accused-respondents in which one person died and another one seriously injured on 26.11.2009. Naturally, the police tried to apprehend them but was unsuccessful, yet within 10 (ten) days, 14 (fourteen) of them very conveniently appeared before the concerned Bench of the High Court Division and prayed for bail when their initial obligation was either to surrender before the police or before the concerned Court of Judicial Magistrate. Instead, all of them, surrendered before the High Court Division, and prayed for bail which is in common parlance known as anticipatory bail, although the question of anticipation did not arise here since they are admitted fugitives and sure to be arrested, in connection with investigation into the allegations contained in the FIR and to bring the offenders before the Court for trial. These duties are cast upon the police and other law enforcing agencies under the various provisions of the Code of Criminal Procedure, long before the enactment of the Constitution. The Constitution only strengthened those established legal duties of the police, so that ordinary law-abiding people of Bangladesh can run their normal avocation of life without being afraid of their life and limb. This security from being killed or molested is not only the Constitutional right of 150 million ordinary people of Bangladesh but is happened to be their birth right. The people of Bangladesh have a right to die a natural peaceful death and not being hacked to death by a Chinese axe and other weapons as alleged in this case.

Anticipatory bail is an extra-ordinary relief and this power should be exercised sparingly, only in extraordinary and exceptional circumstances, not otherwise. The Court must bear in mind that granting of anticipatory bail is an exception to the general rule.

The Judges are well advised to remember this aspect of humanity when they sit on the high alter of justice. They must remember that not only the livings appearing before them but the deads are also equally seeker of even handed justice before them and we cannot deprive either of them.

Let me now consider the impugned order. With great respect, the order passed by the learned Judges gives an impression that they did not even go through the FIR in considering the petition for bail. The order does not reflect it at all. It does not state a word about the incident which resulted the death of a human being but granted bail, an anticipatory one, to the main accused on invoking the Constitutional right of the accused. But it was the first legal duty of the accused persons to surrender either before the police or before the concerned Magistrate before invoking their Constitutional right, although we are not aware of their any other right but the obligation to surrender as above. After all, the victims also have their various rights under the same very Constitution.

This petition also gives me an opportunity to remind all concerned which is sometimes forgotten that a bail although may often be a right to an accused but sometimes it is imperative on the part of the Court to refuse if there is serious allegations against him, like murder, rape, violence etc. because the Court must always keep in mind that justice must ultimately be done by ensuring punishment upon the offender, otherwise, the offenders will get upper hand and the sober section of the society will suffer, which will destroy the fabrics of the civilized society. After all, it is the first and foremost duty of the State to bring the offenders to book in order to ensure justice in the society.

It may be noted that proper investigation is the precondition for ensuring dispensation of justice. Mainly for that purpose, when there is allegations of serious offence, bail is generally refused, in order to avoid tempering of evidence so that the police may collect evidence from the witnesses, who may otherwise be afraid of reprisals. If the witnesses themselves are afraid of their own life and limb or of their near ones, they will never come forward with the truth against the marauding offenders, if let loose on obtaining bail from the Court.

Ultimately, the administration of criminal justice would collapse and no member of the society will be safe. It must also be remembered that the fugitives generally do not come out in the open, out of fear of the police and the public in general but once they are enlarged on bail, instead of feeling shy, they without the fear of the police become doubly emboldened, while the informant and the witnesses take refuge in their hearth and home. The learned Judges would do injustice to their vow to dispense even handed justice if they give a blind eye to this naked truth of the present day situation.

In the present case, the learned Judges ought to have remembered that anticipatory bail is an extra-ordinary relief and this power should be exercised sparingly, only in extraordinary and exceptional circumstances, not otherwise. The Court must bear in mind that granting of anticipatory bail is an exception to the general rule.

In this connection, reference may be made to the stern warning sounded by S.A. Rahman, J., in the case of *Sadiq Ali* v. *State*, 18 DLR (SC) 393:"In discriminate grant of bail, however, merely on the request of a person, who appears in Court, and thereby surrenders himself to that Court, without the other conditions for such bail being satisfied, would amount to an act of judicial extravagance which cannot be countenanced."

This Division, in the case of *State* v. *Abdul Wahab Shah Chowdhury* 51 DLR (AD) (1999) 243, considered the scope of granting of an anticipatory bail. In that appeal, two cases from the High Court Division were considered where anticipatory bails were allowed. In one case, the petitioner was the president of the local unit of Bangladesh Jatiyatabadi Juba Dal and in another case; the petitioner abducted his 19 year old cousin, the daughter of his aunt. In allowing both the appeals and rejecting the plea of anticipatory bail, A.T.M. Afzal, C.J., explained the principle thus: "20. Now we come to the real point at issue as to the conditions and circumstances under which an application for pre-arrest or anticipatory bail can be considered under Section 498 of the Code of Criminal Procedure. We wish to lay down as a first proposition that it is an extraordinary remedy, and an exception to the general law of bail which can be granted only in extraordinary and exceptional circumstances upon a proper and intelligent exercise of discretion. The ordinary law is that a person accused of a non-bailable offence must appear before the Court taking cognizance for making a prayer for bail. The prayer can be made when he is arrested or detained with or without warrant and is brought before the said Court. Pre-arrest bail is an exception to the general law....."

The learned Chief Justice, referring to the submissions of the learned Attorney General held: "22. As for the present appeals, the learned Attorney-General has submitted that the facts disclosed in the petitions for bail are absolutely no grounds for even entertaining an application for anticipatory bail. The allegation that the case is false or that the case has been instituted out of political rivalry or the omnibus allegation that the Magistrates are being controlled by the ruling party and the petitioner being a member of the opposition party has apprehension that his prayer for bail will not be justly and judicially dealt with are at all no grounds for granting the extraordinary relief of pre-arrest bail. He submits that having regard to the gravity of the offences and the allegations made against the petitioners the High Court Division should have rejected their applications in limine.

23. ..... While we agree with the submissions of the learned Attorney-General, we may add that it may often even be possible to successfully make a prayer for bail on merit in the facts of a particular case but that alone can never be a ground for granting a prayer for pre-arrest bail. This prayer, extraordinary as it is, can only be considered, as already stated, when it appears to the Court that the purpose of the alleged proceeding as far as the accused is concerned, is not what it purports to be, but to achieve a collateral purpose by abusing the process of law, such as, harassment, humiliation, etc, of the accused which cannot be permitted."

Latifur Rahman, J. (as his Lordship then was) held the same views: "40. On a consideration of these decisions, I hold that ordinarily when a person is wanted in connection with a non-bailable offence of grave nature he is not entitled to anticipatory bail. All persons charged with non-bailable offences must be treated equally unless, of course, there are special circumstances which need special consideration in particular facts of a case.....

43. Anticipatory bail should be granted by the High Court Division for a limited period or till filing of the charge sheet whichever is appropriate in the circumstances of the case. After expiry of the period or filing of the charge-sheet, as the case may be, the accused must appear before the Court concerned and obtain fresh bail from the Court on the merit of the case."

In a recent order, passed in the case of the *State* v. *A. Haque* and others 15 MLR (AD) (2010) 151, this Division, in discouraging indiscriminate granting of anticipatory bail, was constrained to discharge a Rule, pending before the High Court Division.

In the present case, there is specific allegations of overt acts against the respondents in the FIR, as such, there is no scope to grant anticipatory bail to the respondent No.1, whether he is a political leader or not. Let me now consider the order passed by the High Court Division, in respect of other accused-respondents. It appears that the accused-respondent nos.2 to 14, instead of surrendering before the police or before the Court of Judicial Magistrate, surrendered before the High Court Division and prayed for anticipatory bail.

The Court, however, did not grant them bail, instead, directed them to surrender before the Sessions Judge, Pabna, within 8 (eight) weeks and in the meantime, the police is directed not to arrest them. This order is also beyond the provisions of the Code of Criminal Procedure or any other law known to us. It should be noted that it is an offence to harbour a criminal, rather it is a civic duty, recognised all over the world, to hand over a fugitive to the police. A Court of law cannot be an exception to it. If a fugitive surrenders before the High Court Division and prays for bail, it may either grant bail under section 498 of the Code, on the principle discussed above or is obliged to hand him over to the police, to be dealt with in accordance with law. But directing the police not to arrest a fugitive, which the police is duty bound to do under the law, is an order beyond the ambit of the Code of Criminal Procedure or any other law, known to us. This kind of order may impede the investigation and ultimately frustrate the administration of criminal justice. Besides, the learned Judges of the High Court Division, also directed the Sessions Judge, Pabna, to consider the prayer of the fugitives for bail. This kind of direction is very much improper and tantamount to interfering with the discretion of the Sessions Judge, in considering the petition for bail on merit. The Sessions Judge, in considering a petition for bail, is at liberty either to grant or to refuse it, in his discretion, subject to merit of the case, without being influenced by any order of the High Court Division.

Under the circumstances, the petition for leave to appeal is disposed of with the above observations. The order of stay granted by this Division on 27.12.2009,in Criminal Miscellaneous Petition No.308 of 2009, shall continue till disposal of the Criminal Miscellaneous Case No. 27040 of 2009, pending before the High Court Division. The petition filed on behalf of the accused respondents dated 20.04.2010, praying for vacating the order of stay, granted earlier by this Division, stands rejected.

(Other Judges concurred).

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