

AFR

Reserved on 29.11.2022

Delivered on 02.12.2022

**Court No. - 76**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 3162 of 2021

**Applicant :-** Ganesh

**Opposite Party :-** State of U.P.

**Counsel for Applicant :-** Ardhendu Shekhar Sharma, Ram Babu Sharma, Sanjay Kumar Shukla

**Counsel for Opposite Party :-** G.A.

**Hon'ble Shekhar Kumar Yadav,J.**

1. This is a second bail application on behalf of the applicant. The first bail application was rejected by a co-ordinate Bench of this Court vide order dated 30.01.2019 passed in Criminal Misc. Bail Application No.8363 of 2014.
2. Heard Mr. Ram Babu Sharma , learned counsel for the applicant, Mr. R.P. Mishra, learned Additional Government Advocate for the State.
3. By means of this application, the applicant is seeking enlargement on bail during the trial in Case Crime No.255 of 2013 (S.T. No.584 of 2013), under Sections 498-A, 302, 326, 323, 504, 506 IPC, Police Station Jhangha, District Gorakhpur.
4. In short, the facts in brief are that the impugned FIR has been lodged by the informant/complainant, who is the father of the deceased, alleging that he solemnized marriage of her daughter, namely, Sunita with the applicant Ganesh s/o Harishchandra, resident of Kona, Police Station Jhangha, District Gorakhpur and in the said marriage, sufficient dowry was given but her son-in-law (applicant) and his family members were not happy with the dowry given in the said

marriage. It is further alleged that when the daughter of informant went to the house of the applicant, she was tortured and harassed by the applicant and his family members and she was also beaten by the accused persons. It is further alleged that the applicant pressurized her daughter to bring Rs.2 lakhs from her parents and when the said demand was not fulfilled, the applicant and other co-accused persons abused and threatened to kill his daughter by burning. It is further alleged that applicant was having illicit relationship with the wife of his brother. Ultimately, on 25.07.2013 in the evening, the informant received a telephonic call from sasural of his daughter that his daughter has been burned by pouring kerosene oil by her husband and his family members and she is admitted in Sadar Hospital, Gorakhpur. The informant/complainant immediately rushed to the hospital where he saw that his daughter has been burned and she is struggling for her life. The informant/complainant asked his daughter about the incident, then she told that she has been burned by her husband, devrani Ranjana Devi, dever Kanhaiya, mother-in-law and father-in-law by pouring kerosene oil upon her. The victim Sunita was admitted in District Hospital, Gorakhpur where she died on 01.08.2013 at about 5.15 am. As per postmortem report, the cause of death is due to septic shock.

5. The contention as raised at the Bar by learned counsel for the applicant is that applicant-accused is quite innocent and has been falsely implicated in the present case. The applicant has never committed any offence as alleged in the impugned FIR. The applicant is the husband of the deceased. The whole case is based on the statement of the victim/deceased, who narrated

the entire incident to the Investigating Officer as well as Magistrate. Learned counsel for the applicant has not disputed the dying declaration of the deceased and his sole argument is that even if it is assumed that the applicant has committed the offence as alleged in the impugned FIR as well as dying declaration, no offence under Section 302 IPC is made out against the applicant. The deceased in her statement has clearly stated that on the date of alleged incident i.e. on 25.07.2013 in noon, she could not prepare the food due to non availability of vegetable for which her husband lost his temper and started beating and poured kerosene oil upon her and burned. Maximum this case can travel up to the limits of offence under Section 304 Part II IPC because the deceased died after 8 days of the alleged incident due to septic shock and maximum punishment for the offence under Section 304 Part II of IPC is 10 years. Further contention is that the applicant is languishing in jail since 04.08.2013 having no previous criminal history and he has already served more than 9 and ½ years in jail, hence, the applicant may be enlarged on bail. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required.

6. No other point or argument has been raised by learned counsel for the applicant and confined his argument only on the above points.

7. Per contra, Mr. R.P. Mishra, learned Additional Government Advocate for the State has vehemently opposed the prayer for bail by submitting that being the custodian of his wife has misused his position and set his wife to flame, which

ultimately resulted into her death. The applicant is perpetrator of the alleged crime in question. Before death, the deceased has given dying declaration specifying that the applicant caused burn injuries. The offence is heinous in nature, hence, the applicant is not entitled for any relief and the bail application is liable to be rejected.

8. I have heard the rival submissions advanced by learned counsel for the parties and perused the material available on record.

9. Before proceeding further, it is relevant to refer to the provisions of Sections 299, 300 and 304 IPC, which read as under:

**“299. Culpable homicide.—**Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that

other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

**300. Murder.**-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.-When culpable homicide is not murder. - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above Exception is subject to the following provisos:-

First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and

sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3. - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

**304. Punishment for culpable homicide not amounting to murder.**—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

**Or**

with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

**Para-I:Punishment-** Imprisonment for life, or

imprisonment for 10 years and fine-Cognizable-Non-bailable- Triable by Court of Session-Non compoundable.

**Para-II:Punishment**-Imprisonment for 10 years, or fine, or both-Cognizable-non bailale-Triable by Court of Session- Non- compoundable.”

10. The question which arises for consideration is as to whether the act of the accused-appellant would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'.

11. 10. The Apex Court in *State of A.P. vs. Rayavarapu Punnayya and Another, (1976) 4 SCC 382* while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such

causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

12. Perusal of dying declaration of the deceased clearly shows that on the date of alleged incident i.e. on 25.07.2013 in noon, when the deceased could not prepare the food due to non availability of vegetable for which her husband lost his temper and started beating and poured kerosene oil upon her and burned. It means that there was no premeditation for the applicant to commit such offence as alleged against him.

13. It is also an admitted fact that the deceased was admitted in hospital and she remained under treatment in hospital for 8 days and thereafter she died after 8 days of the incident in question. During course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days, the injuries aggravated and worsened, as a result, she died due to septic shock.

14. Perusal of record shows that the victim Sunita was



admitted in District Hospital, Gorakhpur on 25.7.2013 at about 6.30 pm and during treatment after 8 days of the alleged incident, she died on 01.08.2013 at about 5.15 am. It means that the deceased remained alive for about 8 days. Perusal of post mortem report of the deceased reveals that the deceased has received superficial to deep septic burn from face to umbilicus, whole back of both upper limb and cause of death has been mentioned as septic shock.

15. In *Maniben vs. State of Gujarat [(2009) 8 SCC 796]*, the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

16. In *Chirra Shivraj vs. State of Andhra Pradesh [(2010) 14 SCC 444]*, incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicaemia. Accused was convicted under

Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The Apex Court dismissed the appeal holding that the deceased suffered from septicaemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

17. Considering the overall facts and circumstances, the nature of allegations, the gravity of offence, the severity of the punishment, the evidence appearing against the accused, submission of learned counsel for the parties, considering the principle laid down by the Courts in the above referred case laws, I am of the view that it is a fit case for grant of bail. Accordingly, the bail application is **allowed**.

18. Let the applicant-**Ganesh** involved in the aforesaid case be released on bail on furnishing a personal bond and two heavy sureties each in the like amount to the satisfaction of the court concerned subject to following conditions :

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in Court. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the Trial Court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A IPC.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C., may be issued and if applicant fails to appear before the Court on the date fixed in such

proclamation, then, the Trial Court shall initiate proceedings against him, in accordance with law, under Section 174-A IPC.

(iv) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v) The Trial Court may make all possible efforts/endeavour and try to conclude the trial within a period of one year after the release of the applicant.

19. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

20. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

**Order Date :- 02.12.2022**

Ajeet