

Neutral Citation No. - 2024:AHC-LKO:66373

Court No. - 13

Case :- APPLICATION U/S 482 No. - 8004 of 2024

Applicant :- Abhishek Singh @ Sarvan Singh

Opposite Party :- State Of U.P. Thru. Prin. Secy. Minis. Of Home Affairs Lko And Another

Counsel for Applicant :- Sameer Singh, Anurag Shukla, Sakshi Singh

Counsel for Opposite Party :- G.A., Naved Ali, Sandeep Yadav

Hon'ble Saurabh Lavania, J.

1. Heard Shri Anurag Shukla, learned counsel for the applicant, Shri Sandeep Yadav, learned counsel for opposite party no.2 and learned A.G.A. for the State.
2. The present application under Section 482 Cr.P.C. read with Section 528 Bharatiya Nagrik Suraksha Sanhita, 2023 (in short "BNSS") has been filed by the applicant, namely, Abhishek Singh @ Sarvan Singh seeking the following main relief(s):-

“That for the facts, reasons and circumstances stated in the accompanying affidavit in support of Application Under Section 528 BNSS, 2023, it is most respectfully prayed that this Hon’ble Court may graciously be pleased to quash the order dated 05.08.2024 passed by the learned Chief Judicial Magistrate, Ayodhya in Case No.838 of 2024 (Abhishek singh Versus State of U.P.) (Contained at Annexure No.1) and direct the re-investigation/De-novo investigation of Case Crime No.0522 of 2023, Police Station – Poorakalandar, District – Ayodhya, in a fair and proper manner by considering the CCTV Footage procured from the residence of the applicant by some superior officer, as the investigating officer in the present crime has filed the charge sheet dated 03.03.2024 in a routinal manner, without conducting fair and proper investigation, in the interest of justice.”

3. Vide order dated 05.08.2024, Chief Judicial Magistrate, Ayodhya (in short 'Magistrate') rejected the application preferred by the applicant/defence under Section 175(3) BNSS which was filed with the prayer to direct the Investigating Officer (in short 'I.O.') to further investigate the matter. The relevant portion of the said application is extracted hereinunder :-

*“APPLICATION UNDER SECTION 175(3) BNSS, 2023
FOR FURTHER INVESTIGATION*”

The applicant / accused, above named, most respectfully begs to submit as under :-

That for the facts, reasons and circumstances stated in the accompanying affidavit in support of Application Under Section 175(3) BNSS, 2023 for further investigation, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to direct the investigation officer to conduct further investigation in a fair and proper manner by considering the CCTV Footage and Location of the accused person at the time of incidence, as the investigating officer in the present case crime has filed the charge sheet dated 15.12.2023 in a routinal manner, without conducting fair and proper investigation, in the interest of justice.

Such other orders which this Hon'ble Court may deem just and proper in the facts and circumstances of the case may kindly also be passed in the interest of justice.

Lucknow

Dated 2024

(Sameer Singh)

Advocate

Counsel for the Applicant/Accused”

4. The facts for the prayer sought in the application indicated above could be deduced from the paragraph nos.3 to 11 of the affidavit filed in support of the said application under Section 175(3) BNSS, which are reproduced hereinunder :-

“3. That as per the First Information Report it has been alleged that on 05.12.2023 at around 09:45 AM the accused persona have assaulted the complainant while

he was leaving for his government/official duty, after hearing the noise of the incidence the son of the complainant i.e. Deependra Vikram Singh, Vimal Singh (Uncle), Vishal Singh, Vivek Singh intervened in between and thereafter, Abhishek Singh alias Sarvan Singh (present applicant) opened fired upon Vivek Singh by his Licensed Pistol. Due to such firing Vivek Singh succumbed to his fire arm injury. Upon the instigation of Abhishek Singh the other co-accused persons Shekhar Singh, Golu Singh and Vivek Singh alias Tinku Singh open fired upon the complainant and his Son Deependra Vikram Singh and both the persons sustained fire arm injury on their head, the Villagers and the near relatives took the complainant and his Son to District Hospital where their treatment is going on.

4. That the investigating officer has filed the charge sheet dated 03.03.2024, despite of the fact he has recovered the CCTV footage installed at the premises of the applicant, the DVR has been taken by the investigating officer but during course of investigation there is no record of the same, the investigation is being conducted in a routinal manner, despite of finding the truth and investigating the matter on the foot that who is the aggressor and who has acted in Self Defence. Whether there is involvement of the present applicant or not, in the present case crime. As per the CCTV visuals it is crystal clear that the applicant was present at his residence and upon hearing the noise he came to the entrance of his premises but no such act has been committed by him, as alleged in the impugned First Information Report.

5. That the investigating officer has filed the charge sheet in an arbitrary manner without conducting a fair and proper investigation on 03.03.2024. True/Photocopy of the charge sheet dated 03.03.2024 is being annexed herewith as Annexure No. 2 to this Affidavit.

6. That as per the CCTV footage it is crystal clear that the applicant was present at his residence at the time of alleged incidence but despite of recovering the DVR from the place of the applicant the same has not been taken consideration by the investigating officer and a tainted investigation has been conducted by the investigating officer. True/Compact Disk containing the CCTV footage of the incidence is being annexed herewith as Annexure No. 3 to this Affidavit.

7. That as per CCTV footage applicant and Shekhar Singh was present at the residence of the applicant and

Anubhav Singh alias Golu Singh was not at the place of incidence and the same can be traced by his Cellphone location but these things have never been investigated by the investigating officer.

8. That the wife of the applicant has preferred an application before the Director General of Police, dated 25.02.2024, prior to filing of charge sheet, the same was marked to the Superintendent of Police, Ayodhya but the present case crime has never been investigated in a fair and proper manner True/Photocopy of the application before the Director General of Police, dated 25.02.2024 is being annexed herewith as Annexure No.4 to this Affidavit.

9. That the applicant is innocent and he is languishing in jail since 06.12.2023 due to tainted and arbitrary investigation, as the investigating officer has filed the charge sheet without conducting fair and proper investigation.

10. That this Hon'ble Court vide its order dated 04.03.2024 has taken cognizance of the charge sheet and the charges have been framed by the learned trial court.

11. That the applicant has a vested right of fair and proper investigation and therefore, this Hon'ble Court may kindly direct further investigation of the present case crime, by directing the investigating officer to investigate the present matter by considering the CCTV footage and cellphone locations, in the interest of justice."

5. From the above paragraphs of affidavit, it is apparent that the applicant based upon the CCTV footage claimed that the accused applicant, at the time of incident, was not present at the situs of crime. The photographs of CCTV footage and the relevant pen drive of the same are annexed at page no.110 to 157 of the paper book.
6. From the aforesaid, it is apparent that claim of the accused-applicant is that the I.O. took into possession the DVR of the said CCTV footage and while filing the charge sheet against the accused applicant, the I.O. has completely ignored the said evidence which ought to have been considered by the I.O.

7. The Magistrate by the impugned order dated 05.08.2024 rejected the application of the accused-applicant preferred under Section 175(3) BNSS after taking note of the fact that the charge sheet has been filed and cognizance on the same has been taken on 04.03.2024, as also that charges have already been framed and the case has been committed to the court of Sessions. The order dated 05.08.2024 is extracted hereinunder :-

"पत्रावली पेश हुई। प्रार्थी / अभियुक्त अभिषेक सिंह की ओर से मु०ज०सं० 522/2023 अन्तर्गत धारा 147, 148, 149, 302, 307, 506, 120-बी मा०द०सं० थाना पूराकलन्दर जनपद अयोध्या के मामले में जरिये विद्वान अधिवक्ता प्रार्थना-पत्र वास्ते अग्रेतर विवेचना प्रस्तुत करके कथन किया गया है कि विवेचक ने मनमाने तौर पर विवेचना किया है तथा घटनास्थल का सी०सी०टी०वी० फुटेज प्राप्त करने एवं अभियुक्त की लोकेशन ज्ञात करने के सम्बन्ध में विवेचना में कोई तथ्य नहीं आया है। अतः प्रार्थना की गयी कि इस मामले में अग्रेतर विवेचना हेतु आदेश पारित किया जाये। प्रार्थी की ओर से प्रार्थना-पत्र के साथ दाखिल शपथ पत्र के धारा 10 में यह भी उल्लेख किया गया है कि इस मामले में विवेचक द्वारा प्रेषित आरोप-पत्र पर दिनांक 04.03.2024 को संज्ञान लिया जा चुका है तथा मा० परीक्षण न्यायालय द्वारा आरोप भी विरचित किया जा चुका है। प्रार्थी की ओर से अपने अभिकथन के समर्थन में माननीय उच्चतम न्यायालय की विधि व्यवस्था वीनू भाई हरिभाई मालविया आदि बनाम गुजरात राज्य (2019) 17 एस०सी०सी० 1 प्रस्तुत की गयी है।

सुना तथा आवेदन के साथ संलग्न प्रपत्रों एवं कार्यालय की आख्या का अवलोकन किया।

माननीय उच्चतम न्यायालय द्वारा उपर्युक्त विधि व्यवस्था में यह अवधारित किया गया है कि किसी मामले में संज्ञान लिये जाने के बाद भी विशिष्ट तथ्यों के होने पर मजिस्ट्रेट को अग्रेतर विवेचना हेतु आदेश पारित करने का अधिकार है। परन्तु यह भी अवधारित किया गया है कि इस अधिकारिता का प्रयोग विचारण शुरू होने (आरोप विरचित होने) से पूर्व ही किया जा सकता है। प्रस्तुत मामले में स्वयं प्रार्थी की ओर से प्रस्तुत शपथ-पत्र के धारा-10 में यह उल्लेख किया गया है कि इस मामले में विवेचक द्वारा प्रेषित आरोप-पत्र पर दिनांक 04.03.2024 को संज्ञान लिया जा चुका है जिसमें मा० परीक्षण न्यायालय द्वारा आरोप भी विरचित किया जा चुका है। पत्रावली पर उपलब्ध कार्यालय आख्या के अनुसार उक्त प्रकरण माननीय सत्र न्यायालय द्वारा परीक्षणीय होने के कारण दिनांक 03.04.2024 को मा० सत्र न्यायालय को उपार्पित की जा चुकी है। अतः इस स्तर पर मामले में अग्रेतर विवेचना हेतु आदेश पारित

किये जाने हेतु आधार पर्याप्त नहीं है। तदुसार प्रार्थी/अभियुक्त अभिषेक सिंह की ओर से प्रस्तुत प्रार्थना-पत्र निरस्त किये जाने योग्य है।

आदेश

प्रार्थी / अभियुक्त अभिषेक सिंह की ओर से प्रस्तुत उपर्युक्त प्रार्थना-पत्र निरस्त किया जाता है।

मुख्य न्यायिक मजिस्ट्रेट
अयोध्या"

8. Based upon the aforesaid facts, particularly, the facts pleaded in the affidavit extracted hereinabove as also the judgment(s) passed by the Hon'ble Apex Court in the case of (1) **Shivam Vs. State of U.P.** 2021 (3) JIC 31 (All), (2) **Babubhai Vs. State of Gujarat** (2010) 12 SCC 254, (3) **Vinay Tyagi Vs. Irshad Ali** (2013) 5 SCC 762, (4) **Amitbhai Anilchandra Shah Vs. CBI** (2013) 6 SCC 348, (5) **Manohar Lal Sharma Vs. Principal Secretary** (2014) 2 SCC 532, (6) **Dinubhai Boghabhai Solanki Vs. State of Gujarat** (2014) 4 SCC 626, (7) **Rajiv Singh Vs. State of Bihar** (2015) 16 SCC 369, (8) **Nirmal Singh Kahlon Vs. State of Punjab** (2009) 1 SCC 441, (9) **Azija Begum Vs. State of Maharastra** (2012) 3 SCC 126-128, (10) **State of Punjab Vs. C.B.I.** (2011) 9 SCC 182 (11) **Willie (William) Slaney Vs. The State of Madhya Pradesh** 1956 AIR SC 116, (12) **Surajit Sarkar Vs. State of West Bengal** (2013) 2 SCC 146, (13) **Dataram Singh Vs. State of Uttar Pradesh** (2018) 3 SCC 22, (14) **Sasi Thomas Vs. State** (2006) 12 SCC 421, (15) **Youth Bar Association of India Vs. Union of India** (2016) 9 SCC 473, (16) **Sakiri Vasu Vs. State of U.P.** (2008) 2 SCC 409, (17) **Rajiv Thapar & others Vs. Madan Lal Kapoor** (2013) 3 SCC 330, (18) **Satish Mehra Vs. Delhi Administration & Another** (1996) 9 SCC 766 (19) **Paramvir Singh Saini Vs. Baljit Singh & Ors, Special Leave Petition (Criminal) Diary No.13346/2020**, (20) **Vinubhai Haribhai Malaviya & Others Vs. State of Gujarat & Another** (2019) 17 SCC 1, (21) **Anant Thanur Karmuse Vs.**

State of Maharashtra & Others, (2023) 5 SCC 802, (22) Hasanbhai Valibhai Qureshi Vs. State of Gujarat & others (2004) 5 SCC 347, (23) Vinay Tyagi Vs. Irshad Ali alias Deepak & Others (2013) 5 SCC 762, (24) Bharati Tamang Vs. Union Of India & others (2013) 15 SCC 578, (25) Dharam Pal Vs. State of Harayana & others (2016) 4 SCC 160 (26) Anuj Chaudhary Vs. State of Uttar Pradesh & Others (2013) 6 SCC 384, (27) State of Punjab Vs. Central Bureau of Investigation & others (2011) 9 SCC 182, (28) Sasi Thomas Vs. State & others (2006) 12 SCC 421, (29) Kewal Krishan Vs. Union Territory of J&K (High Court of Jammu & Kashmir & Ladakh at Jammu) CRM (M) No.157/2023 and (30) Upkar Singh Vs. Ved Prakash & Others (2004) 13 SCC 292, learned counsel for the applicant advanced his submissions and made prayer to interfere in the order impugned and direct the I.O. to file the charge sheet after further investigation, particularly, after taking note of the CCTV footage pertaining to applicant.

9. Shri Sandeep Yadav, learned counsel for opposite party no.2 has opposed the present application for the reliefs sought. He stated that in the instant case trial has already been commenced before the Sessions Court, namely, Additional Sessions Judge, Court No.8 (in short 'Trial Court') and before the Trial Court, three witnesses have already been examined and as such the order under challenge dated 05.08.2024 is just and proper and no interference is required in the matter and the present application for the relief sought is liable to be dismissed.
10. Considered the aforesaid submissions advanced by learned counsel for the parties and perused the record.
11. In so far as the interference in the order dated 05.08.2024, passed by the Magistrate is concerned, by this Court in exercise of powers under Section 528 of BNSS, 2023, *pari materia* to

Section 482 Cr.P.C. (now repealed), this Court is of the view that in the impugned order dated 05.08.2024 no interference is required in view of the observations made by Hon'ble Apex Court in the case of **Vinubhai Haribhai Malaviya etc. Vs. State of Gujarat**, reported in (2019) 17 SCC 1 and the fact that trial in the instant case has already been commenced and before the trial court three witnesses have already been examined.

12. In the case of **Vinubhai Haribhai Malaviya (supra)**, three Judges Bench of Apex Court has observed that Magistrate can exercise of powers under Section 173(8) Cr.P.C., *pari materia* to Section 175 (3) of BNSS, till trial commences and in this case the trial has already commenced and this fact is not in dispute. The relevant paragraph 42 of the judgment of **Vinubhai Haribhai Malaviya (supra)** is extracted hereinunder :-

“42. There is no good reason given by the Court in these decisions as to why a Magistrate’s powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, [Sakiri Vasu v. State of U.P.](#), (2008) 2 SCC 409, [Samaj Parivartan Samudaya v. State of Karnataka](#), (2012) 7 SCC 407, [Vinay Tyagi v. Irshad Ali](#), (2013) 5 SCC 762, and [Hardeep Singh v. State of Punjab](#), (2014) 3 SCC 92; [Hardeep Singh \(supra\)](#) having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is [Article 21](#) of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate’s nod under [Section 173\(8\)](#) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid- way through the pre-trial proceedings, would amount to a travesty of

*justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. **There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences.** It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in *Hasanbhai Valibhai Qureshi (supra)*. Therefore, to the extent that the judgments in *Amrutbhai Shambubhai Patel (supra)*, *Athul Rao (supra)* and *Bikash Ranjan Rout (supra)* have held to the contrary, they stand overruled. Needless to add, *Randhir Singh Rana v. State (Delhi Administration) (1997) 1 SCC 361* and *Reeta Nag v. State of West Bengal and Ors. (2009) 9 SCC 129* also stand overruled.”*

13. In regard to the relief related to further investigation, this Court is also of the view that the said relief/prayer cannot be acceded. It is for the following reasons :-

(A) The basis of the pending criminal proceedings against the applicant, i.e. FIR No.0522 of 2023, which was lodged on 05.12.2023 at about 18:04 hours, under Sections 147, 148, 149, 302, 307, 308, 506, 34, 120-B I.P.C. reads as under :-

"नकल तहरीर हिन्दी वादी (दो प्रति में)..... सेवा में, थाना प्रभारी महोदय थाना पूराकलन्दर जनपद अयोध्या विषय प्रार्थना पत्र वास्ते दर्ज किए जाने प्रथम सूचना रिपोर्ट एवं उचित वैधानिक कार्यवाही हेतु महोदय निवेदन है कि प्रार्थी शैलेन्द्र प्रताप सिंह पुत्र श्री सभापति सिंह निवासी ग्राम अवनपुर सरोहा थाना पूराकलन्दर

जनपद अयोध्या का स्थायी निवासी है व उक्त मुकदमे की घटना का गोली की चोट लगने से चोटहिल गवाह भी है। सूचित हो कि विपक्षीगण अभिषेक सिंह उर्फ सरवन सिंह, विवेक सिंह उर्फ टिकू पुत्रगण स्व० रमलखन सिंह व उनके रिश्तेदारों / भाजों शेखर सिंह, अनुभव सिंह उर्फ गोलू सिंह पुत्रगण अरुण कुमार सिंह उर्फ पवन सिंह निवासीगण ग्राम खिरिया थाना वजीरगंज जनपद गोंडा व दो अज्ञात विपक्षीगण के असलहा धारी प्राईवेट सुरक्षा कर्मी है। विदित हो कि उक्त विपक्षीगण प्रार्थी के पड़ोस में रहने वाले पट्टीदार लोग हैं, जिनसे प्रार्थी व प्रार्थी के पट्टीदारी के चाचा स्व० विवेक सिंह (घटना का मृतक) पुत्र श्री समर बहादुर सिंह के परिवार वालों से पुश्तैनी सहन भूमि व पट्टीदारी की जलन की रंजिश व वैमनस्य चला आ रहा है। जिसकी वजह से उक्त विपक्षीगण आये दिन प्रार्थी व उसके सहयोगी पट्टीदारी के चाचा विवेक सिंह (मृतक) के परिजनों को आए दिन प्रताड़ित व अपमानित करके जान से मारने की धमकी दिया करते हैं। प्रताड़ना के इसी क्रम में आज दिनांक 05.12.2023 को समय लगभग 09.45 बजे सुबह उपरोक्त विपक्षीगण आपराधिक साजिश करके व एक राय होकर व गाड़ा बंदी करके जब प्रार्थी घर से निकलकर अपने सरकारी ड्यूटी पर जा रहा था उसी समय उपरोक्त विपक्षीगण ने अपने हाथों में लिए हुए असलहो, लाठी, डण्डा, लोहे की राड, व बारह बोर की बन्दूक व लाइसेंसी व गैर लाइसेंसी पिस्टल / रिवाल्वर से जान से मारने की नीयत से जानलेवा हमला कर दिया। प्रार्थी के हल्ला गुहार पर प्रार्थी के पुत्र दीपेन्द्र विक्रम सिंह व पड़ोसी पट्टीदार / चाचा विमल सिंह, विशाल सिंह, विवेक सिंह पुत्रगण समरबहादुर सिंह के आ जाने व ललकारने पर उपरोक्त विपक्षीगण ने सभी लोगों को जान से मारने हस्ता० (शैलेन्द्र प्रताप सिंह) की नीयत से ललकारते हुए विपक्षी अभिषेक सिंह उर्फ सरवन सिंह ने विवेक सिंह को लाइसेंसी बन्दूक से गोली मार दी। जिससे उसकी घटनास्थल पर मृत्यु हो गयी व अभिषेक सिंह के ललकारने पर विपक्षीगण शेखर सिंह, गोलू सिंह व विपक्षी विवेक सिंह उर्फ टिकू सिंह ने प्रार्थी व प्रार्थी के पुत्र दीपेन्द्र विक्रम सिंह की हत्या करने के लिए अपने - अपने हाथों में लिए छोटे असलहों रिवाल्वर / पिस्टल से गोली मार दी जिससे दोनों लोगों के सिर पर गोली की चोटे आयी है। जिससे दोनों लोग घटनास्थल पर बेहोश हो गये। घटना उपरान्त गाँव वाले व परिजन प्रार्थी व उसके पुत्र को लादकर जिला चिकित्सालय अयोध्या लेकर आये हैं व दोनों लोगो का इलाज चल रहा है व जान जोखिम में बनी हुयी है। अतः निवेदन है कि उक्त प्रकरण में प्रार्थी की

प्राथमिकी दर्ज करके विपक्षीगण के विरुद्ध वैधानिक कार्यवाही करने की कृपा करे। हस्ता० शैलेन्द्र प्रताप सिंह प्रार्थी शैलेन्द्र प्रताप सिंह पुत्र श्री सभापति सिंह नि० ग्राम अवनपुर सरोहा थाना पूराकलन्दर जनपद अयोध्या मो० नं० 9598016415 दिनांक 05/12/2023 हस्ता० में हे०मो० रवीन्द्र कुमार प्रमाणित करता हूँ तहरीर मेरे द्वारा अक्षरशः कम्प्यूटर में फीड करायी गयी। हस्ता० हे०मो० रवीन्द्र कुमार"

(B) What reflects from the contents of FIR can be summarized as under :-

(a) There was enmity between two families, i.e. family of informant and the accused applicant.

(b) The incident occurred on 05.12.2023 at 09.45 A.M.

(c) The accused named in the FIR, at the time of incident, were armed with country made pistol, lathi, danda, iron rod, 12 bore gun, licensed gun/revolver/pistol and they attacked the informant.

(d) On raising alarm by the informant, son of the informant- Deependra Vikram Singh, Vimal Singh (uncle of informant and neighbour/pattidar), Vishal Singh, Vivek Singh s/o Samar Bahadur Singh reached at the spot.

(e) On challenging the accused persons, the accused -Abhishek Singh @ Sarvan Singh shot at Vivek Singh with his licensed gun and on account of gun shot injury sustained, Vivek Singh died.

(f) The accused, namely, Shekhar Singh, Golu Singh and Vivek Singh @ Tinku Singh shot at the informant and his son Deependra Vikram Singh on account of which they received gun shot injuries.

(g) After the aforesaid FIR, the I.O. conducted the investigation and recorded the statements of injured Deependra Vikram

Singh s/o informant Shailendra Pratap Singh, eye-witness
Vimal Singh s/o Samar Bahadur Singh, informant-injured
Shailendra Singh, Pankaj Singh s/o Sabhapati Singh.

(C) It would be apt to indicate that the injured witnesses before the I.O. attributed the role of causing fire arm injury to the deceased. According to injured witnesses all the accused including the applicant were present at the situs of crime.

(D) Before proceeding further, it would be apt to indicate that the testimony of the injured witness has greater evidentiary value and unless compelling circumstances exist, these statements are not to be discarded lightly. As observed by Hon'ble Apex Court in the judgment(s) passed in the case of **Balu Sudam Khalde Vs. The State of Maharashtra**, reported in **2023 SCC OnLine 355**.

(E) Indisputably, the incident occurred on 05.12.2023 in the morning at about 09.45 A.M. and from the photographs annexed at page nos.112, 118, 119, 121, 122, 123, 124, 125, 126, 127, 130, 135, 136, 139, 140, 141, 142, 147, 149, 154, 155, 156, it, prima facie, appears that distance between the presence of applicant and the place of incident is about 50 mts., which has not been disputed, and it also appears from the same that the applicant was present in front of his residence between 09.52 A.M. to 10.39 A.M. with his mobile phone and to the view of this Court, a normal person can cover 50 mts. distance in five minutes.

(F) It appears from the record including the relevant paragraphs of the affidavit filed in support of the application indicated hereinabove that the applicant is seeking further investigation based upon the plea of "Alibi".

(G) The Latin word "Alibi" means 'elsewhere'. Plea of "Alibi" is a rule of recognized in Section 11 of the Evidence Act. The plea of 'Alibi' disputes the case of prosecution. Thus plea of "Alibi" is question of fact. It is settled law that when an accused raises plea of "Alibi", the burden is on accused to prove the same. A plea of "Alibi" is a question of fact which is required to be proved by the accused at the stage of trial to show that he/ she was elsewhere and was falsely implicated and the accused is also required to prove the same by adducing appropriate evidence.

(H) Under Section 103 of the Evidence Act the burden rests on the accused who raises the plea of "Alibi". Section 103 of the Evidence Act provides:—

"103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(b) B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."

(I) In **Binay Kumar Singh v. State of Bihar [(1997) 1 SCC 283]**, the Hon'ble Apex Court observed as under:

"23. The Latin word 'Alibi' means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person;

(i) the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.

(ii) The burden would not be lessened by the mere fact that the accused has adopted the defence of 'Alibi'.

(iii) *The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.*

(iv) *But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of 'Alibi', to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.*

(v) *When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.*

(vi) *But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of 'Alibi'. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P.* [(1981) 2 SCC 166 : 1981 SCC (Cri) 379]; *State of Maharashtra v. Narsingrao Gangaram Pimple* [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]).*

(J) In *Rajendra Singh v. State of U.P.*, (2007) 7 SCC 378 the Hon'ble Apex Court has held as under:—

"8. That apart, the plea taken by the respondent Kapil Dev Singh in his petition under Section 482 CrPC was that of 'Alibi'. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact lie on any particular person. The second illustration to Section 103 reads as under:

"B wishes the Court to believe that at the time in question, he was elsewhere. He must prove it."

(K) In **Shaikh Sattar v. State of Maharashtra [(2010) 8 SCC 430]**, the Hon'ble Apex court has observed as under:-

"35. Undoubtedly, the burden of establishing the plea of 'Alibi' lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of 'Alibi' had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of 'Alibi' is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in Gurpreet Singh v. State of Haryana [(2002) 8 SCC 18 : 2003 SCC (Cri) 186] as follows : (SCC p. 27, para 20)

"20. ... This plea of 'Alibi' stands disbelieved by both the courts and since the plea of 'Alibi' is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact."

(L) From the observations made by the Hon'ble Apex Court in the judgments referred above, what appears is as under:-

- (i) The prosecution has to prove its case including the role of the accused in that incident.
- (ii) Only when prosecution succeeds in discharging the burden by establishing its case including participation of the accused in the crime/incident, the plea of "Alibi" put up by the accused needs to be considered.
- (iii) The burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.
- (iv) The burden would not be lessened by the mere fact that the accused has adopted the defence of "Alibi".

(v) The plea of "Alibi" of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.

(v) It is incumbent on the accused, who adopts the plea of 'Alibi', to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.

(vii) When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.

(viii) If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy.

(ix) Strict proof is required for establishing the plea of "Alibi". [vide: **Dudh Nath Pandey v. State of U.P. (1981) 2 SCC 166 : 1981 SCC (Cri) 379; State of Maharashtra v. Narsingrao Gangaram Pimple (1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]**"].

(M) The plea of 'Alibi' is a plea of defence which can be taken when the evidence of prosecution takes place and prosecution establishes its story, presence of the accused at the place of crime and involvement of the said accused in the crime, as observed in the above referred judgments.

(N) Thus, in facts of the present case, this Court is of the view that the power under Section 175(3) of BNSS should not be exercised for the reason that the purpose of further investigation is not to collect the evidence for the defence or to prove/establish the defence of the accused.

(O) Learned counsel for the applicant has not shown any material to establish that the DVR was taken by the I.O., though in the application it has been alleged. In this view of the matter, the same cannot be considered for the purposes of granting the relief of further investigation.

14. In view of aforesaid, this Court is of the view that no interference in this case is required. Accordingly, for the reasons aforesaid, the application is **rejected**. No order as to costs.
15. It is made clear that the observations made in this order are limited to the purpose of this application and in no way be construed as an expression on merits of the case. The trial court shall be absolutely free to arrive at its independent conclusion on the basis of led/adduced evidence unaffected by anything said in this order.

Order Date :- 24.09.2024

Anand/-