

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 650 OF 2014

Anand @ Andy Cruz

.....Applicant

V/s.

The State of Maharashtra

....Respondent

Mr. S. B. Shetye i/b I. A. Shaikh for Applicant

Mr. Nitin Sejpal a/w Mrs. Pooja Bhojane Sejpal for Intervener

Ms. P. P. Shinde APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : FEBRUARY 4, 2015

PC :

1) Heard. This is an application under section 439 of Code of Criminal Procedure, 1973. Applicant herein is arrested on 15/02/2013 in crime no. 59 of 2013 registered at Panvel City Police Station for offence punishable under sections 363, 365, 302, 201 r/w 34 of Indian Penal Code and section 120 (B) of Indian Penal Code.

2) It is the case of prosecution that one Atul Mhatre who was working as a clerk in CIDCO went missing after the office hours of 08/02/2013. His car was seen in an abandoned state at Uran-Panvel Road on 09/02/2013. His

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shoes and the wig which he was wearing, when he had been to the office on 08/02/2013 were also found near the car. Hence, missing report was lodged and was registered as missing report no. 12 of 2013 and the offence punishable under section 363 of Indian Penal Code was registered against unknown persons. On 10/02/2013, post mortem was conducted on the dead body at 8.15 pm. Post mortem notes would reveal that small maggots were found in the oral cavity. Body was in a stage of decomposition. Epidermal layer of skin peeling off all over body especially genitals, chest, abdomen and upper and lower extremities, foul smelling body etc. Hence, it is clear that the body was getting decomposed and the skin layer was peeling off. It is pertinent to note that in inquest panchanama, it is not mentioned that the body was in a stage of decomposition or that there was formation of maggots. In fact, this aspect would determine approximate time of death. According to the prosecution, deceased Atul Mhatre was killed sometime after 7.00 pm on 08/02/2013, whereas post mortem was conducted on 10/02/2013 at 8.15 pm. Learned counsel for the applicant submits that the medical evidence in the present case would simply indicate that decomposition had started much prior to 48 hours. However, this aspect can be considered at the time of recording

of substantive evidence of the Medical Officer who conducted post mortem.

3) On 15/02/2013, applicant was arrested. On 19/02/2013, clothes of the applicant were discovered under section 27 of Indian Evidence Act and it is alleged that blood stained shirt, one knife and Rs. 30,000/- were recovered at his instance from his residential house at Kamothe.

4) It is the case of prosecution that present applicant was working as supervisor on the construction site of a developer named Prem Patil and that it was at the instance of Prem Patil that the applicant and others were hired to kill Atul Mhatre. Learned counsel for the applicant has placed on record the application granting bail in favour of co-accused Nitin Bhoir vide Order dated 23/08/2013 by Co-ordinate Bench (Coram: Abhay, M. Thipsay, J.) It is observed in the said order that :

“3 In the course of investigation, the accused, including the applicant, came to be arrested. The applicant was arrested on 15.2.2013. The case against the applicant and the other accused is based on circumstantial evidence. The only circumstance against the applicant is that the wrist watch, which the deceased was wearing before he went missing, was allegedly recovered at the instance of the applicant,

pursuant to the information disclosed by him, and that, the clothes of the applicant, which he was allegedly wearing at the time of the incident, were containing stains of blood.

4 Though it appears that there was some transaction and dispute between the accused no.1 Prem and the deceased, there is no material to indicate that the applicant was the driver of the said accused no.1. Infact, the accused no.4 is also said to be the driver of the applicant. There is nothing to show that the deceased was last seen in the company of the applicant. The alleged recovery of a wrist watch has been effected from the house of the applicant himself, about six days after his arrest. The learned counsel for the applicant has pointed out that the wrist watch has not been identified by any one, as the one which the deceased was wearing.”

5) In the present case, learned APP as well as learned counsel for the intervener submit that it is a case of circumstantial evidence and there are sufficient circumstances to indicate that present applicant is one of the assailants of Atul Mhatre. Learned counsel for the intervener submits that bank balance of applicant was Rs. 2,000/- for two years, however, there has been recovery of Rs. 30,000/- from his house which would clearly indicate that he was hired by Prem Patil.

6) On 15/02/2013, when the applicant was arrested, it was noticed that he had sustained an injury on the right palm of his hand. Said injuries were sutured injuries. On 20/02/2013, investigating officer recorded the statement of Dr. Nitin Yewale. Doctor has disclosed that on 08/02/2013, at about 9.00 pm to 9.30 pm, present applicant who happens to be a good friend of Prem Patil had come to his dispensary with a sharp injury on his right palm. He had inquired with the applicant the cause of the injury and that the applicant had disclosed that it is an injury by a broken glass. Doctor was well acquainted with the present applicant. Learned APP as well as learned counsel for the intervener submit that Atul Mhatre was missing after 6.30 pm on 08/02/2013. On the same day, within 3 hours applicant had been to the doctor with an injury on his palm which is indicative of the fact that he had sustained the injury in the course of assaulting Atul Mhatre.

7) The material evidence collected by the prosecution to prove complicity of present applicant is in the form of call details record. In the course of hearing of present application, call details record at the first instance were submitted before this Court, which would indicate that at 5.14 pm on

08/02/2013, the location of his cellphone showed that he was at Anand Nagar Majas Wadi. At 5.15 pm also he was at Majas Wadi. At 5.44, he was at Marve road, Vishal Nagar, Malad West. The location is not ascertained between 6.02 pm to 6.06 pm. At 6.39 pm he was at Tulsi Apartment, Station road, Thane West. At 9.02 pm, he was at Tilak Bridge, Dadar. From 9.03 pm to 9.07 pm, his location was not ascertained. At 9.35 pm to 9.42 pm, he was at Vartak Nagar, Thane. At 10.38 pm, he was at Kamothe bus stop and at 10.40 pm, he was at Khargar.

8) Subsequently, call details record were again obtained from the same service provider of the same number which showed that location of the applicant was not available from 5.14 pm to 9.07 pm and at 10.38 pm, he was at Kamothe and at 10.45 pm, he was at Khargar. In fact, there is no reason for any variance in the location of applicant, although it pertains to same cellphone number. It is apparent on the face of record that there are major lapses in the investigation. It is true that accused cannot benefit from the lapses on the part of investigating agency, however, applicant has been in jail for the last two years. Co-accused with whom the wrist watch of the deceased

was found has been enlarged on bail. In the facts and circumstances of the case, learned counsel for the applicant is rightly claiming bail on the ground of parity.

9) Learned counsel for the intervener submits that in fact, Prem Patil was also arrested along with present applicant. In the course of investigation, he was admitted in Vashi Hospital from where, he had absconded. Whereabouts of Prem Patil and his wife were unknown for two months. He was subsequently arrested by the police. Today, Prem Patil is not before the Court. There is no reason for considering the evidence against Prem Patil since, in all probabilities, his case would stand different footing and the evidence against him may be appreciated under section 8 of Indian Evidence Act. As on today, it is clear from the doctor that Prem Patil had met present applicant when he had gone to the hospital of doctor Nitin Yewale. Statement of the doctor would show that applicant had gone to the hospital on his own and subsequently Prem Patil had been there. This, in all probabilities would indicate that present applicant was not in the company of Prem Patil at the relevant time. However, all these would be a matter of adducing evidence at

the time of trial.

10) Observations made herein above are prima facie in nature and pertain only to consideration of an application under section 439 of Code of Criminal Procedure, 1973. Observations shall not be considered for quashing of F.I.R., discharge application or at the time of trial.

ORDER

- (i) Application is allowed.
- (ii) Applicant be enlarged on bail on furnishing P. R. bond in the sum of Rs. 50,000/- and one or two solvent sureties in the like amount.
- (iii) Applicant shall report to office of State C.I.D. at Kokan Bhavan on every alternative Saturday, between 11.00 am to 1.00 pm till the conclusion of trial.

Application stands disposed of.

(SMT. SADHANA S. JADHAV, J.)