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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 177 OF 2016

Arif Abdul Kalam Shaikh

..Petitioner.

Vs.

The Sr. Police Inspector & The Public Prosecutor

...Respondents.

Mr. Sharif Shaikh a/w Mateen Shaikh for Petitioner.

Mr. Deepak Thakare, APP for State.

CORAM: A.S. GADKARI, J.

Reserved on: 7th April 2016

Pronounced on: 9th June 2016.

P.C.

1) By the present petition, the petitioner has challenged the order dated 19.12.2015 passed below Exhibit-6 in Sessions Case No.156 of 2015, rejecting his application under Section 227 of the Cr. P.C. for discharge from the said Sessions Case. The applicant is the original accused No.3 in CR No.228 of 2014 dated 10.12.2014 registered with Bhoiwada Police Station, Bhiwandi, District-Thane under Section 302, 120(B) and 504 of the Indian Penal Code.

2) It is the prosecution case in brief, that on 30.10.2014 at about 2.00 p.m. the deceased, Maksud was repairing a pipeline in front of a public latrine at Somanagar area, Bhiwandi. At that time, the accused No.2 Asif came there and abused the deceased Maksud and questioned him as to why deceased was

repairing the said pipeline and pushed him. That on 2.12.2014 one Talib Shaikh friend of accused No.2 Asif, threatened Maksud that he will assault him with a knife and abused him in filthy language. The deceased Maksud therefore lodged a complaint against the accused No.2 Asif at Bhoiwada Police Station which was registered as N.C. No.720 of 2014 under Section 504 and 506 of the Indian Penal Code. That thereafter the accused No.1 Ahmed Kamal Abdul Mobin Ansari @ Pappu Puriwala, the accused No.2 Asif Abdul Kalam Shaikh and the present applicant i.e. Arif Abdul Kalam Shaikh entered into a conspiracy and at the instance of accused No.2- Asif Shaikh and the accused No.3-Arif Shaikh (the present applicant), the accused No.1-Ahmed Kamal Abdul Mobin Ansari @ Pappu Puriwala assaulted the deceased Maksud with a knife on his back, head, face and the right side of the ribs and committed his murder on 10.12.2014 at about 3.15 p.m.

3) Sikandar Abdul Kadir Shaikh, the brother of deceased, lodged the first information report on 10.12.2014 with the Police. In the said first information report, it is specifically stated that by the informant that, he witnessed the said incident of assault by the accused No.1 Ahmed Kamal Ansari @ Pappu Puriwala on his brother Maksud with a knife. The first informant has further stated that the applicant and his brother Asif have instigated the accused No.1-Ahmed Kamal Abdul Mobin Ansari @ Pappu

Puriwala for assaulting the deceased Maksud with a knife. After lodging the first information report, the Police investigated the crime and after completion of the investigation have filed a final report as contemplated under Section 173(2) of the Cr. P.C. on 7.3.2015 in the Court of competent jurisdiction. The learned Judicial Magistrate First Class took cognizance of the said case and committed it to the Court of Sessions and the same is numbered as SC No.156 of 2015.

The petitioner, original accused No.3, preferred an application as contemplated under Section 227 of the Cr. P.C. seeking his discharge from the said case which came to be rejected by the learned Trial Court by an Order dated 19.12.2015 which is impugned herein.

4) Heard Mr. Sharif Shaikh, the learned Counsel for the petitioner and Mr. Deepak Thakare, the learned APP at length and I have also perused the entire record made available before me.

5) The learned Counsel for the petitioner submitted that the evidence available on record in the form of statements of the witnesses, does not make out any case against the petitioner. He submitted that the witnesses namely Farhan Siddiqui, Sakib Momin and Nurruddin Shaikh have only expressed apprehension and/ or possibility of assault on the deceased Maksud and the suspicion about the involvement of the applicant in the present crime. He

submitted that the statements of Sakib Momin and Nurrudin Shaikh proceeds only on the hearsay information and therefore their statements cannot be taken into consideration. The witnesses have only expressed strong suspicion about the involvement of the applicant in the present crime. He contended that the suspicion, however, strong it may be, cannot be the basis for framing charge and conviction and therefore charge itself cannot be framed on the said footing. That there is no sufficient material against the petitioner to proceed with and as a consequence therefore the petitioner may be discharged from the said case. He submitted that there was no direct contact between the deceased Maksud and the petitioner. That his name is not mentioned in the N.C. lodged by the deceased and the said N.C. was against his brother Asif.

In support of his contentions, he relied upon the following decisions :

- (a) State of Karnataka Vs. L. Muniswamy
reported in AIR 1977 SC-0-1489: (1977) 2 SCC 699.
- (b) Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra
reported in AIR 2008 SC-0-2991: (2008) 10 SCC 394.
- (c) P. Vijayan Vs. State of Kerala
reported in AIR 2010 SC-0-663/(2010) 2 SCC 398.
- (d) Salman Sufiyan Shaikh Vs. State of Maharashtra

reported in ALL MR (CRI) 2014-0-2792: 2014 BCR (CRI) 3-1.

He lastly submitted that in view of insufficient material connecting the petitioner with the crime, the impugned order may be set aside and the petitioner may be discharged from the case.

6) The learned APP per contra opposed the petition and submitted that there is sufficient material available on record in the form of statements of the witnesses to frame the charge against the petitioner. He submitted that the first informant in his statement has categorically stated that the petitioner herein has instigated the deceased in commission of the present crime. He further submitted that the witnesses namely Farhan Siddiqui and Sakib Momin with whom the deceased had expressed apprehension of an assault by the applicant and his persons have categorically stated it. That witness namely Mushahid Shaikh has stated about the motive behind the crime and the conspiracy hatched by the petitioner for commission of the crime. He submitted that in view of the material available on record, a clear prima facie case to frame the charge against the petitioner is made out. He lastly submitted that the learned Trial Court after taking into consideration the entire material available on record has rightly rejected the application of the petitioner for discharge and there is no need by this Court to interfere with the said impugned order and the petition may be dismissed.

7) At this stage, a useful reference can be made to the judgment of the Hon'ble Supreme Court in the case of Union of India v. Prafulla Kumar Samal, reported in AIR 1979 SC 366, and in particular to paragraph 10 of the said judgment which reads as under :

“10.Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the

evidence as if he was conducting a trial.”

8) Further useful reliance can also be placed on the decision of the Supreme Court in the case of State of Maharashtra Vs. Som Nath Thapa reported in (1996) 4 SCC 659 wherein the Supreme Court has held that, if there is a ground for presuming that the accused has committed the offence, it can be said that the prima facie case has been made out against the accused. It has been further held that even if the Court finds that the accused might have committed the offence, it can frame the charges. The Supreme Court in the said case has clarified that at the stage of framing of charge, probative value of the material on record cannot be gone into.

9) In this background, I propose to deal with the material which has been produced and relied upon by the prosecution against the petitioner for framing charge. The first informant-Sikkandar Shaikh in his statement dated 10.12.2014 has stated that he has witnessed the assault on his brother Maksud by the accused No.1-Ahmed Kamal Mobin Ansari @ Puriwala with a knife. He has further categorically stated that due to earlier enmity, the petitioner along with his brother Arif has instigated (“chithavani dili”) and at their instance only accused No.1 assaulted the deceased Maksud with sharp edged weapon. The witness Farhan Siddiqui in his statement dated 12.12.2014 has stated that due to the earlier enmity the petitioner has instigated the accused No.1-Ahmed Kamal

Mobin Ansari @ Pappu Puriwala, who in turn has committed murder of deceased Maksud. The witness Sakib Momin in his statement dated 24.12.2014 has stated that after the commission of offence, the petitioner had given a phone call to him and informed that he had no role to play in the said crime. It is to be noted here that the petitioner had no reason to give a phone call to the said witness for giving explanation about his role in the crime. The witness namely Mushahid Shaikh has categorically stated about the motive behind the crime and the conspiracy hatched by the petitioner along with other persons to assault the deceased and other persons.

10) Thus, after taking into consideration the material available on record in the form of statements of witnesses, I am of the considered opinion that the prosecution has made out a case for framing charge against the petitioner. It is to be noted here that the decisions relied upon by the petitioner in support of his contention are of no help to him as the said decisions deal with the aspect of suspicion expressed by the witnesses against the accused persons in commission of crime. In the instant case, the witnesses have categorically stated about, hatching of conspiracy and instigation given by the petitioner to accused No.1-Ahmed Kamal Mobin Ansari @ Pappu Puriwala for commission of the present crime.

11) In my view, as stated above, a strong prima facie case for framing charge against the petitioner is made out by the prosecution. The impugned order dated 19.12.2015 passed by the Trial Court below Exhibit-6, does not suffer from any legal infirmity and there is no need to interfere with the said order. The petition being devoid of merits is accordingly dismissed.

(A.S. GADKARI,J.)