

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.359 OF 2016

Yashodhan Nitin Thakur

.... Applicant

versus

The State of Maharashtra

... Respondent

Mr. Manoj Mohite, advocate a/w Mr. Chaitanya Pendse,
advocate a/w Mr. Akshay Gosavi, advocate i/b. GMS Legal,
advocate for the applicant.

Mr. S.V. Gavand, APP for the State/Respondent.

CORAM : A.M. BADAR, J.

DATE : 30th NOVEMBER, 2016

P.C. :

1. This is an application u/s 401 of Cr.P.C. filed by the revision applicant/original accused No.4 challenging the order passed by the learned Additional Sessions Judge-1, Vasai, on 10/05/2016 on an application Ex.121 filed by him seeking discharge from the offence punishable u/s 302, 307 and 120-B of the IPC.

2. Heard finally with consent of parties and as entire text of the charge-sheet is produced before the Court, calling of record and proceeding is dispensed with.

3. Briefly stating according to prosecution case, accused persons including the present applicant committed murder of Shailesh Thakur on 01/12/2013 by firing bullets at him from the firearm and that they had attempted to commit murder of Prakash Handore. The motive behind this crime, according to prosecution case is rivalry due to Municipal Election, disputes regarding cable business as well as business rivalry. Undisputedly, the deceased as well as the present applicant and co-accused Nitin Thakur, who is father of the present applicant, are relatives.

4. I have heard the learned counsel for the revision applicant at great length. By taking me through the entire charge-sheet, the learned counsel for the applicant argued that 5 or 6 unknown persons, according to prosecution case, actually killed Shailesh Thakur and injured Prakash Handore by firing bullets at them. The learned counsel further argued that so far as present application is concerned, according to prosecution case, he is involved in conspiracy to kill Shailesh Thakur. In

submission of the learned counsel for the applicant, there is no iota of evidence to connect the applicant to the crime in question. The learned counsel argued that the prosecution is pressing reliance on the statement of Lalitsingh Jantpal, Manager of Hotel Balaji as well as statement of Ajit Kamble, Senior Captain o that hotel. In fact, the prosecution has not conducted identification parade in order to test veracity of these two witnesses. The learned counsel argued that statements of these two witnesses are verbatim same and both of them have claimed to have taken the order from persons who visited the hotel. Lalitsingh Jantpal claims to be the Manager of the hotel and as such there was no reason for him to take order from guests who visited the hotel. Both these witnesses are not even disclosing the date on which so called conspirators have visited Hotel Balaji. The prosecution is claiming that photographs appearing in the daily newspapers are shown to these two witnesses. Therefore, according to the learned counsel for the applicant, statements of these witnesses does not constitute grounds for proceeding against the present applicant.

5. The learned counsel for the applicant argued that the prosecution is relying on the statement of two witnesses who were allegedly hired by accused Nitin for killing Shailesh. But those persons could not execute the plan. By taking me through statements of two witnesses namely Shailesh Shirke and Ravindra Pawar, the learned counsel for the applicant argued that both these two witnesses are not naming applicant Yashodhan Thakur as one of the members of the gang who hatched conspiracy to eliminate Shailesh Thakur. It is argued that Ravindra Pawar had not stated in his statement u/s 161 of Cr.P.C. that he had disclosed the conspiracy hatched by accused persons to kill deceased Shailesh Thakur in presence of witnesses Dinesh Raut. However, witness Dinesh Raut is claiming that deceased Shailesh Thakur disclosed the conspiracy hatched by accused persons including the present applicant to him at Velakani. It is further argued that Dinesh Raut has claimed that in the last week of September 2013, alongwith Shailesh Thakur, he went to Hotel Balaji where witness Ravindra Pawar disclosed conspiracy to him. It is argued that in

absence of such statement by Ravindra Pawar, disclosure by Dinesh Raut naming present applicant as one of the conspirator is of no use.

6. Learned counsel for the applicant further argued that the prosecution is relying on statements of Frank Fernandes, Sandeep Jadhav, Poonam Thakur (widow) and Rahul Thakur (informant brother) by claiming that the deceased had made oral dying declaration to these witnesses implicating the present applicant as one of the conspirator. In submission of the learned counsel for the applicant, alleged statement made to these witnesses by deceased Shailesh Thakur cannot be termed as his dying declaration and those statements are not admissible in evidence as per the provisions of section 32(1) of the Evidence Act. To buttress this submission, learned counsel for the applicant placed reliance on judgment of the Privy Council in the matter of Pakala Narayan Swami, versus, Emperor, reported in AIR 1939 PC 47 and on Babubhai Bokhiria and another, versus, State of Gujarat and Others, reported in

(2014) 5 Supreme Court Cases 568. The learned counsel for the applicant submitted that in order to make statement of the deceased admissible u/s 32(1) of the Evidence Act, such statement must be in respect of circumstances of transaction which resulted in his death. Opinion, expression or fear expressed by the deceased, in submission of the learned counsel for the applicant, does not amount to circumstances of the transaction as envisaged by section 32(1) of the Evidence Act and therefore those are not admissible in evidence.

7. With this, the learned counsel for the applicant argued that the learned Additional Sessions Judge proceeded on wholly wrong premises to reject the application for discharge moved by the applicant. It is submitted that the learned Additional Sessions Judge while rejecting the application for discharge relied on inadmissible portion of confessional statements of co-accused Donald Ignace Coria and Sachin Patil. Portions of their confessional statements which are not relating to recovery or discovery of the fact, but simply amount to

confession before the police authority are used against the present applicant for rejecting his application for discharge and as such the impugned order suffers from error of law and therefore liable to be interfered with. Lastly, the learned counsel for the applicant argued that as there are no grounds to proceed against the applicant, he needs to be discharged from the offences alleged against him.

8. The learned APP opposed the application by arguing that the widow as well as the informant brother of the deceased have spoken about the strong motive with the applicant to eliminate deceased Shailesh Thakur. The learned APP further pointed out the memorandum statement of co-accused Sachin Patil recorded u/s 27 of the Evidence Act and argued that ignoring confessional part of the statement, it is obvious that the said statement resulted in discovery of the fact and thus co-accused has pointed out the place where the conspiracy was hatched by accused persons including the present applicant. This evidence, in submission of the learned APP is gaining further

corroboration from statements of Lalitsingh Jantpal and Ajit Kamble – employees of Hotel Balaji. With this, the learned APP submitted that while considering the matter of discharge from serious offence, the Court is required to see whether the available evidence and material on record constitute sufficient grounds for proceeding against the present applicant/accused and the Court is not required to examine the matter from the angle where the material is sufficient to entail conviction of accused persons. To substantiate this contention, the learned APP relied on paragraph No.20 from judgment of Supreme Court in the matter of *State of Tamil Nadu by Inspector of Police, Vigilance and Anti Corruption, versus, N. Suresh Rajan and Ors., reported in AIR 1982 S.C. (SUPP) 1982.*

9. I have carefully considered the rival submissions and also perused the record and proceedings made available by parties. The application for discharge from offences punishable u/s 302, 307 r/w 120-B of IPC moved by the present applicant/original accused No.4 came to be rejected by the

impugned order by the learned Additional Sessions Judge-I, Vasai. As such it is apposite to quote provisions of section 227 and 228 of Code of Criminal Procedure, 1973. Section 227 and relevant portion of section 228 of Cr.P.C. reads thus:

Section 227 -:

Discharge - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

Section 228 -:

Framing of charge- (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

- (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any

other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

- (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

10. Bare perusal of provisions of these sections goes to show that when the judge considers that there is no ground for proceeding against the accused, he is required to discharge the accused by recording his reasons. However, if the Judge is of the opinion that there are grounds for presuming that the accused has committed the offence, then he is required to frame charge. By now it is well settled that at this stage detailed scrutiny of material gathered by the prosecution in order to examine whether the same is sufficient for recording the conviction or not is absolutely not essential. What is required is examination

of the material from the angle whether the same constitute sufficient ground for proceeding against the accused. Some prima facie material with strong suspicion regarding commission of the alleged offence by the accused is sufficient for framing charge against him. The learned APP has rightly placed reliance on paragraph No.20 of the judgment of the Honourable Supreme Court in the matter of State of Tamil Nadu (Supra) which reads thus;

“We have bestowed our consideration to the rival submissions and the submissions made by Mr.Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouth piece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption hat the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the

ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171), in which, after analyzing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96):

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents

on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.” ”.

11. The first circumstance relied by the prosecution in order to implicate the present applicant/original accused No.4 in the offence of conspiracy to murder Shailesh Thakur and to attempt the commission of murder of Prakash Handore is hiring of the contract killers by the present applicant, his father co-accused Nitin Thakur and co-accused Rajesh Raut. It is the case of prosecution that initially the contract to kill Shailesh Thakur was frustrated because of inability of the contract killers to

execute the plan to kill Shailesh Thakur. According to the prosecution case, the applicant and co-accused hired contract killers, they were shown four wheeler vehicle of deceased Shailesh Thakur, his office and his area of business. On this aspect, statements of witness Shailesh Shirke and Ravindra Pawar are relied by the prosecution. Shailesh Shirke is an Estate Agent. He was contacted by one Balu Pujari at the instance of co-accused Rajesh Raut. This witness was informed about the work of killing deceased Shailesh Thakur through Balu Pujari. The statement of this witness goes to show that co-accused Nitin Thakur had even showed Shailesh Thakur to the contract killers. Similar is the statement of another witness Ravindra Pujari, who was initially hired by co-accused, as per the case of prosecution. Ravindra Pujari is also not referring the applicant as one of the conspirator. Dinesh Raut is a witness examined by police during the course of investigation. His statement reveals that he accompanied deceased Shailesh Thakur to a place named Velakani for Darshan of a deity and at that time as per his version deceased Shailesh Thakur had disclosed him about the

contract given by the applicant, his father co-accused and co-accused Rajesh Raut. Dinesh Raut claims that in the last week of September 2013 he had been to Hotel Balaji with deceased Shailesh Thakur and at that place witness Ravindra Pujari had disclosed deceased Shailesh Thakur about conspiracy and the contract to kill him by accused persons including the present applicant. The statement of Ravindra Pujari is silent about his alleged disclosure to deceased Shailesh Thakur about the conspiracy and the contract to kill Shailesh Thakur.

12. Witnesses Frank Fernandes, Sandeep Jadhav, Poonam Thakur (widow) and Rahul Thakur (informant brother) had stated to police during investigation that Shailesh Thakur (since deceased) had disclosed them about the conspiracy and the contract to kill him by present applicant Yashodhan Thakur, his father co-accused Nitin Thakur and co-accused Rajesh Raut. Witnesses Sandeep Jadhav and Rahul Thakur, in addition are also stating name of Shantaram as one of the conspirator. According to the prosecution case, these disclosures amounts to

dying declarations of deceased Shailesh Thakur. Thus according to prosecution, in the dying declarations of Shailesh Thakur, the disclosure by him to these witness amounts to circumstances of transaction which resulted in his death. Therefore, according to prosecution these statements can be relied on and forms sufficient ground to proceed applicant Yashodhan Thakur.

13. In this context, the judgment of the Apex Court in the matter of **Pakala Narayan Swami** (cited supra) and **Babubhai Bokhiria** (cited supra) are relevant. In the matter of Pakala Narayan Swami, there was statement of the widow of the deceased that the deceased had told her that he was going to Behrampur because of the call in writing from wife of the accused. The deceased had disclosed his widow that wife of the accused had told him to come and receive payment of his dues. The Prevy Council upon examination of such statement of the deceased as well as provision of section 32(1) of the Evidence Act, observed that, *“The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether a particular individual or otherwise and not directly*

related to the occasion of the death will not be admissible” u/s 32(1) of the Evidence Act.

14. In the matter of **Babubhai Bokhiria** (cited supra) about one year prior to his death, deceased Mulubhai had written a chit disclosing that if he dies due to murder, then action be taken against Babubhai Bokhiria and his murder will be done by Babubhai only. In the case of murder of Mulubhai, the Honourable Supreme Court examined whether this chit written by the deceased constitutes circumstances of transaction, which resulted in his death. Relevant observations of the Honourable Supreme Court in paragraph No.14 and 15 of this judgment read thus;

14. *We have given our thoughtful consideration to the rival submissions and the first question which falls for our determination is whether the note in question is admissible in evidence or in other words, can be treated as a dying declaration under [Section 32](#) of the Act. [Section 32](#) of the Act reads as follows:*

“32.Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a

person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) when it relates to cause of death.-When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

From a plain reading of the aforesaid provision, it is evident that a statement of a fact by a person who is dead when it relates to cause of death is relevant. It is an exception to the rule of hearsay. Any statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate to the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question.

15. *In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of [Section 32](#) of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under [Section 319](#) of the Code.*

15. It is thus clear that general expressions suspecting a particular individual by the deceased are not admissible when the cause of death of the deceased comes into question.

16. Now, the third circumstance, which according to prosecution constitutes sufficient ground for proceeding against the present applicant. It constitutes statements of two witnesses namely Lalitsingh Jantpal, Manager and Ajit Kamble. After his arrest, the confessional statement of Sachin Patil – co-accused came to be recorded by the investigator on 11/12/2013. Barring inadmissible portion thereof, this confessional statement is to the effect that he will show the hotel. Co-accused Sachin in presence of panch witness took the investigator to Vasai Court

Road, G,G, College, Babhola, Ambadi Road, towards the Sun City Rajdip Banquet ground floor and showed a hotel named Balaji. The confessional statement of co-accused Sachin Patil resulted in discovery of the fact. During investigation, statement of Lalit Jantpal, Manager working with Balaji Hotel is recorded and this witness has stated that during the period between 25/11/2013 and 27/11/2013 two persons came to his hotel by a Fortuner vehicle. Two more persons joined them. This witness claims to have taken order placed by those four persons and heard their conversation. This witness has stated that those four persons were uttering the name of Shailesh. Similar is the statement of Ajit Kamble, who claims to be the Senior Captain of the said hotel. He also stated that he heard conversation of persons who came to the hotel. He heard name of Shailesh from mouth of these persons. Both these witnesses were shown photographs appearing in the daily newspapers by the Investigator. These two witnesses have stated in their statements that those two persons seen in the photograph had come to their hotel in a Fortuner vehicle. Statements of these two witnesses

shows that those two persons are accused Nitin Thakur and present applicant Yashodhan Thakur. The date of incident of murder of Shailesh Thakur is 01/12/2013. As stated in forgoing paras, learned counsel for the petitioner criticized these statements on various grounds and stated that this evidence does not constitute sufficient ground to proceed against the petitioner. However, such argument cannot be accepted because probative value of these statements cannot be examined at the pre trial stage. If these two statements are considered in proper perspective at the pre-trial stage then these two statements indicates that co-accused Nitin Thakur, present applicant Yashodhan Thakur, Sachin Patil, Donald Ignace Coria had been to hotel Balaji during the period from 25/11/2013 to 27/11/2013 and they have some conversation, in which they were uttering name of Shailesh. Ultimately Shailesh died homicidal death on 01/12/2013. At this stage, one has to put on record that these two statements coupled with discovery of the fact pursuant to confessional statement of co-accused Sachin Patil recorded u/s 27 of the Evidence Act, do constitute prima

facie material and indicates strong circumstance that the present applicant may be one of the conspirator, who had hatched conspiracy to eliminate Shailesh Thakur at hotel Balaji. Apart from this, there are statements of witnesses indicating the motive with the applicant as well as co-accused Nitin Thakur and Rajesh Raut to eliminate the deceased. Therefore though the learned Additional Sessions Judge while rejecting the application for discharge has erroneously considered confessional part of the disclosure statement of co-accused Donald and other accused person, the ultimate conclusion reached by him cannot be stated to be perverse or illegal. In this view of the matter, the revision application is devoid of merit and the same is dismissed.

17. Needless to mention that all these observations are totally prima facie in nature and they shall not have any bearing on the trial of the case.

(A.M. BADAR, J.)