

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Criminal Application [BA] No.752 of 2016

(Sayyed Shorab s/o Sayyed Ayefaj

vs.

State of Maharashtra, through P.S.O. Lakadganj, Nagpur)

=====

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

=====

Court's or Judge's Orders

Shri R.K. Tiwari, Advocate for the Applicant.

Shri T.A. Mirza, Advocate for the Non-Applicant/State.

CORAM : S.B. SHUKRE, J.
DATE : 20th SEPTEMBER, 2016.

Heard the learned Counsel for the applicant and
the learned A.P.P. for the State.

Perused the charge-sheet. The allegation against
the applicant is that in the evening of 27/09/2015, when he
along with the main accused Wasim Chirya and others was
partying with deceased Nawab Anwar and enjoying liquor,
Wasim Chirya, entering into the criminal conspiracy with this
applicant and others, stabbed deceased Nawab Anwar
repeatedly by means of knife and killed him at the spot. On
receipt of the information, offences punishable under Section
143, 147, 148, 302, 201 and 120-B read with Section 149 of
the Indian Penal Code, Section 135 of the Maharashtra Police
Act and Section 25 read with Section 4 of the Arms Act came
to be registered against this applicant and others. During the

course of investigation, offence punishable under Section 3 of the Maharashtra Control of Organised Crime Act, 1999 (MCOC Act for short) was further added against the applicant and others. The motive for the crime has been alleged to be the suspicion that the main accused, Wasim Chirya, had against deceased Nawab Anwar. The suspicion was that deceased Nawab Anwar had joined the rival gang led by one Tirupati Bhoge.

The case as against this applicant is entirely based upon the circumstantial evidence and the confessional statement given by co-accused viz. Sheikh Nisar. According to the prosecution, the CCTV footage of Gamdoor Beer Bar has disclosed that this applicant and his co-accused had sat at the bar along with deceased Nawab Anwar and that this applicant was one of the persons, who had gone to the house of deceased Nawab Anwar along with others for taking him away on the pretext of enjoying a party. The prosecution also submits that there has been C.D.R. showing that this applicant was in constant touch with other co-accused and that a small sword has been recovered at the instance of this applicant. But, the main reliance of the prosecution is upon the confessional statement of the co-accused.

If one goes through this statement, called as 'confessional statement' of the co-accused, one would find that it does not refer to any circumstance, which would adversely affect this applicant. It is, *prima facie*, neither in the nature of admission of guilt by the co-accused nor in the nature as would show that he was party to the criminal conspiracy or that there was any criminal conspiracy to eliminate deceased Nawab Anwar.

The learned A.P.P. for the State submits that this statement is admissible in evidence under Section 18 of the MCOC Act, because this section is independent and prevails over Section 30 of the Indian Evidence Act as well as Section 164 of the Code of Criminal Procedure. The learned Counsel for the applicant submits that even though this section would prevail over the provisions contained in other Acts, basically it would apply only when there is a confessional statement in the nature of admission of guilt or admission of do something, which resulted in commission of crime or admission about sharing intention or forming part of unlawful assembly and this statement does not disclose any such circumstance.

In the case of *Mohd. Farooq Abdul Gafur vs. State of Maharashtra – 2010(14)SCC 641* referred to me by the learned A.P.P. for the State in support of his aforestated

argument, the principle laid down by the Hon'ble Apex Court is that a confessional statement made under Section 18 of the MCOC Act is a substantive piece of evidence and not just a corroborative piece of evidence. There can be no doubt about the principle of law. However, the question involved in this case is not as to whether or not Section 18 confessional statement is a substantive piece of evidence or corroborative piece of evidence and, therefore, in my opinion, this case, at this stage, does not assist the prosecution, rather, we can take guidance from the law laid down by the Hon'ble Apex Court in the case of Jameel Ahmed and another vs. State of Rajasthan – 2003 ALL MR (Cri) 1542 (S.C.), to know as to what amounts to confessional statement admissible in evidence, which is recorded under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act for short) or similar provision under the MCOC Act. Now it is well settled that, Section 15 is in *pari materia* with Section 18 of the MCOC Act and, therefore, the interpretation given by the Hon'ble Apex Court to the term 'confession' used in Section 15 of the TADA Act can also be fruitfully applied while examining the import and meaning of the term 'confession' employed in Section 18 of the MCOC Act. In paragraph 14 of the judgment of the Hon'ble Apex Court, it has been found

that the so called confessional statement of the co-accused could not be considered to be so in the absence of any inculpatory statement made by the co-accused. The Hon'ble Apex Court has held that before a statement recorded under Section 15 of the TADA Act is held to be admissible in evidence, it must be found that the statement amounts to a confession. The observations of the Hon'ble Apex Court as they appear in paragraph 40 are reproduced thus :

“40. We do not think we can accept this argument of learned ASG. While considering the contents of Ex.P-124, for the purpose of finding out whether the said statement amounts to a confession or not, the document in question will have to be considered on the basis of the statement found in itself and there is no scope for any external material being taken into consideration to draw an inference that what the accused stated in the so-called confessional statement could be an admission of a guilt. As stated above, in the instant case, we are not able to find any inculpatory statement in Ex.P-124 by itself so far as the maker of the statement, namely, A-1 is concerned and in the absence of which, in our opinion, this document cannot be construed as a confessional statement because at this stage we are not considering the fact whether the prosecution has established its case against A-2 from other evidence. We are at this stage only considering whether Ex.P-124 is

confession or not for which we will have to look into the contents of Ex.P-124 only.”

Bearing in mind these principles of law that we must examine the nature of the statement of the co-accused on which heavy reliance has been placed by the prosecution.

A bare perusal of the statement, however, shows that it does not incorporate any such circumstance as would incriminate the maker of the statement nor does it go in any manner against this applicant. The statement is of such a nature that it *prima facie* indicates that this applicant and its author neither formed any unlawful assembly with the other co-accused nor had any criminal agreement with them to eliminate the deceased. The maker of the statement, rather, was taken by surprise, when he found that without any rhyme or reason, the main accused Wasim Chirya pulled out a knife suddenly and stabbed the deceased by means of that knife. He has also stated that he had tried to dissuade the main accused from doing so and even rushed to the rescue of the deceased, but all in vain. At this stage, such statement of the co-accused, *prima facie*, cannot be considered to be one made under Section 18, because it does not say any such thing as would amount to confession as held in the case of *Jamil Ahmad*. Therefore, in my view, this statement, *prima facie*,

would not help the prosecution in showing any incriminating circumstance against this applicant in the crime. Such being the case of the prosecution as against this applicant, I do not think that the applicant can be detained in jail for any longer period of time especially when the investigation is already over.

Then, what remains, is the other circumstances pointed out earlier. But, by themselves, these circumstances would not be sufficient to find that this applicant is *prima facie* involved in the commission of offence alleged against him. In these circumstances, I am inclined to grant this application. Hence, the following order.

The application is allowed and it is directed that the applicant be released on bail on his furnishing a P.R. Bond in the sum of Rs.25,000/- together with one solvent surety in the like sum on the conditions that the applicant shall regularly attend the Court proceedings on the dates fixed in the matter, shall co-operate with the trial Court in expeditious disposal of the case and shall not tamper with the prosecution witnesses in any manner.

Hamdast is granted.

JUDGE

C E R T I F I C A T E

I certify that this order uploaded is a true and correct copy of the original signed order.

Uploaded by: S.D. Waghmare
P.A. to the Hon'ble Judge.

Uploaded on : 22/09/2016