

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

CRIMINAL APPLICATION (BA) NO.911 OF 2016

(Anikit Anup Borele and others ..vs.. State of Maharashtra, through PSO, Wadgaon Jungle, District Yavatmal)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.S. Jaiswal, Advocate for applicants,
Shri S.A. Ashirgade, Addl.P.P. for non-applicant.

CORAM : P.N. DESHMUKH, J.

DATED : 16-12-2016

Heard Shri S.S. Jaiswal, learned Advocate for applicants and Shri S.A. Ashirgade, learned Additional Public Prosecutor for non-applicant.

This application is filed by applicants involved in Crime No.103/2016 registered by Wadgaon Jungle Police Station, District Yavatmal for the offences punishable under Sections 302 and 201 read with 34 of Indian Penal Code. The offence is registered on 30-06-2016. All the applicants are arrested on 02-07-2016 and since then are in custody.

Learned Counsel for applicants has submitted that case of prosecution is based on circumstantial evidence of last seen and has submitted that even if the case of prosecution is accepted as it is there is no evidence sufficient to establish that immediately prior to dead body of deceased Rushabh was located near nullah in

jungle, he was seen in the company of applicants. It is further contended that though according to the case of prosecution, motive for commission of murder of deceased was that he was having illicit relations with mother of applicant No.1, has submitted that during the course of investigation no such evidence could be collected and that even from the statement of Seema, mother of applicant No.1, she did not reveal about such relations.

In that view of the matter, it is submitted that as there is no evidence sufficient to establish involvement of applicants and charge-sheet is filed, application be allowed.

Learned Additional Public Prosecutor opposed the application on the lines of reply on record and has contended that there are witnesses who have stated to have seen applicants with deceased immediately prior to his death and relying upon statement of owner of vehicle and its seizure panchanama involved in this crime has submitted that said evidence established circumstance of vehicle involved in this case to have blood stains and for that purpose has relied upon statement of its owner.

In the background of submissions as aforesaid, I have perused copy of charge-sheet. Admittedly case of prosecution is based on circumstantial evidence and on

the theory of deceased having been last seen together with applicants.

In the background of facts as aforesaid, on perusal of report dated 30-06-2016, it is noted that deceased at the time of incident was working in some bank and has left to attend his job, however, did not return back home and therefore, complainant being his brother-in-law after searching with their relations and at his bank, from some person learnt that the dead body of one person having bank's uniform on his person was lying in the nullah of Kolambi jungle. On receiving such information, complainant visited said spot and found deceased lying having sustained injuries on his legs, back and hands by sharp weapon. He thus lodged his report on the basis of which offence is registered against unknown person. On a specific query put to learned Additional Public Prosecutor with regard to name of person, who has provided source of information to complainant, if any, during the course of investigation, it is informed that no statement of any such person is recorded. In that view of the matter, it is noted that material link on the basis of whose statement, complainant received information of dead body of deceased lying at a particular spot in a jungle, thus is missing in the case of prosecution. No satisfactory explanation could be given as to why no investigation is carried out or if investigation is carried out on these lines

why no name of such person could be revealed. In that view of the matter, fact remains that there is nothing on record to establish as to on whose information complainant learnt about deceased lying in a jungle.

With reference to case of prosecution of last seen together, on perusal of statements of material witnesses on record being of Somesh Sawarkar, Mayur Raichura, dated 02-07-2016 and their additional statements dated 22-07-2016, it is found that from their statements what is revealed is that on 29-06-2016 at about 6.30 p.m. while he was proceedings alongwith Mayur on motorcycle, near Chacha Ka Dhaba, he had seen deceased in the company of applicants alongwith two-three other boys. Both the statements are similar and are even similarly worded wherefrom it is further revealed that on the next day both these witnesses learnt that Rushabh was murdered in Kolambi jungle. As per their statement, for the whole day they were in Yavatmal. No post-mortem of deceased could be held on that day, which was held on 01-07-2016, they also attended the last rights of funeral of deceased. According to them, it is only after accused involved are arrested, they learnt that applicants are involved in commission of murder of deceased. From the statements of these two witnesses, which are heavily relied by prosecution two things needs consideration, first as per

these statements, deceased was found in the company of applicants in the evening at 6.30 p.m. while as per the report, the dead body of deceased was recovered from nullah in jungle on the following day after 11-30 a.m. As such there is sufficient time gap between deceased having been found in the company of applicants and finding of his dead body. By now law on this aspect is well established. The theory of last seen has been well established. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive, and when the deceased is found dead is so small that possibility of any person other than the accused being author of crime becomes impossible. In the case in hand, from the statement of witnesses deceased is stated to have seen in the company of accused on the previous day at around 6-00 to 6.30 p.m. while his dead body was recovered at a distance of 30 to 35 km. away from the said spot on the following day at 11.30 a.m.

Similarly the conduct of these two witnesses also raised doubt when they state that inspite of their seeing deceased in the company of applicants on 29-06-2016 and having knowledge of murder of deceased on the following day, they did not find it necessary to inform this fact to anyone for a period of two days, which also creates doubt in the case of prosecution.

Further more even if case of prosecution is considered with reference to deceased having illicit relations with Seema, on bare perusal of her statement, it reveals that she is totally silent on this aspect.

In the background of evidence as aforesaid, though there are recovery panchanamas of knife and clothes, alleged to be recovered at the instance of applicant Nos.2 and 3 respectively and as stated by learned Additional Public Prosecutor from the statement of owner of vehicle involved in this crime, it is revealed that it was smelling of blood, though articles involved in the present crime are stated to be forwarded for analysis in the month of July 2016, though charge-sheet is filed on 28-09-2016, no C.A. Reports are yet collected. As such there is nothing to substantiate statement of owner of vehicle about blood in the vehicle alleged to have been noted by him, which evidence is even otherwise immaterial in the absence of substantive evidence.

In that view of the matter, applicants are entitled for bail as per the order below :

Order

- (i) Applicants shall be released on bail on their executing P.R. Bond in the sum of Rs.50,000/- each with one surety each in the like amount.

- (ii) Applicants shall mark their presence with Wadgaon Jungle Police Station, District Yavatmal once in three months on the first day of each such month pending trial.
- (iii) Applicants shall produce proof of their residence and shall update the same in the event of change in near future.

Application is accordingly allowed.

JUDGE

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