

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (BAIL) NO. 96 OF 2017**

**MR. DINESH TIWARI @ MUNNA,
PRESENTLY IN JUDICIAL CUSTODY,
LODGED AT COLVALE., THR. MR. ATUL
DIXIT.,**

... Applicant

Versus

**THE STATE OF GOA, THR. P.I.
ATTACHED TO PORVORIM, POLICE
STATION, PORVORIM AND ANR.,**

... Respondents

Mr. R. J. Pinto, Advocate for the Applicant.

Mr. M. Amonkar, Additional Public Prosecutor for the Respondent.

Coram:- M. S. SONAK, J.

Date:- 21st April, 2017.

Oral Order :

Heard Mr. R. J. Pinto, the learned counsel appearing for the applicant and Mr. M. Amonkar the learned Additional Public Prosecutor of the State.

2. The applicant, who has been charged for the offences punishable under section 302, 392 r/w section 34 of the I.P.C seeks his release on bail. Mr. Pinto, the learned counsel for the applicant submits that the investigation is complete and the charge sheet has already been filed. He submits that from

the perusal of the list of the witnesses as furnished, it is apparent that the trial will take several years. He submits that there is no material on record to link the applicant with the offences as alleged. He submits that even on the basis of the material placed on record, there are inherent improbabilities evident in the case of the prosecution. There are glaring omissions and in a situation of this nature, the applicant is required to be enlarged on bail.

3. Mr. Pinto submits that in this case, the complaint which is made by the son of the deceased is totally vague. Upon the perusal of the complaint it does appear that the deceased mother, was alive at the time when the complainant visited her place on the morning of 20/3/2016. Mr. Pinto submits that the son of the deceased was not residing in the same house with the deceased. He submits that the daughter was residing in the same house and significantly the prosecution has not even recorded the daughter's statement.

4. Mr. Pinto submits that the recovery under section 27 of the Evidence Act is totally unreliable in the facts and circumstance of the present case. In the first place, it was said that some knife was to be recovered, however, what has been recovered is some koita. Secondly, the weapon has no blood stains upon it. The allegation against the applicant is that he had

held the weapon against the neck of the deceased. Mr. Pinto submits that certain injuries are also evident in the post mortem report. Mr. Pinto queries, that if this is so, at least some blood stains should have been found upon the weapon. In the absence of any blood stains, the weapon can never be linked to the crime. The discovery in such a case, is completely futile and there is no question of applicability of section 27 of the Indian Evidence Act. In relation to the scope and interpretation of section 27 of the Evidence Act, Mr. Pinto has placed reliance upon several decisions.

5. Mr. Pinto submits that some gold ornaments are stated to have been recovered from the applicant and other accused persons. The specific allegation against the applicant is that one earring was found with him. Upon analysis it is noted that the said earring was not of gold. One of the bangles stated to have been found with the co accused was also not of gold. One of the earrings was still on the deceased. Mr. Pinto submits that if theft was the motive, why is that some ornaments were still be left on the deceased. Mr. Pinto submits that there are inherent inconsistencies in the case of the prosecution.

6. Mr. Pinto submits that there are the applicant has two small children, his wife and aged parents to maintain. He submits that the applicant

hails from the State of U.P. and was in this State to secure some means of employment. Mr. Pinto submits that there is presumption of innocence which cannot be lightly ignored. He submits that there is no basis to apprehend that the applicant might flee from justice or tamper with evidence. In any case he submits that suitable conditions can always be imposed upon the applicant. Mr. Pinto finally submits that in such matters, it is bail and not jail which is the rule. For all these reasons, Mr. Pinto submits that the applicant may be enlarged on bail subject to suitable conditions that this Court may deem appropriate to impose.

7. Mr. Amonkar, the learned Public Prosecutor submits that the applicant is involved in the commission of very serious offences, which if proved, would invite life imprisonment in the least. Mr. Amonkar submits that this is a case involving four accused persons and consequently the provisions of section 34 of the I.P.C have been applied. From the confessional statement of one of the accused, the role of the applicant has been disclosed and the role to say the least, is quite substantial. Mr. Amonkar submits that the applicant does not have roots in the State and there is very strong possibility that the applicant will flee from justice in order to avoid facing trial. Mr. Amonkar submits that the learned Sessions Judge by order dated 23/12/2016 has rejected bail, even though, at that stage, the

charge sheet had already been filed against the applicant. Mr. Amonkar submits that there is no change in the circumstance and therefore, the bail application may not be entertained.

8. In this case, the applicant has been charged for the offences under sections 302 and 392 r/w section 34 of the I.P.C. The offences are no doubt serious. It is alleged that the applicant along with three other accused persons with common intention effected entry in the ancestral house of the complainant at Betim-Goa, by removing the roof tiles and thereafter committed a gruesome murder of the complainant's mother aged 73 years. The motive of the murder is alleged to be robbery. It is the case of the prosecution that the gold ornament worth Rs.45,000/- were actually robbed by the accused persons on the night between 19/3/2016 and 20/3/2016.

9. One of the co accused, Rajesh Gaud has made a statement, which reads thus:

“On being asked by PI Rajesh Kumar, the said accused person disclosed his name as Rajesh s/o Munnilal Gaud, age 36 yrs. R/o. Sunil Mittal near R & D compound, Walkeshwar wada, Betim Barde, Goa and native of Azamgarh, Uttar Pradesh he further stated that on 20th of march 2016 at about 02.45 hrs. In the early morning, he along with his associate namely Meheboob, Munna

and Zakir went to Betim to commit theft in the house of one Priyanka Naik at Betim. Further Zakir was told to remain outside, near S. T. Bus Stand and he along with Mehboob and Munna @ Dinesh Tiwari effected entry into the house of one Priyanka Naik by removing the roof tiles with intention to commit theft however, while they were in process of committing theft, the said Priyanka Naik woke up and started screaming. As such he and Dinesh Tiwari @ Munna tried to make her quiet by holding her mouth and subsequently Munna had also placed a knife on her neck, in order to treat her, however, both of them could not manage her. As such they called Mehboob for help, wherein Mehboob came and pressed the neck of the said lady and committed murder of Priyanka Naik, while he i.e. Rajesh Gaud and Munna were holding her mouth. Further he removed the bangles from the hands of the deceased lady, Mehboob removed the chain from the neck of the deceased lady, and Dinesh Tiwari @ Munna removed one earring from the ear of the deceased lady and there after all three of them came out of the house through rear door.”

10. In this case the applicant is Mr. Dinesh Tiwari alias Munna. From the statement, it is the case of the prosecution that Muuna held the mouth of the deceased and thereafter place the knife on her neck so that she does not scream. However, as this did not suffice, Mehboob, another co

accused was called for and with his help, the deceased was strangled. Throughout, Rajesha and Munna were holding her mouth. There is reference to removal of gold ornaments from the body of the deceased and effecting exit or escape from the scene of the crime.

11. The prosecution also relies upon discovery in terms of section 27 of the Evidence Act. This relates to the knife in question as well as some gold ornaments. One of the earrings of the deceased was found with the applicant. The knife was also discovered pursuant to a statement made by the accused. It is not possible to accept the contention of Mr. Pinto that the knife was found in an open space accessible to all and therefore, the discovery pursuant to the statement may hardly be regarded as the discovery in terms of section 27 of the Evidence Act. In the facts and circumstances of the case, prima facie it cannot be said that the weapon was not in a concealed state.

12. Mr. Pinto has himself relied upon the decision of the Hon'ble Supreme Court in the **State of H.P. vs. Jeet Singh 1999 (4) SCC 370**, in which it is held that there is nothing in section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is held that a fallacious notion that when recovery of any incriminating article was

made from a place which is open or accessible to others, it would vitiate the evidence under section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

13. The decisions relied upon by Mr. Pinto reiterates the scope and provisions contained in Section 27 of the Evidence Act in particularly, most of the decisions reiterate the position established in locus classiscus of the Privy Council in the case of **Pulukuri Kotayya V. Emperor (AIR 1947 PC 67)**. Obviously, there can be no dispute about the propositions laid down. However, it is the application of the principles to the facts and circumstances of each case is what is important. At the stage of deciding the application for bail, it is neither necessary nor advisable to approach the matter on merits as if this was a mini trial. Suffice to record that the material on record, is not

prima facie sufficient to distance the applicant from the crime which he is alleged to have committed. Rather the material on record, does prima facie refer to the complicity of the applicant in the crime alleged.

14. The seriousness of the crime is one of the parameters though certainly not the only parameter to be taken in to consideration at a stage of deciding an application for bail. There are other relevant considerations like the possibility of the applicant fleeing from justice or tampering with the evidence. On the aspect of tampering with the evidence, that does not seem to be any serious possibility since the charge sheet has already been filed and the investigation is completed. However, the applicant has not demonstrated that he has roots in Goa or for that matter in the society. This is also a case where the applicant has failed to demonstrate any change of circumstance since the rejection of his bail by the Session Court by order dated 23/12/2016.

15. For all the aforesaid reasons, this application for bail is dismissed.

16. However, by way of abundant caution, it is made clear that the observations in the order made by the learned Sessions Judge on 23/12/2016 or for that matter the present order, are only in the context of deciding the

application for bail and the same, shall not even be remotely taken into consideration by the learned Session judge at the stage of trial of the offences.

M. S. SONAK, J.

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