

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 1118 OF 2016

Kiran Kantilal Makwana	...	Applicant / Accused
Vs.		
The State of Maharashtra	...	Respondent

Mr. Prashant Pandey i/b. Mr. N.P.Bhavsar, Advocate for the applicant.
Mr. J.S. Lohokare, APP, for the State.
Mr. R.S. Dhaigude, PSI, Tulinj Police Station, Palghar, present.

CORAM: SMT.SADHANA S.JADHAV, J.
DATE : 8th March, 2017.

P.C.

Heard. This is an application under Section 439 of Cr.P.C. The applicant herein is charge-sheeted for the offence punishable under Section 302 of the Indian Penal Code in Crime No.541 of 2015 registered at Tulinj Police Station at the instance of the applicant. The investigation is completed and charge-sheet is filed.

2. It is the case of the prosecution that in the intervening night of 26th and 27th of October, 2015, the present applicant made a telephonic call to the police station, thereby informing the police that he was living separately from his first wife. He was residing with Rajkumar Chavan and his wife Sonali and their son Kunal aged 18 years. That Rajkumar Chavan had night duty. He informed the police that at the relevant time, Sonali was

misbehaving with his children i.e. Janhavi ad Lakshya and was abusing them. By an order dated 21.4.2015, the Civil Court had given the custody of both children to him who were residing with him. He further informed that there was a verbal altercation between Sonali and himself and in a fit of rage, he had given a blow by hammer on her head. He brought a kitchen knife and stabbed her. Her son Kunal woke up and tried to intervene to save his mother. At that time he was attacked by the applicant also. he also informed the police that he had attempted to commit suicide, however, regained his mental balance and therefore, called Tulinj Police Station. The police had asked him about the address, however, the applicant chose to go to the Police Station immediately. He approached the police and lodged a report.

3. On the basis of his statement, the police had gone to the given address. There they found two dead bodies – one of Sonali and the other was of her son Kunal. The police had informed the husband of Sonali about the said incident. The bodies were sent for autopsy. The post-mortem notes of Sonali would indicate that she had sustained incised wound on her sternum between 6th and 7th rib. Two incised wounds just below sternum which were gaping. One incised wound on the chest, another on 6th rib left side of the chest 6 cm. Sonali had sustained as many as 16 incised wounds.

@The cause of death is as follows :-

“Death due to hemodynamic shock due to trauma to vital organs sustained in a homicidal assault.”

4. At this stage, the learned counsel for the applicant vehemently submits that the post-mortem notes of Kunal does not find place in the compilation of the charge-sheet. However, the medical case papers are filed in the charge-sheet which show that he was taken to IASIS Hospital at about 4 a.m. He was conscious. he had grievous bleeding injury. There were multiple abrasions over his head. He had sustained contused lacerated deep puncture. He had died in the hospital while he was being treated. The post-mortem notes would indicate that Kunal had sustained about 3 fractured wounds, 3 incised wounds and two contused lacerated. The cause of death is same.

5. The learned counsel for the applicant submits that according to the complainant, there was a quarrel between Sonali and the applicant. The applicant had assaulted Sonali on her head, stabbed her with a knife. However, he was not the author of all the 16 injuries. According to the learned counsel for the applicant, Kunal had tried to intervene to save his mother. According to the learned counsel, some third person was the author

of some of the injuries sustained by Sonali and, therefore, the applicant cannot be held responsible for all the injuries sustained by deceased. All these facts are within the knowledge of the applicant and same can be proved under Section 106 of the Indian Evidence Act at the time of trial and therefore, at this stage, it would not be necessary to consider the said submission as it is unwarranted, unfounded and uncorroborated.

6. The learned counsel for the applicant submits that the statement given by the applicant, on the basis of which the offence was registered would be hit by Section 25 of the Indian Evidence Act as it was a statement made to the police and the same cannot be admissible evidence and therefore, the applicant deserves to be enlarged on bail. To substantiate his submission, the learned counsel for the applicant has placed implicit reliance upon a Judgment of the Hon'ble Apex Court in the case of **Bheru Singh S/o Kalyan Singh vs. State of Rajasthan Crimes (SC) 1994 Vol.I, 630.**

7. At this stage, the Court cannot be oblivious of the fact that the said judgment is delivered in an appeal challenging the conviction of the appellant by the High Court of Rajasthan. As on today, this Court is considering an application under Section 439 of Cr.P.C. In paragraph 16 of the said Judgment, the Hon'ble Apex Court has observed as follows :-

“The expression “accused of any offence” in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not.”

It is further observed as follows :-

“Where the first information report is given by an accused himself to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25 of the Evidence Act. No part of the confessional statement can be proved or received in evidence, except to the extent it is permitted by Section 27 of the Evidence Act. The first information report recorded under Section 154 Cr.P.C. is not a substantive piece of evidence.”

8. At the same time, the Hon'ble Apex Court has also held :-

“Where the accused himself lodges the first information report, the fact of his giving the information to the police is admissible against him as evidence of his conduct under S. 8 of the Evidence Act and to the extent it is non-confessional in nature, it would also be relevant under S. 21 of the Evidence Act but the confessional part of the first information report by the accused to the police officer cannot be used at all against him in view of the ban of S.25 of the Evidence Act.”

9. This Court is constrained to consider the present case against the applicant under Section 8 of the Evidence Act.

10. The learned counsel for the applicant has placed reliance upon a Judgment of the Hon'ble Apex Court in the case of **Madhya Pradeshsharma vs. Satish Chandra Dist magistrate, Delhi AIR 1954 SC 300**. The learned counsel has placed implicit reliance upon paragraph 4 of the said Judgment. The Hon'le Apex Court has observed as follows :-

“Broadly stated the guarantee in Art. 20(3) is against “testimonial compulsion”. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Art. 20(3) is “to be a witness”. A person can “be a witness” not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness the like.”

The observations of this judgment would have no relevance in the present case as the law was set in motion at the instance of the present applicant and the police had gone to the place where the dead

bodies were lying and therefore this Court is of the opinion that it was not just discovery of dead body but discovery of a fact at the instance of the accused himself and hence the present case would have no relevance.

11. The learned counsel for the applicant has placed reliance upon several other judgments only in order to substantiate his contention that the statement given by the applicant is not an admissible evidence and therefore, there would be no fruitful purpose in further incarceration of the applicant.

12. Upon perusal of the papers of investigation, it is clear that this was not an incident which had occurred on the spur of the moment. The applicant had initially given one blow with a hammer on the head of Sonali and thereafter the applicant literally butchered both the victims. His submission that it could be at the behest of the husband of the deceased or the wife of the applicant is an unfounded submission since at the relevant time there was no other person besides the applicant and the deceased at home.

13. Taking into consideration all these aspects and

moreover, the legal position that the conduct of the applicant can be considered by the trial Court under Section 8 of the Indian Evidence Act, this Court is not inclined to grant bail.

The Application stands rejected.

(SMT. SADHANA S.JADHAV, J.)