

N THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.482 OF 2016

Devidas Anant Gaikwad)...Applicant

V/s.
State OF Maharashtra)...Respondent

Mr. Vikas Shivarkar i/by Sambat Bhoite ,Advocates for the Applicant.

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

Mr. R.M.Khedekar, API Kamshet Police Station, Pune present.

CORAM : A. M. BADAR, J.

DATE : 19th JANUARY 2017.

P.C. :

Rule. Heard.

2 The Revision Applicant/Accused No.14 Devidas Anant Gaikwad in Sessions Case No.98 of 2016 arising from Crime No.200 of 2015 for the offences punishable under Sections 302, 120(B), 143, 147,148, 149 of IPC, under Sections 3, 25 and 27 of the Indian Arms Act as well as under Section 135 of the Maharashtra Police Act registered with Vadgaon Maval Police Station, District: Pune by this Revision Application, is challenging

the order below Exhibit 10 passed on 12.7.2016 by the learned Additional Sessions Judge, Pune thereby rejecting application for his discharge.

3 Heard learned counsel appearing for the applicant-accused. He argued that the only material available against the applicant-accused in the entire charge-sheet is confessional statement of co-accused no.12-Akshay Shinde recorded by investigator on 16.8.2015. In submission of the learned advocate for the applicant-accused no.14, this confessional statement is not itself of legally translatable evidence against the applicant-accused as per provisions of Section 27 of the Indian Evidence Act, 1872 and, therefore, the same cannot constitute the ground for presuming that the applicant-accused has committed an offence alleged against him. The learned advocate further argued that the revision applicant-accused no.14 was arrested on 13.8.2015 but nothing was recovered from him by the investigator despite availing of his police custody. Then on 16.8.2015, confessional statement of accused no.12-Akshay Shinde came to be recorded wherein it is stated that the said co-accused had procured pistol

and bullets from the present applicant-accused no.14-Devidas Gaikwad. However, this confessional statement has not resulted in discovery of any fact and, therefore, the same is of no assistance for the prosecution to demonstrate a ground for proceeding against the present applicant-accused.

4 The learned APP opposed the application by contending that charge of the conspiracy is also slapped on the applicant-accused. The learned APP rightly drew my attention to the provisions of Section 10 of the Indian Evidence Act, 1872 which prescribes that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence then anything said, done or written by anyone of such persons in reference to their common intention, after the time when such intention was first entertained by anyone of them, is a relevant fact as against each of the persons believed to so conspiring was also for the purpose of proving the existence of conspiracy. With this, the learned APP argued that as the confessional statement shows there was passing of fire arm from the applicant-accused- Devidas Gaikwad to co-accused Akshay

Shinde, there is sufficient material to frame charge against the applicant-accused.

5 I have carefully considered rival submissions and also perused the entire charge-sheet apart from impugned order rejecting application for discharge of the applicant-accused passed by the learned Additional Sessions Judge, Pune on 12.7.2016. The Revision Applicant-Accused No.14-Devidas Gaikwad has invoked revisional jurisdiction of this Court for challenging the said order rejecting his application for discharge. It is well settled that while exercising revisional jurisdiction, this Court cannot re-appreciate evidence and cannot act as Court of appeal. Such jurisdiction can be exercised only when there is manifest error of law or procedural defect which ultimately result in miscarriage of justice. Such jurisdiction has to be exercised in exceptional cases in which it is shown that there is flagrant miscarriage of justice. These aspects will have to be kept in mind while considering the present revision application.

6 At the outset, number of facts leading to the prosecution of the accused-persons including revision applicant-

accused are required to be placed on record. It is the prosecution case that in the year 2009 over the issue of political supremacy in elections, there was a dispute between Walunj family and Shinde family. According to the prosecution case, Mangesh @ Banti Dnyaneshwar Walunj (since deceased) is the Taluka Head of Maharashtra Navnirman Sena Party and the other fraction in the village Kamshet is the head of Shinde family. According to the prosecution case, election of Gram Panchayat at Kamshet was scheduled on 04.08.2015. Mangesh @ Banti Walunj alongwith his supporters visited several polling booths for supervising the performance of his group in the elections. When he was returning after his visit to the election booth at Nehru Vidyalaya, it is found that his vehicle was surrounded by other vehicles. His supporters then started removing other vehicles in order to make vehicle of the deceased free. It is averred that at that time, accused persons including Shekhar Shinde and the present applicant surrounded Mangesh @ Bani Walunj. Thereafter, Shekhar Shinde fired at Mangesh @ Banti Walunj from his pistol. At that time, co-accused Balu Shinde is also stated to be having pistol. Mangesh @ Banti

was then immediately shifted to Pioneer Hospital, Somatane Phata, Tal. Maval, Pune by his supporters where he was declared dead. The investigator has also received opinion from B.J.Medical College and Sasoon Hospital, Pune to the effect that Mangesh @ Banti Valunj died due to firearm injury.

7 Perusal of the charge-sheet shows that this incident of murdering Mangesh @ Bunty Dnyanesh Walunj was witnessed by several other witnesses such as Pradeep Dattatray Bardade, Kolhya @ Ravinda Ashok Jadhav, Kiran @ Surya Maruti Hagvane, Vinod Suresh Gaikwad, Randhir @ Gangya Budhaji Yadav, Mangesh Maruti Rane, Hiranman Mahadev Kedari, Mahesh Namdav Malpote, Ritesh Raghunat Walunj, Vijay Suresh Gaikwad, etc. Statements of these witnesses shows that since beginning, group of persons with accused no.1-Shekhar Shinde was behind deceased Mangesh @ Bunty in order to encash the opportunity to kill him. Statements of all witnesses recorded by the prosecution during the course of investigation does not show complicity of the present applicant-accused in the actual incident of killing Mangesh @ Bunty. Not a single witness has named the Revision Applicant-

accused as a person present on the spot aiding accused no.1-Shekhar Shinde. This is not even the case of the prosecution against the present revision applicant-accused.

8 It is not disputed by the learned APP that the only material which prosecution considers as a evidence against the revision applicant-accused is a confessional statement of the accused no.12-Akshay Shinde who came to be arrested in crime in question on 8.8.2015. The confessional statement came to be recorded by the Sub-Divisional Police Officer, Lonawala on 16.8.2015 in presence of two pancha witnesses. Including the inadmissible portion, this confessional statement was recorded for the purpose of eliciting information from him for discovery of the fact, if freely translated in English reads thus:

“I Akshay Sanjay Shinde, residing of Kamshet Taluka: Maval, District: Pune, while under arrest of Vadgav Maval Police Station, out of free will and without any pressure gives statement that I alongwith Shekhar Bajrang Shinde, Tushar Tukaram Shinde and other associates have decided prior to two months to eliminate Bunty @ Mangesh Walunj. Then after 15 days, I procured a pistol and rounds

from Devidas Ananta Gaikwad, prior to murdering Bunty. I myself, Shekhar Shinde and Tushar Shinde practised firing. I will show that spot and accompany me for that purpose.”

9 According to the prosecution case as reflected from the resultant panchanama of the same date, accused no.12-Akshay Shinde had shown field gat no.690 of Nane village as a place where practice of firing was done. Perusal of the resultant panchanama does not show that at the spot allegedly discovered by the accused no.12-Akshay Shinde, any empties or fired bullets were recovered.

10 Sections 24,25 and 26 of the Indian Evidence Act, 1872 prohibit use of confession made by accused person and makes it clear that confession made to a police officer can not be proved against accused-persons. Section 27 of the Indian Evidence Act, 1872 is an exception to these provisions. Section 27 of the Indian Evidence Act, 1872 reads thus:

“27. How much of information received from accused may be proved- Provided that, when any fact is deposed to as discovered in

consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

A bare perusal of this provision of the Indian Evidence Act, 1872 makes it clear that when any fact is deposed to as discovered in consequence of information received from an accused then only such part of such information which relates distinctly to the fact discovered thereby can be proved against the accused. At this juncture, observations in paragraph 5 of the Hon'ble Apex Court in the matter of **Pandurang Kalu Patil v. State of Maharashtra 2002 AIR (SC) 733** can be quoted with advantage. Paragraph 5 reads thus:

“5. “EVEN the recent decision in *State of Maharashtra V/s. Damu* this Court followed *Pulukuri Kottaya* with approval. The fallacy committed by the Division Bench as per the impugned judgment is possibly on account of truncating the word “fact” in Section 27 of the Evidence Act from the adjoining word “discovered”. The essence of Section 27 is that it was enacted as a proviso to the two preceding sections (see Sections 25 and 26) which imposed a complete ban on the admissibility of any confession made by an accused

either to the police or to anyone while the accused is in police custody. The object of making a provision in Section 27 was to permit a certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is confessional or non-confessional. Nonetheless, the ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the police (investigating officer) pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. Recovery, or even production of object by itself need not necessarily result in discovery of a fact. That is why Sir John Beaumont said in *Pulukuri Kottaya* that, “it is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced”. The following sentence of the learned Law Lord in the said decision, though terse, is eloquent in conveying the message highlighting the pith of the ratio:

“INFORMATION supplied by a person in custody that “I will produce a knife concealed in the roof of my house” does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the

knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.

It is thus, clear that information elicited from the accused in this case, if amounts to discovery of fact can be proved against accused persons. Thus, if on the discovered spot, evidence of use of firearm/pistol was found then, such information elicited from accused no.12-Akshay Shinde would have been a piece of relevant evidence. In this case, however, discovery panchanama effected in pursuance to the confessional statement of accused no.12-Akshay Shinde does not show any discovery of fact such as finding of empties or fired bullets at the place, where as per confessional statement of accused no.12-Akshay Shinde firing was done for purpose of practice.

11 It is well settled that at the stage of framing charge, Court is required to confine its attention to only that material collected by the Investigator which can be legally translated into evidence. In the matter of **Laxmi Koli Babita v. State of Maharashtra 2005 ALL MR (Cri) 571**, by placing reliance upon the judgments of the Apex Court in the matter of **Suresh Budharmal Kalani @ Pappu Kalani 1999 All MR (Cri) 95 (S.C.)** and **Kashimira Singh v. State of M.P. AIR 1952 SC 159**, this Court has clarified that confession of co-accused cannot be called in aid to frame charges against accused in absence of any other evidence to do so. Paragraph 4 of that judgment needs

reproduction and it reads thus:

“4 Having considered the rival submissions and after perusal of record there is substance in the grievance made on behalf of the applicant(s) before this Court that there is absolutely no evidence against them except the statement of co-accused which is pressed into service on behalf of the prosecution. Even the learned A.P.P fairly accepts this position. He was unable to point out any other material on record to implicate the Applicant(s) in the charge of conspiracy or otherwise. The Counsel for the applicant(s) has rightly placed reliance on the exposition of the Apex Court in Suresh Budharmal Kalani Alias Pappu Kalani Vs. State of Maharashtra, reported in 1998 S.C.C. (Cri) 1625 : [1999 ALL MR (Cri) 95 (S.C.), in particular paragraphs 6 and 7 of the said decision. The Apex Court has observed that at the stage of framing of the charge the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges. The Apex Court then relying on the exposition in the case of Kashimira Singh Vs. State of M.P Reported in A.I.R.1952

S.C.159 has observed that, confession of co-accused cannot be called in aid to frame charges against accused in the absence of any other evidence to do so. In the present case except the statement of co-accused, there is no other independent evidence. A priori, it will not be open to frame any charge against the applicant(s) herein. In view of this settled legal position, the applications as filed by the applicant(s) before the trial Court for discharge ought to have been allowed. Accordingly, the applicant(s) succeed. Impugned orders are set aside and Misc. applications preferred by the revision applicants before the trial Court are allowed. Ordered accordingly.”

Applications allowed.

12 Similar question was for consideration before this Court in the matter of **Arun Gulab Gawli v. State of Maharashtra 2007 ALL MR (Cri) 2562**. In that matter, according to the prosecution case, the first informant Ahmed Rahim was called at Dagdi Chawl at Agripada. He was asked to produce his employer Ratilal Shah or in the alternative to bring 4 boxes, meaning thereby a sum of Rs.4 Lakhs. This direction was given by accused named Prakash Krishna Joglekar. In that matter, co-accused disclosed name of Arun Gulab Gawli and the prosecution sought to frame a charge of conspiracy against Arun Gulab Gawli. His discharge application was rejected by the trial Court and that

is how the matter came before this Court. This Court by relying upon the judgment in the matter of **Suresh Kalani @ Pappu Kalani v. State of Maharashtra 1998(7)SCC 337, State of UP through CBI v. Sanjay Singh 1994 Supplementary (2) SCC 707, Prabhakar Pal 2005 2005 All MR (Cri) 739, Md. Yakub v. State of West Bengal 2004(4) CHN 406** has held that the material which can be legally translated into evidence can only be considered at the time of framing of charge. It is further held that test of grave suspicion was not satisfied and resultantly, the Petitioner therein came to be discharged. Facts of the case in hand are identical with the facts in the said reported case. In the case in hand, confessional statement of accused no.12-Akshay Shinde has not resulted in any recovery or discovery of fact. Even otherwise, statement of accused no.12-Akshay Shinde to the effect that he had procured pistol and rounds from the present Revision Applicant-accused-Devidas Gaikwad amounts to confession before a police officer which cannot be proved as per provisions of Section 25 of the Indian Evidence Act, 1872. Therefore, this statement of accused no.12-Akshay Shinde cannot be translated into legal evidence against accused persons during the course of trial. As such, it is not possible to hold that this confessional statement of accused no.12-Akshay Shinde forms a ground for presuming that accused had committed an offence which is requirement of Section 228 of the Code of Criminal Procedure, 1973.

13 The Investigator is also alleging commission of the offence punishable under Section 120B of the IPC by accused persons including the present Revision Applicant-accused. What amounts to criminal conspiracy is defined by Section 120-A of the IPC. It reads thus:

“120-A. Definition of criminal conspiracy-

When two or more persons agree to do, or cause to be done-

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.”

Perusal of this definition of the offence of criminal conspiracy makes it clear that it is the unlawful company. Direct evidence for such offence is generally not available. However, still in order to frame charge for the offence punishable under Section 120B of the IPC, prosecution is required to place some material on record for inferring commission of offence punishable under Section

120B of the IPC. Confession of co-accused which is undisputable the only material against the Revision Applicant-accused is not sufficient to form grave suspicion about commission of offence of criminal conspiracy by the Revision Applicant-accused. As such, Section 10 of the Evidence Act is of no assistance to the prosecution.

14 The investigator has alleged commission of offence punishable under Sections 3, 25 and 27 of the Indian Arms Act, 1959 . Section 3 of the Indian Arms Act deals with requirement of licence for acquisition and possession of fire-arm. Section 25 of the said Act prescribes punishment for manufacturing, sell, transfer etc of any arms and ammunition in contravention of provisions of Section 5 which deals with licence for manufacturing, sell of arms and ammunition. Section 27 of the Arms Act prescribes punishment for using arms in contravention of provisions of Section 5 of the said Act. So far as the Revision Applicant-accused is concerned, there is no material to demonstrate prima-facie case against him for commission of such offences.

15 Therefore, I am of the considered view that despite, scrutiny of the entire material against the Revision Applicant-accused, with a view to find out as to whether there is a ground for presuming that he has committed any of the offences against

accused persons, I am unable to find out any legal material against the Revision Applicant-accused. Even no circumstances are available in the charge-sheet which remotely gives rise to a suspicion that the Revision Applicant-accused is a part of conspiracy to eliminate the deceased Buntty @ Mangesh. The learned Additional Sessions Judge has failed to consider these aspects which has ultimately resulted in manifest error of law on the face of record while dismissing the application for discharge moved by the revision applicant-accused.

16 In the result, the Revision Application is allowed. The impugned order is quashed and set aside. The application moved by the Revision Applicant for discharge from Sessions Case NO.98 of 2016 pending on the file of the learned Additional Sessions Judge, Pune is allowed. The Revision Applicant is discharged from the said sessions case. Rule is made absolute in terms of prayer clause (b).

(A. M. BADAR, J.)