

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

CRIMINAL APPLICATION (BA) NO.165 OF 2017

Pawan s/o Sundarlal Gour

..VS..

The State of Maharashtra, Crime Branch, through Police Station Ganeshpeth,
Nagpur

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

Court's or Judge's Order

Shri P.P. Kotwal, Counsel for the Applicant.
Mrs. K.H. Deshpande, Addl.P.P. for the Non-applicant/State.

CORAM : P.N. DESHMUKH, J.
DATED : FEBRUARY 23, 2017.

One of accused in Crime No.184 of 2016 registered for the offences punishable under Sections 302, 307, and 109 read with Section 34 of the Indian Penal Code and Section 4 read with Section 25 of the Arms Act, 1959 has applied for bail.

Heard learned counsel for the applicant and learned Additional Public Prosecutor.

It is submitted that applicant is involved in this case only on the oral dyeing declaration alleged to be made by deceased to his wife, complainant Nasrin Bano wald Sk. Akbar and his dyeing declaration recorded by police on 30.8.2016. However, it is contended that there is no corroborative evidence on record to oral dyeing declaration nor dyeing declaration dated 30.8.2016 recorded by police is reliable as in the

entire charge-sheet there is nothing to establish if at the time of recording dyeing declaration, deceased was physically examined and was certified to be in a fit physical condition to make a statement. It is further contended that in fact there is overwriting on the dyeing declaration changing date from 31.8.2016 to 30.8.2016.

Learned counsel for applicant has contended that except for statement of witness namely Vicky Gourkar, there are no other eyewitnesses and even as per said eyewitness one Pawan is stated to have assaulted deceased, however, there is no investigation if Pawan is applicant and that no identification parade is held to identify applicant to be the same Pawan from Vicky. It is further contended that there are other statements, however, the same are hearsay and thus it is submitted that since there is no recovery of any incriminating article from applicant nor he has a criminal antecedent, application be allowed as charge-sheet is filed and applicant is in custody since 31.8.2016.

Learned Additional Public Prosecutor opposed the application as per its reply on record and supports its case based on dyeing declaration recorded on 30.8.2016 by relying upon statement of Dr. Suchitra Somkuwar and has contended that from her statement it is established that deceased was mentally and physically fit when dyeing declaration came to be

recorded. Learned Additional Public Prosecutor, however, has not disputed fact of Pawan referred by eyewitness by his maiden name only and that there is no test identification to parade held to fix his identity and has contended that application be rejected.

In the light of submissions advanced as aforesaid, on report lodged by wife of deceased she has alleged that when she learnt about her husband having been admitted in hospital, she visited hospital where deceased is stated to have informed her that he was assaulted by, “होटलवाला राजा, मुन्ना, भु-या, और पवन”. Admittedly, there is no evidence corroborating above contents of report. Oral dyeing declaration is even otherwise is a weak type of evidence which could be relied only same is found corroborated with ample other evidence. So for as application in hand is concerned, involvement of applicant, as per oral dyeing declaration, is only by referring him as Pawan. As such, only maiden name of one Pawan since is stated by complainant that by itself cannot be directly linked up to say that Pawan is applicant alone, particularly in the absence of any investigation in that aspect.

In view of contents of report, particularly oral dyeing declaration as aforestaed, on perusal of statement of Vicky, sole eyewitness, also reveals that assault was committed by one Pawan. It is material to note that statement of alleged eyewitness is recorded

after 40 days of the incident. Admittedly, said witness though claims to have witnessed the incident of assault by one Pawan, he took no step to intervene in the assault or even to inform to police, nor took steps to save the victim. Considering delay in recording statement of eyewitness and his conduct, makes such statement doubtful.

On considering case of prosecution with reference to dyeing declaration recorded by police, contents of this document appear to be totally cryptic as except for writing name of deceased thereon what is sated is “मुझे होटलवाला राजा, मुन्ना, भु-या, और पवन ने मारा.” Again no full name of Pawan is mentioned. There is no endorsement by medical officer certifying physical condition of deceased before recording his dyeing declaration, though same appears to be signed by two medical officers. On bare perusal of dates mentioned by both medical officers, there appears overwriting on it changing date from 31.8.2016 to 30.8.2016. Fact of such deliberate change in date is found, substantiated as from requisition memo to medical officer filed with the charge-sheet reveals that it is dated 31.8.2016 on which date patient is certified to be not fit to make a statement. In view of such medical certificate therefor, it appears that prosecution agency got date mentioned on the dyeing declaration changed from 31.8.2016 to 30.8.2016.

In the circumstances, though learned Additional Public Prosecutor refers to statement of Dr. Suchitra Somkuwar since it is recorded after 15 days, that can be of no use to establish case of prosecution on the point of physical fitness of deceased at the time of recording statement, particularly in the absence of endorsement by any of the medical officers to that effect on the dyeing declaration.

In that view of the matter, application is liable to be allowed as even otherwise both co-accused are already released on bail by the Trial Court. Hence, the following order:

Applicant shall be released on bail on his executing P.R. Bond in the sum of Rs.50,000/- with one surety in the like amount.

While on bail, applicant shall attend Ganeshpeth Police Station, District Nagpur once in three months on the first day of each such month, pending Trial.

Needless to say that observations as aforesaid are *prima facie* and learned Trial Judge shall not get influenced with the same and shall independently evaluate the evidence at the time of Trial.

JUDGE

!! BRW !!

C E R T I F I C A T E

I certify that this Order/Judgment uploaded is a true and correct copy of original signed Order.

Uploaded by : Bhushan R.Wankhede.
(Personal Assistant)

Uploaded on :- 24/2/2017