

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

CRIMINAL APPLICATION (BA) NO.1053 OF 2016
(Deepak s/o Fransis Alexander vs. The State of Maharashtra)
WITH CRIMINAL APPLICATION (BA) NO.1054 OF 2016
(Frank s/o Anthony Bhushanam vs. The State of Maharashtra)

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

Shri R.K. Tewari, Advocate for applicants.
Shri S.S. Doifode, Additional Public Prosecutor for
respondent.

CORAM : P.N. DESHMUKH, J.

DATED : FEBRUARY 15, 2017

Both these criminal applications are heard together and are decided by this common order since they are arising out of Crime No. 305/2015 registered under Sections 143, 147, 148, 149, 302, 307, 396, 397, 452 and 120-B of Indian Penal Code, Section 4/25 of Arms Act and Section 135 of Maharashtra Police Act by Police Station, Gittikhadan, Nagpur.

Heard Shri Tiwari, learned Counsel for applicants, and Shri Doifode, learned Additional Public Prosecutor for respondent.

Shri Tiwari, learned Counsel for applicants, has submitted that from the report lodged by Mikhil Fransis, brother of deceased Mohit, no involvement of applicants is established in any manner as according to its contents, co-accused committed assault on deceased Mohit along with others. It is contended that applicants came to be arrested on the basis of statements of

Shubham and Martin, who have stated to have seen the applicants running from the spot of incident and have identified in the test identification parade. It is thus submitted that this is the only evidence implicating applicants in the present crime. However, by referring to earlier orders passed by this Court granting bail to co-accused in Criminal Application (BA) Nos. 572/2016 and 758/2016, learned Counsel has contended that this Court has already taken a view that test identification parade in this crime is contrary to guidelines prescribed in the Criminal Manual and thus, those two co-accused were released on bail as their involvement was also only on the basis of test identification parade. It is, therefore, prayed that applications be allowed.

Shri Doifode, learned Additional Public Prosecutor for respondent, has opposed the applications on the ground that applicant Frank, who is identified in the test identification parade, has been involved by one of the witnesses, namely, Martin in his statement recorded under Section 164 of Code of Criminal Procedure. It is contended that one dagger along with blood stained clothes and knife are seized from applicants Deepak and Frank respectively at their instance under Section 27 of Evidence Act. It is also submitted that though names of applicants are not mentioned in the report, it is specifically mentioned by complainant that along with four accused persons, there were some other accused, who assaulted deceased and thus, considering said contents and statements of Martin and Shubham about their seeing applicants running from

the spot, involvement of applicants is established in the present crime. The applications are, therefore, prayed to be rejected.

In the background of aforesaid facts, on perusal of report, it is seen that on 26/6/2015 assault came to be committed on deceased Mohit. Names of co-accused Tambi Bablu Grabiyal, Brian Bastian alias Ibrahim Sheikh, Anna Palti and Maddy alias Ashish Rathod are specifically mentioned therein, who having been armed with sword, knife, etc. along with other co-accused on entering in the office of complainant all of a sudden committed assault on his brother Mohit, who died on the spot. Bare perusal of the report would reveal that except for above four persons stating to have committed assault on deceased Mohit by knife, sword, etc., general statement is made with respect to other co-accused, who are stated to be present with them. Thus, it is found that no specific involvement or overt act is attributed to co-accused in the report.

As per prosecution, applicants are involved since have been identified by Shubham and Martin in test identification parade. However, it is material to note that this Court while considering Criminal Application (BA) Nos.572/2016 and 758/2016 granted bail to co-accused Manoj Gajbhiye and Shaikh Salman, holding that test identification parade held is totally in violation of procedure prescribed in the Criminal Manual and thus, held that since test identification parade is totally in violation of prescribed procedure and law by now settled, evidence collected against those co-accused with

regard to their identification would offer no assistance to prosecution.

In view of finding of facts as aforesaid, since more than two accused persons were paraded so as to enable witnesses to identify the accused persons, no case can be said to be made out on behalf of prosecution involving applicants so far as test identification parade is concerned.

Though learned Additional Public Prosecutor has referred to statement of Martin recorded under Section 164 of Code of Criminal Procedure, admittedly this is recorded two months after statement recorded under Section 161 of Code of Criminal Procedure of said witness which, even otherwise, only establishes fact of applicant Frank having been seen by him running from spot of incident and nothing more.

Considering the available evidence against applicants as aforesaid, both applications are thus liable to be allowed by imposing suitable conditions as charge-sheet is filed and though other evidence available against applicants is of recovery of clothes and weapons as aforesaid, that evidence by itself is not sufficient to establish applicants' involvement in this crime :

In the circumstances, criminal applications are allowed. Applicants shall be released on bail on their executing P.R. bonds in the sum of Rs.50,000/- each with one surety each in like amount. Applicants shall mark their presence with Police Station, Gittikhadan, Nagpur on first day of every three months. Applicants shall furnish proof of their residential address to

Investigating Officer and shall update the same in the event of any change therein.

JUDGE

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