

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

(I) CRIMINAL APPLICATION (BA) NO.1111 OF 2016

Anand alias Banti s/o Dwarkaprasad Jaiswal,
aged about 38 years, occupation :
business, r/o Itwara Chowk, Yavatmal,
Tahsil and District Yavatmal. ... Applicant

- Versus -

The State of Maharashtra, through
Police Station officer (City), Police
Station, Yavatmal. ... Respondent

Shri Shashank V. Manohar, Advocate with Shri A.S. Manohar, Advocate
for applicant.

Shri N.B. Jawade, Additional Public Prosecutor for respondent.

Shri A.B. Moon, Advocate for intervener.

(II) CRIMINAL APPLICATION (BA) NO.1116 OF 2016

Vikas @ Vikki Rai s/o Nandlal Rai,
aged about 33 years, occupation :
business, r/o behind Ankush Lodge,
near Apsara Talkies, Yavatmal,
Tahsil and District Yavatmal. ... Applicant

- Versus -

The State of Maharashtra, through
Police Station officer, Police
Station, Yavatmal (City), District
Nagpur. ... Respondent

Shri R.M. Daga, Advocate for applicant.

Shri N.B. Jawade, Additional Public Prosecutor for respondent.

Shri A.B. Moon, Advocate for intervener.

CORAM : P.N. DESHMUKH, J.

DATED : FEBRUARY 10, 2017

Both these applications as are arising out of Crime No.573/2016 registered for the offences punishable under Sections 302, 364, 143, 147, 148, 149 and 120-B of Indian Penal Code and Sections 3/25 and 4/25 of the Arms Act are considered together and decided by this common order.

2) Heard Shri Manohar, learned Counsel for applicant in Criminal Application No. 1111/2016, Shri Daga, learned Counsel for applicant in Criminal Application No.1116/2016, Shri Jawade, learned Additional Public Prosecutor for respondent, who has filed affidavit-in-reply and also placed on record crime chart and Shri Moon, learned Counsel for intervener/complainant, who has also placed on record affidavit of complainant in both these applications bringing on record fact of alleged threat to life of complainant Srushty, daughter of deceased Pravin, in view of anonymous letter received by her extending threats to her and her family members, upon which N.C. report is registered against unknown persons. Learned Counsel Shri Daga has also placed on record

certified copy of report filed by the Investigating Officer under Section 169 of Code of Criminal Procedure to discharge co-accused Rajesh alias Jugya Maharaj Ganeshprasad Dube along with order of learned Chief Judicial Magistrate accepting report and order of learned Additional Sessions Judge granting bail to said co-accused.

3) Shri Manohar, learned Counsel for applicant in Criminal Application No.1111/2016, has submitted that according to the case of prosecution, incident took place on 27/8/2016 at 9 a.m. while Pravin was admitted dead in the Hospital at about 9.15 a.m. Police arrived along with Dog Squad at spot at 10.30 a.m. and thereafter drew inquest panchanama at 1.30 p.m. and forwarded dead body for post mortem. However, till that time, admittedly no first information report was filed, which is lodged by Srushty, daughter of deceased Pravin, at 3 p.m., upon which crime as aforesaid came to be registered. Learned Counsel by referring to the contents of the report has tried to demonstrate as to how same is a concocted document. It is contended that so called eye witnesses, namely, Nishant Chapariya and Mayur Desai had arrived on the scene of offence after the incident took place and since case of prosecution is mainly based on the report by the eye witness as well as statements of two other eye witnesses named above, said document needs to be considered, however, statements of so called eye witnesses are required to be kept out of consideration as they do not inspire confidence inasmuch

as there are material inconsistencies in them and are recorded two days after the incident.

4) It is further submitted that though according to report, incident of alleged assault on deceased by use of fire arms and other weapons took place outside his office, spot panchanama falsifies said fact as according to this document, blood stains, etc. were found on the walls inside the office, which is one other aspect, which creates doubt in the truthfulness of first information report. It is pointed out that though according to contents of report, co-accused Shyam Jaiswal had accompanied applicant Anand alias Banti Jaiswal in the same car and had alighted from the car together and alleged to have thrown chili powder and then fired gun shot on deceased, co-accused Shyam Jaiswal is not charge-sheeted for the reasons best known to prosecution. Thus, by creating doubt in the case of prosecution as aforesaid, it is submitted that as according to report, deceased himself was a criminal element, possibility of assault upon him by someone else on the day of incident and of false implication of applicant cannot be ruled out and, therefore, it is prayed that as on completion of investigation, charge-sheet is filed before the competent Court, application be allowed by imposing conditions.

5) Shri Daga, learned Counsel for applicant in Criminal Application No. 1116/2016 has adopted submissions advanced as above

and in addition to that, has submitted that statements of alleged eye witnesses Nishant Chapariya and Mayur Desai are similar to each other wherein involvement of applicant is by way of general allegations. It is contended that co-accused Shyam Jaiswal, whose presence is mentioned in the report along with co-accused Anand alias Banti Jaiswal, has not been charge-sheeted and though role of applicant Vikas alias Vikki Rai is similar to co-accused Jugya Maharaj Dube, said co-accused Jugya Maharaj is discharged under Section 169 of Code of Criminal Procedure. It is further contended that prosecution in spite of relying upon statements of eye witnesses Nishant Chapariya and Mayur Desai, who along with present applicant, have involved Babai Dube and Manish alias Munna Dube, no investigation is carried out with reference to involvement of these co-accused as they are neither shown as absconding accused in the charge-sheet nor are charge-sheeted. Lastly, by commenting upon statement of Santosh, who claims that immediately after the incident, complainant narrated him incident, there is no such reference by complainant in her report of her narrating incident to Santosh and as such, it is submitted that such statement by itself is not sufficient to establish involvement of applicant. Learned Counsel has concluded the submissions contending that in view of general allegations levelled against applicant Vikas alias Vikki Rai, application is liable to be allowed as even according to charge-sheet, what is alleged to be recovered at the instance of applicant is one country-made revolver, but no such weapon is

attributed to said applicant in the entire incident.

6) Shri Jawade, learned Additional Public Prosecutor for respondent, has opposed the applications and commenced his submissions by referring to crime chart and pointed out that according to it, crime at serial no.18 registered by Wadgaon Road Police Station under Sections 307, 143, 147, 148, 149 and 120-B of Indian Penal Code and Sections 3/25 and 4/25 of Arms Act and crime at serial No.20 registered by the same Police Station under Section 307 read with 34 of Indian Penal Code and Section 3/25 of the Arms Act are in respect of earlier assault committed by applicants upon deceased involved in this case. Thus, an attempt is made to establish that applicants even prior to the present incident on two occasions had committed murderous assault on deceased Pravin.

While advancing submissions on merits, it is contended that assault was initiated upon tip given by co-accused to applicants about presence of deceased in the office at the material time and accordingly both applicants along with other co-accused are alleged to have arrived on the spot and committed assault on deceased causing his death. To substantiate this submission, learned Additional Public Prosecutor has submitted that there are C.D.Rs. on record, which establish telephonic contact between co-accused and applicants, however, has fairly conceded that no transcription of conversation whatsoever took place between said

co-accused and applicants is on record. Thereafter by referring to spot panchanama, it is submitted that said document establishes that incident started outside the office and was continued in the office and, therefore, contention of applicants about the spot panchanama falsifying contents of first information report is without substance. Thereafter by referring to post mortem notes, it is submitted that out of 37 injuries sustained by deceased, 26 are chop and incised wounds and 6 injuries are by fire arms, which fact is stated to be sufficient to establish the gravity of offence and brutal attack committed upon deceased.

7) Shri Jawade, learned Additional Public Prosecutor for respondent, by referring to the statements of eye witnesses Nishant Chapariya and Mayur Desai has submitted that even if statements of these witnesses, though named in the first information report as eye witnesses are recorded after two days of incident, that by itself does not establish that these are got up witnesses. It is contended that since complainant in her first information report has named applicants as assailants along with other co-accused and also named aforesaid two witnesses, who have witnessed the incident, their statements can be relied upon at this stage as they prima facie establish involvement of applicants. It is, therefore, prayed that applications be rejected.

8) In the background of submissions as aforesaid, report, which

is admittedly lodged at 3 p.m. after the incident, which took place at 9 a.m. on 27/8/2016, reveals that while complainant Srushty was present in the porch with deceased father Pravin talking with Santosh Chormule while co-accused Monu Bajad was cleaning the office premises, one white coloured scorpio arrived on the spot, which was occupied by applicant Banti Jaiswal and co-accused Shyam Jaiswal and behind them co-accused Vishal Dube, Rohit Jadhav and Shatru along with others arrived on two wheelers, to whom complainant claims can identify by face. It is further stated that then applicant Banti Jaiswal and Shyam Jaiswal alighted from the vehicle when co-accused Vishal Dube caused damage to the front wind-screen of car and at the same time, applicant Banti Jaiswal, Vishal Dube and Shyam Jaiswal threw chili powder on the face of deceased and Vishal Dube and applicant Banti Jaiswal immediately opened fire upon Pravin, due to which he fell down. It is further stated that applicant Banti Jaiswal, Vikas Dube and Shyam Jaiswal then extended threats to complainant saying that she has witnessed the incident and if she discloses it to anyone, she would be killed. It is lastly stated that after the threats, she went running upstairs when Nishant Chapariya and Mayur Desai arrived and on seeing them, all the assailants ran away by taking away with them co-accused Monu Bajad.

Before considering contents of first information report, it is to be noted that co-accused Monu Bajad is the person, who according to prosecution, had given tip to accused persons about presence of deceased

in the office. On considering contents of report as above, it is material to note that at the time of incident, applicant Banti Jaiswal and Shyam Jaiswal had arrived on the spot together in one vehicle. The role attributed to them along with co-accused Vishal Dube is similar, i.e. of throwing chili powder on the face of deceased and then Vishal Dube and applicant Banti Jaiswal opening fire on deceased Pravin. Further role attributed to applicant Banti Jaiswal and Shyam Jaiswal is also similar with regard to their giving threats to complainant as aforesaid. However, admittedly Shyam Jaiswal is not charge-sheeted for want of sufficient evidence.

9) Similarly, from the report, it is material to note that presence of Santosh Chormule is stated therein, who immediately prior to incident was talking with deceased Pravin. However, on considering his statement, it does not substantiate the case of prosecution involving applicants as assailants of deceased as according to his statement while he and deceased Pravin were sitting inside the Office and were discussing, all of a sudden he felt uneasiness in his eyes and, therefore, he closed his eyes when he heard noise of fire arms from the door side and heard Pravin shouting and on opening his eyes, saw deceased lying on the sofa and since he got afraid, he left the spot. As such, nothing can be established from his statement except for the fact that incident of opening firing upon deceased took place when he was inside the office.

10) In view of the case of prosecution as put forth claiming Nishant Chapariya and Mayur Desai as eye witnesses to the incident, statement of Nishant Chapariya when perused, it is revealed that on 27/8/2016 he reached the office of deceased at 8.45 a.m. where co-accused Monu Bajad was present and deceased informed him that he and Mayur should remove the punctured tyre of his vehicle and accordingly they went along with punctured tyre to remove the puncture. He states that as there was no puncture in the tyre, they immediately came back at about 9 a.m. to the house of deceased and saw that from outside the office, applicant Banti Jaiswal and co-accused Vishal Dube were firing from revolver on deceased while co-accused Rohit Jadhav, Anand Gupta alias Andry, Javed Sheikh, Shatru alias Dharmendra Raut, Shyam Jaiswal, Jugya Maharaj Dube, Babai Dube, applicant Vikki Rai, Manish alias Munna Dube and Nitin Nigote armed with sharp weapons entered inside the office premises of deceased and committed assault upon him while complainant was standing in the porch.

In the later part of his statement, Nishant Chapariya has stated that while assailants were going from the spot, they extended threats to complainant and thereafter left the spot on their vehicles by taking with them co-accused Monu Bajad. Admittedly, statement of Mayur Desai is similar to that of Nishant Chapariya. On considering these statements, it is material to note that allegations levelled against applicant Vikas alias Vikki Rai are of general in nature, who is stated to be present along with

above named co-accused persons having armed with sharp weapons and is stated to have committed assault on deceased. No specific role is attributed to applicant Vikas alias Vikki Rai. As per post mortem notes, as pointed out by learned Additional Public Prosecutor, deceased has sustained as many as 37 injuries, out of which 26 are chop and incised wounds and 6 are fire arm injuries. In that view of the matter, it cannot be said that what are the injuries, which can be attributed to applicant Vikas alias Vikki Rai.

11) Moreover, while considering statements of aforesaid eye witnesses, it is also material to note that though they are named as eye witnesses in the first information report dated 27/8/2016, their statements were recorded three days after the incident, i.e. on 30/8/2016 and though both these witnesses claim that after applicant Anand alias Banti Jaiswal and Vishal Dube fired from revolver, applicant Vikki Rai and other co-accused committed assault by sharp weapons, no such facts are mentioned in the first information report as according to complainant, applicant Anand alias Banti Jaiswal and Shyam Jaiswal reached in one vehicle, both of them alighted from vehicle and then they along with co-accused Vishal Dube threw chili powder on the face of her father and then Vishal Dube and Bunti Jaiswal opened fire due to which deceased fell down and thereafter all the accused by extending threats left the spot. Complainant is totally silent about subsequent assault upon deceased after

he sustained fire shot as stated by Nishant Chapariya.

12) Similarly, another point, which needs consideration is whether Nishant Chapariya and Mayur Desai can be considered as eye witnesses in order to rely upon truthfulness of their statements. According to both these witnesses, they returned back to the office of deceased immediately at about 9 a.m. and as such, had witnessed the incident. However, their presence is doubted in view of contents of report where complainant has stated that after assault, all the assailants left by two wheelers and four wheeler and immediately Nishant Chapariya and Mayur Desai arrived on the spot. In fact, she has stated that on seeing Nishant Chapariya and Mayur Desai, accused persons ran away from the spot. In that view of the matter, complainant appears to be specific about arrival of Nishant Chapariya and Mayur Desai on the spot after the incident, who then carried injured Pravin to Hospital. In fact, presence of eye witnesses Nishant Chapariya and Mayur Desai at the time of incident is further doubted from the additional statement of complainant recorded on 28/10/2016 wherein she has reiterated that after the assault, assailants extended threats to her, due to which she went upstairs and contrary to contents in the report has stated that thereafter co-accused, who had arrived on two wheelers, committed assault on her father by sharp weapons when Nishant Chapariya and Mayur Desai arrived and on seeing them, accused left the spot. Similarly, complainant in her additional

statement has stated that she learnt about arrest of applicant Vikas alias Vikki Rai along with other co-accused in the present crime. However, no test identification parade is held to identify applicant Vikas alias Vikki Rai.

13) In view of contents of report and additional statement of complainant as aforesaid, as it is prima facie found that Nishant Chapariya and Mayur Desai arrived on the spot after the assault, it is difficult to consider if they have witnessed the incident. In view of evidence of alleged two witnesses put forth by prosecution, which for the above reason does not appear to be reliable, when documents filed with the charge-sheet are considered in order to satisfy if complainant Srushty was present when incident took place, it is material to note that from the Dog Squad Handler's report, it is found that information of incident was received by Police at 9 a.m. and call was given for Dog Squad at 10.25 a.m. and accordingly, Police officials along with Dog Squad visited the spot at 10.40 a.m. In this report, in column no.20, it is stated that unknown persons had committed assault on deceased Pravin. From the inquest panchanama, it is found that same is drawn at 1.30 p.m. in the mortuary of Government Hospital while report is lodged at 3 p.m. It is, therefore, material to note that complainant had enough opportunity to meet Police before lodging her report at 3 p.m. It is thus found that complainant did not make immediate disclosure to Police.

14) Though prosecution has relied upon crime chart stating that 27 crimes by various Police Stations are registered against all the accused involved in the present case and by referring to two crimes at serial nos.18 and 20 as aforesaid, has stated that both these crimes are in respect of attempt of murder upon Pravin by applicants, learned Additional Public Prosecutor, on instructions, has made a statement that though in crime at serial no.20, victim is deceased Pravin, none of the accused involved in this case are accused in that crime and in crime at serial no.18, applicant Vikas alias Vikki Rai is not charge-sheeted. From the entire chart, it is even otherwise not possible to say that all the accused involved in this crime are common in all the offences mentioned in the chart, except for Crime No. 573/2016, out of which present applications arise and which is shown at serial no.1. Similarly, like co-accused Shyam Jaiswal, who is not charge-sheeted in this crime, it is found that another co-accused Rajesh alias Jugya Maharaj Dube, who is named by both the eye witnesses to have assaulted deceased along with other co-accused by sharp weapons, is discharged under Section 169 of Code of Criminal Procedure, which report is accepted by Chief Judicial Magistrate after considering intervention made therein by complainant Srushty and thus, said co-accused was released on bail by learned Additional Sessions Judge, who since was in custody. Similarly, though from the statements of eye witnesses, apart from Jugya Maharaj Dube, co-accused Babai Dube and Manish alias Munna Dube are also attributed with similar role as that of

applicant Vikas alias Vikki Rai and other co-accused, admittedly, no investigation is carried out with reference to their involvement in the present assault as neither of them is shown as absconding in the charge-sheet nor are charge-sheeted.

15) In the circumstances, considering the nature of evidence available against applicants, prima facie it is found that there is no sufficient evidence against them to curtail their liberty pending trial, applications are, therefore, liable to be allowed as per order below by imposing suitable conditions in view of complainant's apprehension about alleged threats extended to her and her family members as per anonymous letter, upon which N.C. report is registered :

ORDER

- 1) Both 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.
- 2) While on bail, applicants shall not enter the territorial limits of Yavatmal city pending trial.
- 3) While on bail, applicants shall mark their presence with concerned Police Station within whose jurisdiction they stay, on first day of every three months pending trial.
- 4) Applicants shall submit proof of their residence to Police Station, Yavatmal City and concerned Police Station within whose jurisdiction they prefer to stay and shall update the same in the event of any change therein.

5) The criminal applications are accordingly allowed. However, it is made clear that learned Sessions Court shall not get influenced with the observations as above and shall independently evaluate the evidence at the time of trial.

JUDGE

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