

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO.1059 OF 2018

Vitthal Sudam Barate	..Applicant
vs.	
The State of Maharashtra	...Respondent

Mr.Kuldeep S. Patil for Applicant.
Ms. Veera Shinde, APP for Respondent.

CORAM : P. N. DESHMUKH, J.

DATE : 24th APRIL, 2018

P.C.:

. This application is heard finally by consent of learned APP and learned counsel for applicant.

2. The applicant involved in C.R. No.I-253/2017 registered at Haveli Police Station, Pune for offence punishable under section 302, 307, 143, 147, 148, 149 of IPC and section 3, 4 and 25 of Arms Act and section 135 of Mumbai Police Act has filed this application for bail. Offence came to be registered on 14/8/2017 on the basis of report lodged by Vishal Rajendra Shelke, eye witness to the incident of assault on deceased Swapnil Deshmukh at Kedareshwar Guest House, Sinhagad.

3. Learned counsel for applicant has submitted that applicant's involvement in this crime is based only on subsequent statement of complainant Vishal Shelke which is recorded under section 164 of Cr.P.C. on 16/8/2017 where complainant states that he learnt about involvement of applicant as conspirator of this crime. However, it is contended that the nature of statement of Vishal Shelke is not admissible being hearsay evidence. It is further contended that no explanation is put forth by

prosecution as to how Vishal Shelke was made to identify the suspects in the test identification parade held on 8/9/2017 though according to the case of prosecution applicant's involvement was established for the first time from the additional statement of Vishal Shelke recorded under section 164 of Cr.P.C. on 16/9/2017 and admittedly applicant's name nor any role is attributed in the report of complainant dated 14/8/2017.

4. In view of above learned counsel for applicant has submitted that even from the statement of eye witness viz. Dyaneshwar no involvement of applicant is established as he had named assailants along with others in his statement and in his subsequent statement identified applicant to be amongst persons referred as others in his first statement and has thus submitted that there is no involvement of applicant revealed in any of the statements of eye witnesses. He also submitted that in CC TV footage of the spot on 13/8/2017 at about 7.15 p.m. applicant is not seen therein and even otherwise it is not case of prosecution that applicant was present at the spot at the farmhouse.

5. Prosecution to establish involvement of applicant has mainly relied upon above evidence and had further relied on the circumstantial evidence in the nature of CC TV footage of Hotel which is about 13 days prior to incident where applicant is stated to have seen with one of the co-accused and thereafter on the count of seizure of insurance papers of car used by co-accused in this crime, during house search of applicant which admittedly was registered in the name of one Sunil Pawar and lastly, on the count of car which came to be seized at the instance of co-accused Sandeep alleged to be used by assailants in the present crime of which insurance papers are seized from the house of applicant.

6. To make out the case of prosecution with regard to seizure of insurance papers of car alleged to be used by co-accused in the present crime with the applicant, learned APP referred to statement of Somnath and contended that as per his statement one blue colour alto make car was delivered by him on say of applicant to two boys to whom Somnath was knowing and one amongst them had only verified whether the car was sent by applicant and left. As per his statement said delivery of car was made about one month prior to incident.

7. Considering the available evidence against the applicant as aforesaid it is submitted that it is too short to connect applicant with the present crime and by referring to order of this court granting bail to Nilesh Raju Bhame passed in BA No.15/2018 dated 22/1/2018 submitted that only involvement of applicant who is released on bail was of his attempt to cause disappearance of evidence and that he was identified by eye witness Dyaneshwar. No specific role was attributed to him and as such was released on bail. Learned counsel for applicant submitted that in fact case of applicant is on better footing as from charge-sheet there is nothing to establish his involvement as against co-accused Nilesh Bhame, who is already released on bail. Bail is therefore sought on merits as well as on the ground of parity.

8. Learned APP submitted that applicant is identified by complainant in the test identification parade and by referring to evidence which is pointed out by learned counsel for applicant as above has submitted that above stated evidence in fact prima facie establish applicant's involvement in the crime and has therefore prayed that application be rejected.

9. In the background of submission advanced as aforesaid it is

necessary to consider complaint dated 14/9/2018 and subsequent statement of complainant dated 16/9/2017 and that of complainant's identifying applicant in Test Identification Parade.

10. Perusal of report would reveal that no name of applicant is mentioned therein as according to it's contents on 13/8/2019 when complainant was along with deceased at Kedarshwar farmhouse at around 7.15 p.m. co-accused Mangesh along with 6-7 others arrived there armed with koyta, chopper, pistol. Out of them one committed assault on head of deceased whose physical description is stated in the report and other assailants are stated to have committed assault on his face, hands by koyta and chopper and in the course of same transaction one of the assailants is stated to have opened fire whose physical description is also given in the report. As such contents of report do not implicate applicant in any manner.

11. Complainant further states that one amongst the assailants also assaulted him when he sustained injury to left hand elbow and right shoulder and all the assailants ran away. According to complainant motive behind the present assault on deceased is that about 2-2 ½ years before there was quarrel between deceased and co-accused Mangesh Koditkar and his friend.

12. From the subsequent statement of complainant recorded under section 164 of Cr.P.C. applicant's involvement is revealed to the effect that complainant learnt that applicant was behind the said assault and for that purpose he has arranged contract killer as even ½ year prior to incident there was exchange of abuses between applicant and deceased in one birthday party. The motive stated in the report and in the subsequent statement materially differs from each other. According to the subsequent

statement as aforesaid he has identified co-accused Mangesh Koditkar and 5 others, as named by him in his statement, during the Test Identification Parade in jail. However it is pertinent to note that test identification is held on 8/9/2017, which aspect is not disputed by prosecution and admittedly applicant was not put in identification parade. As such from the complaint as well as additional statement of complainant no satisfactory or convincing involvement of applicant is found who even otherwise was not made to participate in the Identification Parade.

13. Considering the statement of Dyneshwar and his additional statement which is recorded as eye witness do not establish involvement of applicant as according to him while he was present in the farmhouse since working there, when deceased along with complainant were present having meals, co-accused Dadya Raut, Shekhar Tambe to whom he was knowing arrived along with three unknown persons and at that time, co-accused Shekhar Tambe had concealed Koyta under his *jarkey* which he could identify while co-accused Dadya Raut was armed with pistol and others were armed with Koytas. Out of others he had identified Mangesh Koditkar and has stated that all the assailants committed assault upon deceased.

14. As per his additional statement dated 9/9/2017 at the identification parade he has identified co-accused named therein as person who had accompanied accused Dadya Raut, Shekhar Tambe at the time of incident.

15. Admittedly, applicant is not seen in the CC TV footage which even otherwise is of no consequence as it is no case of prosecution that applicant was present at the spot of incident. With reference to case of prosecution that applicant is seen with one of co-accused in CC TV footage dated 26/7/2017, i.e. 13 days prior to incident at Hotel Aquarius do not

substantiate the case of prosecution in any manner establishing applicant's involvement in the crime for the reason that no name of said co-accused nor any role is attributed to him as can be seen from the statement of Sanjay Gaikwad who is working as manager of the said Hotel and has stated that on 26/7/2017 he had seen accused involved in this crime in the CC TV footage on 26/7/2017 which is obtained on 13/8/2017. CC TV footage is seized during the course of investigation in pendrive. However on instructions learned APP makes a statement that though investigation is carried out on this aspect and from the statement of Sanjay Gaikwad nothing can be said as to with whom applicant was seen in that hotel on 26/7/2017 and in fact even there is no such person seen along with applicant in the CC TV footage as stated by him except the fact that he was informed by police that as per information received one accused involved in the crime is seen, he accordingly made CC TV footage available to police.

16. Evidence which is further relied by prosecution is of recovery of insurance policy during the house search of applicant which is in respect of blue colour car which according to statement of Somnath was handed over by him to two persons, to whom he admittedly did not identify and even according to its own case said car is registered in the name of one Sunil. In that view of the matter recovery of said document from the house of applicant in respect of car which is not owned by him by itself is too short to connect the applicant even remotely in the present crime. In that view of the matter as it is noted that limited evidence is available against applicant, since do not establish his involvement, co-accused Nilesh who is found identified by witness Dyaneshwar in the test identification parade having no role attributed to him except for recovery of one motorcycle at his instance of co-accused Ganesh, used by co-accused Somnath at the time of incident who is found entitled for bail, application is liable to be allowed.

17. In view of above discussed evidence and reasons applicant is therefore found entitled for bail on merits and even on parity as his case appears to be at par with co-accused Nilesh. In the circumstances, following interim order is passed:

ORDER

- i) Application is allowed;
- ii) Applicant-Vitthal Sudam Barate shall be released on bail, on his executing PR Bond in the sum of Rs.50,000/- with one surety in the like amount;
- iii) Applicant shall mark his presence with Haveli Police Station, District Pune on the first day of each month initially for a period of 6 months and thereafter quarterly on first day of each such month pending trial;
- iv) Applicant shall provide proof of his residential address and in the event of change in his residential address shall communicate the same to Investigating Officer. Applicant shall not enter territorial jurisdiction of Haveli Police Station pending trial.

(P.N. DESHMUKH, J)