

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.153 OF 2019

Siddique @ Suleman Mohamad Khan
aged 42 years, Indian Inhabitant,
Occ. Business, residing at Swapna
Apartment, 3rd Floor Flat No.310,
Mapusa, Goa.

.... Petitioner.

Versus

1. State of Goa,
(through the Police Inspector,
Anjuna Police Station).

2. The Ld. APP,
High Court, Panaji, Goa.

Mr. Mahendra Kawchale, with Mr. Zaheer Shaikh and Mr. Ganesh Naik, Advocate for the Petitioner.

Mr. S. R. Rivankar, Public Prosecutor for the Respondents-State.

***Coram : M.S. Sonak &
Nutan D. Sardesai, JJ.***

Date : 26th August, 2019.

ORAL JUDGMENT : (M.S. Sonak, J.)

Heard Mr. Mahendra Kawchale, with Mr. Zaheer Shaikh and Mr. Ganesh Naik for the Petitioner and Mr. S. R. Rivankar for the Respondents.

2. Rule. Rule is made returnable forthwith with the consent

of and at the request of the learned Counsel for the parties.

3. By this Petition instituted under Article 226 of the Constitution of India, read with Section 482 of the Code of Criminal Procedure (Cr.P.C.), the Petitioner seeks quashing of FIR No.77/2014 and the proceedings before the learned Sessions Judge, at Panaji in pursuance of the same. The FIR alleges that the Petitioner has committed offences punishable under Sections 143, 450, 328, 302, 307, 120-B, read with Section 149 of the Indian Penal Code.

4. Charge-sheet in the matter was filed sometime in the year, 2014, however, the trial had to be split, as the Petitioner was absconding and could not be apprehended until October 2018.

5. The trial before the Sessions Court is now at an advanced stage. The Petitioner and the other co-accused, have already been enlarged on bail. The contentions raised by Mr. Kawchale, therefore, have to be considered from this perspective.

6. Mr. Kawchale, learned Counsel for the Petitioner submits that in the present case, the only material relied upon by the Prosecution is the extra-judicial confession of an Advocate, the statement of Ms. Tersila Fernandes, who is alleged to be an eye witness to the murder and the statement of Caitan Silveira, restaurant

captain at *O Coqueira* hotel in the context of the alleged conspiracy.

7. Mr. Kawchale submits that it is settled position of law that an extra-judicial confession is a very weak form of evidence and the same cannot be relied upon, without any independent corroboration. He seeks to rely upon several decisions in support of this proposition. He submits that even, otherwise, the Advocate has merely stated that he had drawn out an agreement on behalf of the Petitioner. In terms of this Agreement, the deceased was to sell an immovable property to the Petitioner. He submits that in the charge-sheet, there is no reference to such an agreement and no copy of such agreement was even furnished to the Petitioner, along with the charge-sheet. He submits that on the basis of such evidence, it is really not possible to convict the Petitioner and, therefore, continuance of the proceedings will amount to the abuse of process of the Court.

8. Mr. Kawchale submits that the so called eye witness Tersila Fernandes, in her statement has clearly stated that she is not in a position to identify any of the assailants. He, therefore, submits that on the basis of such a statement, the conviction is almost impossible.

9. Mr. Kawchale submits that Caitan Silveira, the restaurant captain, in his statement to the police has stated that there are several

customers who come to the hotel and, therefore, apart from remembering that the Petitioner and other co-accused were sitting on table, he cannot recollect the conversation amongst them. Mr. Kawchale submits that in view of such deposition, even the theory of conspiracy cannot be proved.

10. Mr. Kawchale submits that there are several loopholes in the case of the Prosecution, which is bound to fail applying the principles applicable to appreciation of the circumstantial evidence. He submits that in the Test Identification Parade, there was no question of identification of the Petitioner, since the Petitioner was not available and was apprehended only in October, 2018. He, however, submits that the so called eye witness, has come record to state that she is not in a position to identify the assailants. He submits that despite summons, the so called eye witness is not even forthcoming to depose at the trial. In these circumstances, any further continuance of proceedings, is abuse of process.

11. Mr. Kawchale submits that other co-accused are on the verge being acquitted and, therefore, this is a fit case to quash the FIR and further proceedings against the Petitioner. He also seeks to rely on the Judgments which take view that evidence during the trial against the co-accused cannot be ignored when it comes to a trial of an accused person apprehended at a later date. For all these reasons,

Mr. Kawchale submits that this is a fit case to quash the FIR and the proceedings which have commenced pursuant to the FIR.

12. Mr. Rivankar, learned Public Prosecutor submits that the trial is at an advanced stage and on the basis of the submissions made, there is no case made out for quashing of the FIR or interfering with the trial. He relies upon a decision of the Hon'ble Supreme Court in *Md. Allauddin Khan vs. The State of Bihar & ors*, Criminal Appeal No.675 of 2019, decided on April 15, 2019. In particular, he emphasizes on the observations in paragraph 17 of the said Judgment and Order.

13. We have carefully considered the rival contentions. In this case, the Petitioner is, *inter alia*, charged for the offences under Section 302 and 307, read with Section 120-B of the IPC. From the material adverted by the learned Counsel for the Petitioner, it is quite premature to say that the material does not disclose commission of any cognizable offence or that the chances of conviction are so slim that any further continuance of the trial will amount to an abuse of the judicial process. The issues like weight to be attached to the extra-judicial confession or to the evidence of the witnesses, cannot be ordinarily decided in the proceedings under Article 226 of the Constitution of India, or in the proceedings under Section 482 of the Cr.P.C. Particularly at the stage when entire evidence is yet to be

tendered before the Sessions Court and the Sessions Court is yet to apply its mind to the same. Ultimately, these are matters, which will have to be considered by the learned Sessions Judge before whom the trial is not only pending, but is at an advanced stage.

14. In *Md. Allauddin Khan* (supra), this is what the Hon'ble Supreme Court has observed at paragraphs 15, 16, 17 and 18 :

“15. The High Court should have seen that when a specific grievance of the Appellant in his complaint was that Respondent Nos. 2 and 3 have committed the offences punishable Under Sections 323, 379 read with Section 34 Indian Penal Code, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the Accused for taking its cognizance is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings Under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case.

18. It is due to these two errors, we are of the considered opinion that the reasoning and the conclusion arrived at by the High Court for quashing the complaint filed by the

Appellant against Respondent Nos. 2 and 3 is not legally sustainable and hence it deserves to be set aside.”

15. There may be no dispute with the general proposition that the confession in a given case may need corroboration. However, it is too premature to conclude that in the present case, the Prosecution will not be in a position to produce corroborating evidence. Similarly, the evidence of the eye witness, or the alleged eye witness, will have to be evaluated once the same is actually tendered at the trial.

16. In so far as the offence of conspiracy is concerned, it is very rarely that the direct evidence is available. Therefore, on the alleged ground that the witness in his statement stated that he did not overhear what the accused persons were talking, does not mean that there is absolutely no material on record on the issue of conspiracy. At this stage, we refrain from making any further observations, lest the same may be construed as prejudicial to the Petitioner. All that we note is that the trial is at an advanced stage and, therefore, we have no reason to believe that the objections on behalf of the Petitioner will not be considered or evaluated upon conclusion of the trial. Besides, relying upon certain observations made at the stage of release of the Petitioner and other co-accused on bail, we cannot conclude that the other co-accused are on the verge of being acquitted, as contended by the learned Counsel for the Petitioner.

17. Accordingly, for all the aforesaid reasons, we dismiss this Petition. However, we make it clear that none of the observations in this order should be construed to the prejudice of the Petitioner in the course of the trial. The proceedings before the Sessions Court will have to be decided on the basis of the evidence on record and by applying the well settled principles relating appreciation and evaluation of such evidence.

18. Accordingly this Petition is dismissed. Rule is accordingly discharged. There shall be no order as to costs.

Nutan D. Sardesai, J.

M.S. Sonak, J.