

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2219 OF 2018

Khushi Ajay Sahjwani, Age 42 years,
Occ.Service, R/o.1102, 11th Floor,
Manhar Villa, Near Poddar School,
Santacruz (W), Mumbai. (Presently lodged
at Byculla Jail, Mumbai.)

Applicant

versus

The State of Maharashtra

Respondent

Mr.Satish Maneshinde with Ms.Namita Maneshinde and Anandini
Fernando for applicant.

Mr.Raja Thakare, Special Public Prosecutor with Ms.A.A.Takalkar,
APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 11th January 2019

PC :

1. This is an application for bail under Section 439 of Code of Criminal Procedure, 1973. The applicant has been arrested in this case on 5th May 2018 in connection with CR No.28 of 2018 registered with D.C.B; C.I.D. Unit-II, Mumbai. The offences were registered under Sections 302, 201, 364, 363, 341 r/w 34 of Indian Penal Code.

2. On 16th March 2018 missing complaint was filed with D.B.Marg Police Station, Mumbai by the father of victim Kirti Rajendra Vyas. The matter was referred to API Sachin Mane, CBCID, Unit-II by Police Commissioner. Subsequently the FIR was lodged on 4th May 2018 and investigation was transferred to DCB, CID, Unit-II.

3. It is the case of prosecution that one Kirti Vyas was working as Finance Manager in the “B-Blunt Saloon”. She was residing at Bharat Nagar, near Super Cinema, M.S. Ali Road, Grant Road, Mumbai and her office was situated at Kohli Villa, 3rd Floor, S.V. Road, besides Raymond Showroom, Andheri (W), Mumbai. She usually left for her office at about 9.00 a.m and used to come back by 9.00 pm.. On 16.03.2018 she usually left her house by 9.00 a.m. Her mother Smt.Surekha Vyas called her at 11.30 a.m for obtaining password of `Wifi', at that time, her phone was switched off. Mother of Kirti thought that she must be busy in her work therefore, she might have switched off her phone. But till 9.30 pm she could not return home and in spite of repeated calls by family members, her phone was switched off. The family members of Kirti were worried about her. Therefore, they approached to Dr.D.B.Marg Police Station and at around 11.00 am they registered the missing complaint bearing No.6/2018.

4. During search of Kirti Vyas, it was transpired that at about 9.00 am, the present applicant and co-accused Siddharth Tamhankar picked up Kirti from besides her residence and they together boarded the Eco-Sport car bearing No.MH02 DG 2289, which belongs to the present applicant. Therefore, during inquiry when Siddharth Tamhankar informed that on that day he and present applicant were passing through the residence of Kirti Vyas, he called her and told to accompany them in the vehicle and they will drop her at office. Kirti Vyas boarded the aforesaid vehicle. After going to some distance, Kirti Vyas told that she has a meeting in the morning and if she goes by road, it will take time therefore, she made up her mind to go by local train. Therefore, Siddharth Tamhankar and present applicant

dropped her near Grant Road Station. But in the CCTV footage near the Grant Road Station she was not found getting down from the said vehicle and her phone was switched off near Jijamata Nagar, Worli.

5. During preliminary inquiry, the investigation was handed over to the Crime Branch, Mumbai. During inquiry, it was revealed from the CCTV footage and CDR location that on 16.03.2018 at about 8.57 a.m; Kirti Vyas while going from her building, wearing black and white colour strips T-shirt and blue jeans pant on her person. In the CCTV footage, it was revealed that she was found in the vehicle of present applicant at 9.09 a.m near M.S.Ali Road, she was found sitting besides the driver seat. She was further found in the CCTV footage sitting in the same vehicle crossing Sagale Chowk, Minarwas Talkies and thereafter Navjeevan Society at about 9.18 a.m.

6. As per version of accused, they have dropped Kirti Vyas in between Grant Road, Sagale Chowk to Navjeevan Society junction. But Kirti Vyas was found sitting till Navjeevan junction. It was further revealed in the preliminary investigation on the basis of CDR location of the Kirti Vyas that her last location at 8.51 a.m was at Bharat Nagar, Grant Road and her phone was lastly switched off at 9.30 a.m at Jijamata Nagar, Worli. During preliminary investigation of the CDR reports of both the accused, their location at 8.44 a.m and 8.58 a.m was near Grant Road and thereafter at Senapati Bapat Marg and at 10.30 a.m; their location was shown at Bandra and thereafter, their location was shown at Andheri from Santacruz Marg. Thereafter, in the evening at 18.30 hours their location shown from Santacruz to Wadala Mahul Port Trust between 20.50 to 21.40 hours. Thereafter, the investigating officer inquired about their

location but no satisfactory answers were given by both the accused. As per version of both the accused they have dropped Kirti in between Sagale junction to Navjeevan junction but in the CCTV footage, the said car has not stopped in between Sagale Square and Javjeevan junction and there is no CCTV footage while dropping Kirti Vyas by both the accused persons. Few days before the incident Kirti Vyas has issued a notice to the accused no.1, Siddharth Tamhankar for improving his work and he was put on review upto 16.3.2018. Therefore, on the grave suspicious, the investigating officer seized the car of present applicant.

7. On 13.4.2018 the report of FSL received. Two blood stains were found in car, firstly at foot-rest of driver side seat and in the dickey of vehicle. The DNA of the parents of Kirti Vyas matched with the blood stains found inside the dickey of the car and it was concluded to be of biological female of Surekha Rajendra Vyas and Rajendra Harshadlal Vyas. Therefore, on the basis of the FSL report, accused Siddharth Tamhankar including present applicant came to be arrested on 4.5.2018 and on the basis of the aforesaid information, the API Sandeep Sopanrao Gundewar made report and FIR bearing No.28/2018 was came to be registered against both the accused persons for the offence punishable u/s 302, 201, 363, 364, 341 r/w 34 of IPC and thereby set criminal law in motion.

8. The applicant had preferred an application for bail before the Sessions Court, which has been rejected vide order dated 16th August 2018.

9. Learned counsel for applicant made following submissions :

(i) The case of prosecution rests only on DNA report on the basis of the samples collected from the car;

(ii) The prosecution has given undue weightage to CCTV footage of the victims which does not capture the alleged incident and thus cannot be used against the applicant;

(iii) The prosecution has heavily relied on CDR records which is part of the charge sheet. The prosecution is also relying upon the confessional statements of accused no.1, which is not admissible in evidence;

(iv) In the absence of any eye witness, the statements of other witnesses which did not show the complicity of applicant, cannot be considered against the applicant;

(v) There is no evidence to show that the car had stopped at any stage;

(vi) The representation of the complainant as spelt out in the FIR is not the true representation;

(vii) The entire case is based on the circumstantial evidence and there is no cogent evidence to establish the involvement of the applicant in the crime;

(viii) The prosecution has to prove the chain of circumstances to show the complicity of applicant and merely on the basis of inferences the applicant cannot be subjected to custody;

(ix) On perusal of charge sheet it is evident that the investigation has been carried out in mala fide manner on the basis of predetermined conclusions. The entire case of the prosecution rests on DNA evidence, which has been arrived at belatedly and the same must be viewed with circumspection;

(x) Except the evidence in the form of DNA and CDR, the applicant cannot be shown to be involved in the murder of the victim;

(xi) Except suspecting involvement of the applicant there is no legally admissible evidence against the applicant in the commission of crime;

(xii) The statement of witness Tapan Maithi that since 10th February 2018 he used to routinely wash the car in which the alleged murder took place twice weekly from inside, would indicate that it is difficult to believe that after a period of more than 1 month which would have entailed the said car being washed more than ten times from inside, the prosecution was able to recover blood samples from the said car. It is submitted that even if it were to be believed, it would definitely be impossible for such blood samples to be untainted and provide accurate DNA results;

(xiii) The alleged discovery of blood stains in the car is unlikely given that prior to their alleged discovery, the said vehicle was inspected thoroughly on several occasions by the investigating

authority. The charge sheet does not contain any documents alluding to the previous search and inspection of the said vehicle. It is difficult to accept as to how the blood drops allegedly visible to the naked eye were not discovered during the previous searches of the vehicle;

(xiv) It is submitted that accepting the case of the prosecution that the victim was strangled, it is difficult to believe as to how the blood spots were found in the car, which creates suspicion about the case of prosecution;

(xv) In the facts and circumstances there is reason to believe that the car which is allegedly used in the commission of crime, was undoubtedly contaminated by way of its routine cleaning and other factors, not limited to the passage of time being over one month. Thus, the analysis of samples collected from such a contaminated scene cannot be relied upon. In addition, the authenticity of the alleged blood drops is also extremely doubtful given their belated discovery;

(xvi) The prosecution has failed to attribute any motive to the applicant. The statement of victim's mother which forms part of charge sheet, would indicate that if the victim was ever required to work late, the accused no.1 or another colleague would personally drop the victim home at night. In March-2017 the applicant and accused no.1 even visited the said witness at Reliance Hospital where the victim was being treated for some illness. It is submitted that there was cordial relationship between the victim and applicant. The

prosecution has not established any motive even prima facie to the applicant to have committed alleged crime;

(xvii) The charge sheet does not establish that the applicant is involved in committing murder of the victim Kirti Vyas. The case of prosecution is also based on the alleged extra judicial confession of the applicant which is not reliable at all. It is submitted that such evidence is weak piece of evidence and the applicant cannot be incarcerated in custody. The investigation is completed and charge sheet has already filed;

(xviii) The dead body of the victim has not been recovered and in the absence of recovery of the corpus delicti, the prosecution has not been able to establish that the victim has been murdered. Considering the nature of evidence, the applicant be granted bail.

10. Learned counsel for applicant relied upon several decisions in support of his submissions; viz. :

- a) (2015)-7-SCC-178 – Tomaso Bruno Vs. State of UP;
- b) AIR-2016-SC-290 – Prem Sagar Manocha Vs. State (NCT of Delhi);
- c) 1995 Supp. (4)-SCC-259 – Balwinder Singh Vs. State of Punjab;
- d) (1997)3-SCC-158 – Pakkirisamy Vs. State of T.N.
- e) AIR-2012-SC-2435 – Sahadevan and others Vs. State of Tamil Nadu;
- f) AIR-2001-SC-2842 – Ram Gulam Chaudhary and others Vs. State of Bihar;
- g) (2012)4-SCC-379 – Jai Prakash Singh Vs. State of Bihar.

11. In the case of Tomaso Bruno (supra), it is observed that the Courts normally would look at expert evidence with a greater sense of acceptability but the Courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory and unsustainable. In the case of Prem Sagar Manocha (supra), it has been observed that expert evidence needs to be given closer scrutiny and requires a different approach while initiating proceedings under Section 340 of IPC. After all it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of expert is to furnish the Court his opinion and the reasons for his opinion along with all the materials. It is for the Court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusions. In the case of Balwinder Singh (supra) it is observed that an extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The Courts generally look for independent reliable corroboration before placing any reliance upon an extra-judicial confession. In Pakkirisamy (supra), the Court has considered the similar issue with regards to evidentiary value of the extra-judicial confession. In another case relied upon by advocate for applicant in Sahadevan and others (supra), the Court has referred to the principles to be applied while considering the circumstantial evidence and the extra-judicial confession. It is observed that extra-judicial confession is weak piece of evidence. In the case of Ram

Gulam Chaudhury (supra), the Apex Court has dealt with the issue relating to corpus delicti not being found and it is held that the guilt of the accused can be determined in the absence of corpus delicti.

12. Learned Special Public Prosecutor Mr.Thakare submitted that there is sufficient evidence to show the involvement of the applicant in the crime. It is submitted that circumstantial evidence collected by the investigating machinery fairly establishes the complicity of the applicant in the crime. There are several circumstances which show that the applicant and the other accused were responsible for committing murder of deceased. It is submitted that the conduct of the applicant is required to be taken into consideration which clearly indicates her involvement in the present case. The submissions advanced by learned counsel for applicant are matter of trial and the same cannot be appreciated at this stage. The prosecution has relied upon the CDR record, CCTV footage, DNA report, which prima facie indicate involvement of the applicant. The decisions relied upon by learned counsel for applicant were dealt with by the Courts after trial and not at the stage of bail. The prosecution has prima facie made out case against the applicant which shows her involvement in the crime and no case for grant of bail is made out. It is submitted that the circumstances against the applicant can be narrated by taking into consideration her conduct before, during and subsequent to the offence, which would show the involvement and guilt of the applicant. He submitted that the applicant was in contact with accused no.1 on the previous day, inasmuch as there are 25 calls between them out of which last three calls are of longer duration. The location of mobile phone of accused no.1 was of the area where the victim used to reside. Thus, accused no.1 had gone to conduct

recce of the place on previous day of the incident and was communicating with the applicant. On 16th March 2018 the applicant was in communication with accused no.1 inasmuch as there are 28 calls between them though they were working together in the same office and neither of them disclosed to anybody of having dropped Kirti near Grant Road Station in their car. Particularly between 9.04 am to 9.38 pm though location of both the accused no.1 and the applicant was in the area of Wadala Creek, there are four calls between them which supports the theory of the prosecution that while applicant was in the car, accused no.1 was searching proper place to dispose the body and was thus communicating with the applicant. It is further submitted that on the next day of the incident i.e. on 17th March 2018, there were about 62 calls between the applicant and accused no.1, thus, this communication supports the theory of prosecution showing meeting of mind and pre-meditation. Though the applicant and accused no.1 had given lift to the victim in their car, this fact was not disclosed to anyone till 17th March 2018 at 8.30 pm and it was disclosed to witness Satyajit Thakur, Director, B-Blunt. It is submitted that the CCTV footage shows presence of victim in the car driven by applicant at 9.18 am near Navjeevan Junction. The CDR records of victim at 9.30 am is shown at Jijamata Nagar, Worli and CCTV footage at 9.30 shows that car driven by the applicant was in the same area. The applicant had admitted before witness Varsha Khanolkar of having given lift to the victim. Hence, the victim was last seen together with the applicant and accused no.1. The applicant has confessed this fact to her husband. Though it is submitted that the car was earlier examined, it was by lay person. However, for the purpose of DNA samples the car was examined by experts of forensic scientific

laboratory. Although the car was washed from outside and twice a week from inside, the dickey is not washed with water as it has carpet on it and not rubber matting. Carpet cannot be washed with water. In any event, when the victim herself was not available, there was no question of procuring her blood for planting and fabricating evidence. The DNA evidence at this stage will have to be accepted at its face value in view of Section 293 of Cr.P.C. Learned Special PP further submitted that the contention of the applicant that there was no possibility of blood in the case of strangulation and absence of injury has no basis. Learned Special PP made reference to MODI's book of medical jurisprudence and submitted that even in the case of strangulation there is possibility of blood oozing out and therefore presence of blood stains in the car cannot be doubted at this stage. It is further submitted that the law relating to non recovery of corpus delicti is settled in various decisions of Apex Court. To prove the charge of murder, it is not necessary that in every case the dead body should be recovered. It is submitted that the applicant had admitted that the victim had travelled with her in car and there is evidence of last seen together against applicant. In the circumstances, Section 106 of Evidence Act will have to be invoked and the burden would lie upon the accused to show as to what happened to Kirti thereafter and in the absence of any explanation, the chain of circumstances against applicant is established.

13. Learned Special Public Prosecutor has placed reliance on following decisions :

- (a) 1991-Cri.L.J.-1845 Sevaka Perumal and others Vs. State of Tamil Nadu;

- (b) AIR-2000-SC-2920 – Mani Kumar Thapa Vs. State of Sikkim;
- (c) Bail Application No.1313 of 2018, decided on 28-9-2018 by learned Single Judge of Bombay High Court – (Dnyan dev Dattatray Patil & Raju Patil Vs. State of Maharashtra);
- (d) 2014(2)BomCR (Cri)134-Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and others.

14. The decision in the case of Sevaka Perumal (supra) relates to issue of corpus delicti and the Apex Court has held that in a trial for murder it is not an absolute necessity or an essential ingredient to establish corpus delicti. The fact of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. Take for instance that a murder was committed and the dead body was thrown in to flowing tidal river or stream or burnt out. It is unlikely that the dead body may be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed etc and would afford a complete immunity to the quality from being punished and could escape even when the offence of murder is proved. What, therefore, required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced. Similar view has also been taken in the case of Mani Kumar Thapa (supra) and the order passed by this Court in the case of Dnyandev Dattatray Patil (supra) decided by this Court.

In the case of Nandlal Badwaik (supra), the apex Court has dealt with the issue of DNA report.

15. Having heard both the sides I have gone through the charge sheet which has been annexed to this application. The prosecution case is based on the circumstantial evidence in the nature of CDR, last seen together, DNA report and CCTV footage. The CCTV footage clearly indicates that the victim was in the car driven by applicant. Thus there is evidence of last seen together. The CDR report indicates that there were calls made between the applicant and the co-accused. The facts also indicate that on the previous day of the incident, the location of mobile phone of accused no.1 showed that he was in the area of residence of the victim and apparently he was present at the said place for conducting recce. On the date of the incident there were several calls between the applicant and the co-accused. Several circumstances pointed out by learned Special Public Prosecutor which are borne out from the records prima facie indicate the involvement of the applicant. Learned counsel for applicant has, however, submitted that the circumstances are not sufficient to implicate the applicant and has placed reliance on several decisions of Apex Court on the point of admissibility of such evidence. It would be necessary to note that circumstantial evidence collected during the course of investigation indeed shows prima facie the complicity of the applicant in the crime. The issues raised by the applicant about admissibility of the evidence are matters of evidence and required to be agitated at the time of trial. There are strong circumstances against applicant in the nature as stated hereinabove.

16. The prosecution material shows that the applicant was using two mobile phones. The victim was also using two phone numbers. The accused no.1 was working as accounts executive and the applicant was working as Manager and the victim was working as Finance Manager of B-Blunt saloon. The circumstances clearly disclosed that the victim was residing at Bharat Nagar, M.S.Ali Road, Grant Road, Mumbai. She used to leave her residence at about 9 am and return home at about 9 pm. On the date of incident she left the house at usual. Since she did not return home at usual time, inquiry was made by mother of victim with the employer and it was found that the victim did not attend the office on that day. The investigation then proceeded. Subsequently it appears that the accused had disclosed that the victim was dropped by them in their vehicle. Pursuant to that the FIR was registered. The investigating machinery had obtained CDR records of both the accused. It was found that on previous day of incident there are several calls between the applicant and accused no.1. On 16th March 2018 there are 28 phone calls. The circumstances indicate that they were at Senapati Bapat Marg area at about 7.58 am and went to the residence of the victim. The location nearby the house of the victim shows that inference can be drawn that they were waiting for arrival of the victim. Thereafter the victim was picked up in vehicle and they proceeded in the said vehicle. The phone of victim was switched off at 9.30 am in the area of Jijamata Nagar, Worli. The CDR shows that till Senapati Bapat Marg, they were together. Even on 16th March 2018 after 6.33 pm their location was seen together till Wadala creek. Most important is the CCTV footage of the area where the victim has been seen leaving for her office. The CCTV footage shows that the applicant was driving the vehicle and the

victim was found sitting besides her. In the aforesaid circumstances it appears that the applicant was driving the vehicle. At this juncture the CCTV footage at Dadar shows that the victim was sitting in the applicant's car besides driver's seat. The statements of various witnesses were recorded during the investigation. The witness Satyajit Thakur who is Director of the company has stated that on 17th March 2018 at about 20.30 hours he had received phone call from accused no.1 wherein he had informed that on 16th March 2018 the said accused was with the applicant near the house of the victim. The victim had boarded the car and was dropped in between Grant Road and Bombay Central railway stations. It is pertinent to note that at initial point of time neither the accused no.1 nor the applicant had disclosed to any other person that the victim had boarded their vehicle and she was dropped at Grant Road. It is also pertinent to note that there are several other circumstances as pointed out by learned Special Public Prosecutor which are fortified by the evidence collected during investigation shows involvement of the applicant in the crime. DNA report supports prosecution indicating that blood stains found in car matches with victim. On the next day of incident there are 62 calls between the applicant and accused no.1. Switch off location of CDR record of Kirti at 9.30 am is shown at Jijamata Nagar, Worli and CCTV footage at 9:30:33 shows that car driven by applicant was in the same area. On the date of incident location of applicant and accused no.1 was in area of Wadala creek at about 9.04 pm to 9.38 pm and there are four calls between them. On the next day there are 62 calls between them. The conduct of the applicant prior to the incident, on the date of incident and subsequent to missing of the victim, would show that there are strong circumstance to show her involvement and complicity in the

crime. Analysis of evidence or appreciation of evidence is a matter which can be dealt with during trial and this is not the stage to scan the evidence. Sessions Court while rejecting the application for bail has taken in to consideration the evidence against applicant.

17. Accordingly, I pass following order :

ORDER

- (i) Criminal Bail Application No.2219 of 2018 is rejected;
- (ii) It is made clear that the observations made in this order are only for considering application for bail and the Trial Court shall not be influenced by this order at the time of trial.

(PRAKASH D. NAIK, J.)

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