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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL INTERIM APPLICATION NO.816 OF 2021
IN
CRIMINAL APPEAL NO.156 OF 2017

Umesh Parmanand ChawadiApplicant

Versus

The State of MaharashtraRespondent

ALONG WITH
CRIMINAL APPEAL NO.596 OF 2019

Rahul Shrihari ChoudhariAppellant

Versus

The State of MaharashtraRespondent

Mr. Shekhar Jagtap a/w. Ms. Supriya Kak a/w. Ms. Sairuchita Chawdhary
for the Applicant in IA/816/2021.

Mr. H.J. Dedhia, APP for the Respondent-State.

**CORAM : PRASANNA B. VARALE &
SURENDRA P. TAVADE, JJ.**

DATE : 16th MARCH, 2021.

P.C. :

1. Learned counsel for the applicant submitted that there is a typographical error in para 5 of the interim application and reference made to the dates “28.10.2010, 29.10.2010 and 30.10.2010” should have been “28.12.2010, 29.12.2019 and 30.12.2010” respectively. He orally prayed for an amendment to correct the dates. The oral prayer is allowed. Amendment to be carried out forthwith.

2. Heard learned counsel for the applicant and learned APP for the Respondent-State.

3. By way of present application, the applicant prayed for following reliefs in the application :-

“A. The Hon’ble Court may kindly allow this application and give a reasonable opportunity to the Applicant to prove his innocence on the ground alibi;

B. The Hon’ble Court may kindly consider plea of alibi of the Applicant to be proven based on evidences;

C. The Hon’ble Court may kindly allow the Applicant to cross examine/re-examine Prosecution’s Witnesses and submissions made by them in the subordinate court.”

4. The applicant-Umesh Parmanand Chalwadi faced the Sessions Case No.263/2011 as an Accused No.4, who was charged for the commission of offences under Sections 143, 147, 148, 302 r/w Section 149 of the Indian Penal Code and under Section 37(1) read with Section 135 of the Bombay Police Act, 1951. The learned Sessions Judge, Pune recorded the judgment and order of conviction and awarded sentence to the accused persons including Accused No.4 Umesh Chalwadi. Being aggrieved by the said judgment and order, an appeal is preferred by the applicant bearing Criminal Appeal No.156 of 2017. During pendency of the appeal, an application was filed bearing Criminal Application No.341 of 2017 for enlargement of the applicant on bail pending appeal. The application filed by the applicant Umesh Chalwadi was tagged alongwith other applications filed by Rahul Chaudhari, Dev Chalwadi and Pravin Gaikwad. The Division Bench of this Court finding that the applications are devoid of merit, rejected the applications by an order dated 24.03.2017.

5. Mr. Jagtap learned counsel for the applicant vehemently submitted that there is a sufficient material to show that the applicant was performing his duty on the day of incident. Thus, a very good ground of defence of alibi was available to the applicant and this defence could have been established if proper opportunity would have been granted to the applicant at the trial stage. As no such opportunity was granted to the applicant, the same caused a prejudice to the applicant and this serious error can be rectified by this Court by allowing the application and giving an opportunity to the applicant to cross examine or reexamine the prosecution witnesses taking recourse to Section 391 of the Code of Criminal Procedure, 1973. Learned counsel firstly invited our attention to the documents placed on record in

support of his submissions. At Page No.70 a chart of the employee is placed wherein name of the applicant finds place at Sr.No.4. Then there is a document placed on record at Page No.63 whereby the applicant is informed through Senior Manager of his employer that the applicant is not reporting on duty and is on an unscheduled leave w.e.f. 31.12.2010. Then there is a photocopy of identity card issued in favour of the applicant through employer Tech-Mahindra stating that the applicant is Employer No.51639. Learned counsel then invited our attention to the judgment of the Apex Court ***reported in (2019) 16 SCC 712 in the matter of Brigadier Sukhjeet Singh (Retired) MVC Vs. State of Uttar Pradesh & Ors.*** in support of his submissions.

6. Learned APP vehemently opposed the application and submitted that this application is nothing but an afterthought theory raised by the applicant. Learned APP then submitted that this very theory of alibi was raised before this Court in the earlier application filed at the instance of the applicant seeking enlargement of the bail pending appeal and learned Division bench of this Court in clear and unambiguous words declined to accept this theory. Learned APP also invited our attention to the order passed by the learned Single Judge of this Court in bail application filed at the instance of the applicant in the course of proceedings i.e. in the process of bail. Learned APP submitted that the material placed on record alongwith the application was the very material on which the applicant prayed for bail and as such the facts which were in the knowledge of the applicant during the process of trial the applicant would have certainly raised the defence of alibi in trial by a settled procedure. The applicant who failed to make out any such grounds of defence in the Trial Court is now coming before this Court raising this ground. As such, this is nothing but an afterthought theory.

7. We have gone through the material placed on record as well as the judgments relied upon by the learned counsel for the applicant. Considering the material placed on record, we find substantial merit in the submissions of the learned APP. Learned APP submitted before this Court that the application presented by the applicant is nothing but an afterthought theory.

The applicant had placed on record the documents i.e. a chart, a communication dated 10.02.2011 to submit that at the relevant time, the applicant was in employment and was discharging his duty. If this was the case, the applicant was certainly not prevented to take an appropriate steps raising this defence in the trial. After going through the paper-book, we are unable to find any material to show that the applicant either at the stage of examining the witnesses or at the stage of confronting the applicant that the entire evidence i.e. subjecting the applicant to a statement under Section 313 of Code of Criminal Procedure, 1973, he made an attempt to raise the defence of alibi. There is merit in the submission of the learned APP that this very material was available with the applicant himself. As such, he was nor prevented by any reason, nor by logic to raise the defence of alibi at the proper stage and for this failure, the applicant himself is responsible and he could not throw this blame to anybody else than he himself. The perusal of material placed on record further show that Criminal Application No.341/2017 in Criminal Appeal No.156/2017 was filed at the instance of present applicant Umesh Chawadi for his bail pending appeal. The Division Bench of this Court in its order dated 24.03.2017 made a specific reference to the submission advanced on behalf of the learned counsel appearing for the applicant. It may not be out of place to refer to the observations of the Division Bench, which is reproduced hereinbelow.

“Lastly, it was submitted by the learned counsel for the applicants that applicant no.4 Umesh was not at the spot as he was at the time of the incident, present in Tech-Mahindra where he was working. She has relied on the attendance-sheets of Tech-Mahindra to show that on 28.12.2010 the applicant no.4 Umesh was present in Tech-Mahindra from 8.00 a.m. to 10 p.m. on 28.12.2010. She submitted that in view of these attendance sheets, applicant no.4 could not have been involved in the offence. As far as this submission is concerned, it is noticed that the applicant after a fullfledged trial has been convicted under Section 302 read with Section 149 of IPC for causing the death of Dildar Pathan. None of these attendance-sheets were brought on record before the trial Court by examining any witness. None of these documents have been proved, hence, it is not possible for us to rely on these documents at this stage.”

(emphasis supplied by us)

8. Thus, the very ground of alibi was also pressed in service by the applicant in the application seeking in this bail pending appeal and the Division Bench refused to accept this ground as a ground of merit to consider the application, resultantly the application was rejected. On going through the record of proceedings, we were unable to see such a ground is raised in replying the queries in 313 statement. This was certainly a stage in trial where the applicant/accused who was armed with the material of his so-called attendance sheet could have made an attempt to raise the defence of alibi. The applicant reasons best known to him failed to avail that opportunity at the relevant point of time and now is coming before this Court.

9. On the backdrop of the observations of the Division Bench in the order dated 24.03.2017 and the material placed on record, we are unable to find any merit in the application. Learned counsel for the applicant relied on two judgments of the Apex Court. In the judgment of Apex Court in the matter of **Brigadier Sukhjeet Singh (Retired) MVC (supra)** though there cannot be any dispute in the preposition of law reflected in the judgment, at the same time the Apex Court in Para 24 of the judgment referred to the earlier decision in the matter of **Rajeshwar Prasad Misra vs. State of W.B.** and in Para 9 of the said judgment, the Apex Court observed that the power must be exercised sparingly and only in suitable cases. In the present case, considering the above referred material, we are of the clear opinion that this is not a suitable case where the power of appellate court can be exercised. On the same ground, we may say that the judgment of the Apex Court in **Sudevanand vs. State through Central Bureau of Investigation, reported in (2012) 3 SCC 387** is of no help to the applicant.

10. Learned counsel for the applicant has also raised another ground in the application and that ground is reflected in Para 8 of the application, which read thus :-

“The Applicant states that on 31.01.2017, the learned Session Court, Pune was pleased to convict all the accused in the Session Case No.263 of 2011, including the Applicant, by taking into consideration the evidence led by the Prosecution Witness-1 (Herein referred to as PW-1) and the advocate appointed in the

*trial court did not adduce any evidence or take any step so as to prove the defence of alibi before the learned Session Court, even though the applicant had specifically taken such defense while seeking bail before the Hon'ble High Court and also instructed his trial court lawyer. Hereto annexed and marked **Exhibit "D"** is the order of conviction passed against the Applicant."*

11. We are unable to find any merit in this ground also considering the fact that the counsel representing the applicant/accused in the Trial Court was a counsel engaged by the applicant/accused at his choice firstly and secondly there is absolutely no material to show that the counsel engaged by the applicant was a junior counsel or was having less experience in conducting the trials before the Sessions Court. Thus, even this ground raised in the application hold no merit and as such we are unable to consider this ground also.

12. Considering the above referred reasons, we are of the opinion that the application is devoid of any merit and deserves to be rejected and the same is accordingly rejected.

(SURENDRA P. TAVADE, J.)

(PRASANNA B. VARALE, J.)