

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

CRIMINAL APPLICATION (BA) 778 OF 2021

(Pavan s/o. Nandkishor Sedani..vs.. State, thr PSO, PS Akot City, Dist. Akola)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. S.P. Dharmadhikari, senior counsel with
Mr. Kartik Shukul for applicant.
Mr. M.K. Pathan, APP for non-applicant /State.
Mr. Anil Mardikar, senior counsel with
Mr. V.B. Bhise to assist the prosecution.

CORAM: ROHIT B. DEO, J.

DATE: 21.09.2021.

Heard.

2. The prosecution case is that Police Constable Mr. Bhaskar Sangle heard a loud noise at around 10.00 p.m. on 21.2.2020 and came out of his house to investigate, only to notice two persons, one slim and one stocky fleeing from the spot, and a person lying on the road seriously injured due to a firearm shot. The injured person was Mr. Tushar Pundkar, who succumbed to the gunshot injury suffered and Police Constable Mr. Bhaskar Sangle lodged report at Police Station Akot City on 22.2.2020 on the basis of which, Crime 80/2020, for offences punishable under sections 302, 120, 120-B, 201, 403 read with section 34 of Indian Penal

Code and sections 3/25, 5/27, 7/27 of the Arms Act and sections 47/177, 130(1)(2)/177, 3/181 of the Motor Vehicle Act, came to be registered.

3. It is the prosecution case that Mr. Tushar Pundkar was accused of playing a role in the murder of the applicant's cousin and in order to extract revenge, the applicant orchestrated the killing with the assistance of two sharpshooters/contract killers and the other co-accused.

4. I have heard the learned senior counsel Mr. S.P. Dharmadhikari and the learned APP Mr. M.K. Pathan, who is assisted by the learned senior counsel Mr. Anil Mardikar.

5. Mr. S.P. Dharmadhikari would submit that the incriminating material pressed in service, even assuming arguendo, that the same translates into evidence during the trial, would not be sufficient to bring home the charge of conspiracy. In view of the said submission, I have ventured to look into the incriminating material in some depth. The

Investigating Officer has recovered and seized a mobile from the applicant, which is not a relevant circumstance, considering that it is not even the case of the prosecution that the applicant was in contact with the contract killers or that the prosecution is in possession of Call Details Record to establish such contact. The applicant allegedly disclosed two places, one, where the alleged conspiracy was hatched and the second, where the accused did some target practice. In the absence of any material, to establish the conversation at the place where the conspiracy was allegedly hatched or to indicate that at that place any witness has seen the applicant in the company with the contract killers, the discovery of the place may not be of any significance. Similarly, the place where the accused allegedly practiced shooting may not be of any significance in the absence of any tell tale sign noticed at or around the place allegedly discovered as would link the place or the disclosure to the crime.

The prosecution is however heavily relying on two circumstances to contend that prima facie, the chain of circumstances is complete. The first circumstance is that

pursuant to memorandum recorded under section 27 of the Indian Evidence Act, which contains a disclosure that the applicant has hidden the spare magazine of the weapon used and that such place will be shown to the police, an empty magazine was recovered and seized from the dickey of a scooter which was parked in the residence of the applicant, which was locked, and the dickey was opened with the key made available by the applicant's father. I have perused the report of the ballistic expert which states that the empty magazine can fit in the butt stock of the weapon forwarded by the Investigating Agency. Surprisingly, the Investigating Agency does not appear to have sought a specific opinion from the ballistic expert as to whether the empty magazine was unique or typical to the weapon seized or could have been used in any weapon of similar make or structure. In the absence of material to suggest that the empty magazine could have been used, or was intended to be used only in the weapon of offence which is allegedly recovered on the basis of the memorandum of the co-accused, at least, at this stage, I am not inclined to hold the same against the applicant-accused.

The other circumstance is an alleged extra-judicial confession made by the applicant to witness Mr. Sunil on 30.3.2021. Mr. Sunil states that after applicant's cousin was murdered in the year 2013, the applicant vowed to avenge the killing. Mr. Sunil then states that after Mr. Tushar was shot at 10.00 p.m. or thereabout on 21.2.2020, the applicant was happy, that he gave Mr. Sunil Rs. 150/- and asked him to purchase liquor. Mr. Sunil then states that approximately three days after Mr. Tushar succumbed, the applicant told him in confidence that he enlisted help of two contract killers, and Mr. Sunil claims that their names too were disclosed, and avenged the murder of his cousin. Notably, the extra-judicial confession is recorded more than a month and six days of the confession. I am consciously refraining from making any further observation lest the prosecution is prejudiced in the trial. Ultimately, it is for the trial Court to assess the probative value of the alleged extra-judicial confession.

6. In my considered view, considering the nature and extent of the alleged incriminating material, the

applicant has made out a case for grant of bail.

7. In fairness to the learned APP Mr. M.K. Pathan, it must be noted that bail is opposed also on the ground that the applicant has adverse antecedents and is an accused in two prosecutions under section 302 of the Indian Penal Code. The two prosecutions, to which a reference is made by the learned APP are Crimes 219/2012 and 218/2012 which emanate from a communal strife. In Crime 219/2012, the applicant is one of the more than hundred accused and in Crime 218/2012, the applicant is one of the more than 25 to 30 accused and the common allegation is that due to a communal strife, members of a particular religious group formed an unlawful assembly and caused death of the victims.

The learned APP Mr. M.K. Pathan is right in the submission that for the purpose of bail, adverse antecedents would be relevant. However, if the material on record in the crime, in which bail is sought, is not sufficient in view of the Court to establish a reasonable prima facie case, bail cannot be denied on the ground that there are two

prosecutions already registered against the accused. It would be a different matter altogether if in the crime in which bail is sought, the prosecution makes out a reasonable strong prima facie case on the basis of material collected, in which eventuality, the past antecedents of the accused may be extremely relevant.

8. In view of the discussion supra, this Application is allowed, subject to the following conditions:

(i) The applicant be released on bail in connection with Crime 80/2020, registered with Police Station, Akot City, District Akola, for offences punishable under sections 302, 120, 120-B, 201, 403 read with section 34 of Indian Penal Code and sections 3/25, 5/27, 7/27 of the Arms Act and sections 47/177, 130(1)(2)/177, 3/181 of the Motor Vehicle Act, on executing PR bond of Rs. 16,000/- (Rupees Sixteen Thousand) with one solvent surety of the like amount;

(ii) The applicant shall not enter the territorial limits of Akot Tahsil, District Akola till the conclusion of trial, save and except, on the dates of hearing. Any breach of this condition may *ipso facto* entail cancellation of

bail, if an appropriate motion is moved by the prosecution or any interested person;

(iii) The applicant shall attend every date of hearing scrupulously. Any breach of this condition may *ipso facto* entail cancellation of bail, if an appropriate motion is moved by any interested person;

(iv) While on bail, the applicant shall not indulge in any criminal activity and it is made abundantly clear that breach of this condition may entail cancellation of bail, if an appropriate motion is moved by the prosecution or any interested person;

(v) The applicant shall not, directly or indirectly, make any attempt to influence the witnesses or otherwise tamper with the evidence.

(vi) The applicant shall not leave the country without the permission of the trial Court.

Judge