

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

CRIMINAL APPLICATION (APL) NO. 805 OF 2018

Dr. Chetan S/o Shri Gajanan Khutemate,
Aged about 46 years,
Occ. Ophthalmologist,
R/o. Civil Lines, Chandrapur,
Tah. & Dist. Chandrapur (MS).

. . . . **APPLICANT**

. . .VERSUS . . .

1. State of Maharashtra
Through its Principal Secretary (Home),
Mantralaya, Madam Cama Road,
Hutatma Rajguru Chowk,
Nariman Point, Churchgate,
Mumbai, Maharashtra-400032.
2. The Superintendent of Police,
Supdt. Of Police Office,
Near Bus Stand,
Dist. Chandrapur (Maharashtra)
3. Mr. Sushil Kumar Nayak-S.D.P.O.-
Investigating Officer of Crime No.
672/2017, U/s. 120-B, 302 IPC,
Supdt. Of Police Office,
Near Bus Stand,
Dist. Chandrapur (Maharashtra).
4. Dr. Manish Omdeo Musale,
(Complainant of impugned FIR/
Crime No. 672/2017, U/s. 120-B,
302 IPC) Authorized Representative
of-Dr. Yogita Musale,
R/o. Urjanagar, Opposite Durgapur
Bus Stand, Police Station-Durgapur,
Tadoba Road, Chandrapur,
Dist. Chandrapur (Maharashtra).

5. The Investigation Officer,
Police Station, Ramnagar,
Dist. Chandrapur.

. . **NON-APPLICANTS**

Shri A. S. Mardikar, Senior Advocate a/w. Shri A. R. Wagh,
Advocate for applicant.
Shri T. A. Mirza, A.P.P. for non-applicants/State.
Shri Avinash Gupta, Senior Advocate a/w. Shri A. A. Gupta,
Advocate and Shri Akshaya Pandya, Advocate for non-applicant
no. 4.

CORAM: Z.A. HAQ & AMIT B. BORKAR, JJ.
DATED : 03/02/2021.

ORAL JUDGMENT : (PER AMIT B. BORKAR, J.)

1. This is an application under Section 482 of the Code of Criminal Procedure challenging the Charge-sheet No.190 of 2018 dated 21.08.2018 filed before the Judicial Magistrate First Class-7, Chandrapur, under Section 120-B read with Section 302 of the Indian Penal Code, arising out of Crime No.672 of 2017 dated 12.4.2017.

2. The First Information Report came to be registered against the applicant with the accusations that the applicant married with sister (Non–Applicant No. 5) of the non-applicant no.4 in the year 2004. It is alleged that the applicant is addicted to vices. It is further alleged that the non-applicant no.5 was

physically and mentally harassed by the applicant and with the result, the non-applicant no.5 started residing with her mother and father. It is further alleged that the non-applicant no.5 filed Complaint under Section 498-A and for other offences under the Indian Penal Code against the applicant. It is further alleged that when the custody of son of the non-applicant no.5 and the applicant was handed over to the non-applicant no.5, the applicant threatened the non-applicant no.4 that he will kill the non-applicant no.4 and the non-applicant no.5. It is further alleged that when the applicant was in Saudi Arab in January 2017, his friend Anurag Dakhane on 13.1.2017 sent a WhatsApp message to the non-applicant no.4 that the non-applicant no.4 should call Anurag Dakhane to discuss about some serious issue. It is alleged that when the non-applicant no.4 called Anurag, he told the non-applicant no.4 that the applicant had given contract to kill the non-applicant no.4 for an amount of rupees one crore. It is alleged that the contract to kill the non-applicant no.4 was to be executed through Gajanan Pal and Sinu Anna, who were friends of Anurag Dakhane. It is alleged that the non-applicant no.4 told to Anurag Dakhane to remain in contact with Sinu Anna. It is further alleged that when the non-applicant no.4 returned to India, he met Sinu Anna through Anurag Dakhane and Sinu Anna apprised the

non-applicant no.4 of plan of the applicant and Gajanan Pal to kill the non-applicant no.4. It is further alleged that the non-applicant no.4 requested Sinu Anna to remain in touch with Gajanan Pal and to record their conversation. It is further alleged that Sinu Anna recorded voice calls between the applicant and Gajanan Pal, which was in respect of contract to kill the non-applicant no.4 by accepting the amount. It is alleged that from the recording of call between the applicant and Gajanan Pal, it becomes clear that the applicant and Gajanan Pal had engaged the services of Sinu Anna to kill the non-applicant no.4.

3. During the course of investigation, the Investigating Officer recorded the statements of the non-applicant no.4, Anurag Dakhane and Sinu Anna. The Investigating Officer also seized WhatsApp messages between Anurag Dakhane and the non-applicant no.4, call recording details of conversation between Sinu Anna and Gajanan Pal as well as seized mobile and sim-card of the applicant and the accused. The seized record of WhatsApp messages and call recording details, were sent to forensic analysis and the report of Forensic Analyst is awaited.

4. The Investigating Agency filed charge-sheet against

the applicant on 21.8.2018 bearing Charge-sheet No.190 of 2018 under Section 120-B read with Section 302 of the Indian Penal Code, in pursuance of Crime no.672 of 2017 dated 12.4.2017. The applicant has, therefore, filed the present application challenging Charge-sheet No.190 of 2018.

5. This Court on 31.08.2018, issued notice making it returnable on 26.09.2018.

6. The non-applicant no.2 filed affidavit-in-reply on 16-12-2019 and it is stated that Crime No.672/2017 for offences punishable under Section 120-B read with Section 302 of the Indian Penal Code was registered against the applicant and Gajanan Balaji Pal on the information of the non-applicant no.4. It is alleged that the applicant had threatened to kill the non-applicant nos.4 and 5 due to grant of custody of son of the applicant and the non-applicant no.5 to the non-applicant no.5 and due to filing of complaint to the Income Tax Department against the applicant and also due to filing Complaint in respect of the alleged unauthorised construction of the house of parents of the applicant. It is further stated in reply that the applicant alongwith co-accused Gajanan Pal had hatched criminal conspiracy

to eliminate the informant (Non-Applicant No.4) with the help of Sinu Anna. It is further stated that the informant met Sinu Anna and at that time, it was disclosed that the applicant had given contract to kill the informant(non-applicant no.4). There is voice recording regarding contract given by the applicant and Gajanan Pal to Sinu Anna. The Investigating Officer had recorded statement of Sinu Anna, who stated that the applicant and Gajanan Pal talked with him regarding killing of the informant (non-applicant no.4). It is further stated that the Investigating Officer had seized WhatsApp messages between Anurag Dakhane and the informant. The Investigating Officer also seized mobile and sim-card of Sinu Anna; call recording details of conversation between Sinu Anna and Gajanan Pal. It is stated that the Investigating Officer had seized an amount of rupees seven thousand given to Sinu Anna as an advance against the contract to kill the informant/non-applicant no.4. The Investigating Officer had also seized voice recording of Sinu Anna, which contains conversations between Sinu Anna and the applicant regarding contract to kill the non-applicant no.4. It is further stated that there is sufficient material available with the Investigating Agency to implicate the applicant under Section 120-B read with Section 302 of the Indian Penal Code. It is further stated that the

ingredients of offence of criminal conspiracy have been fulfilled.

7. We have heard the learned Senior Advocates and learned APP for the respective parties.

8. Shri A. S. Mardikar, learned Senior Advocate alongwith Shri A.R.Wagh, learned Advocate for the applicant submitted that the material collected by the prosecution contained in the charge-sheet is not sufficient to implicate the applicant. It is submitted that the essential ingredients of the offence of criminal conspiracy are not fulfilled, even if the entire material collected by the prosecution in the charge-sheet is taken to be true. He submitted that the essential ingredient of meeting of minds is absent. He further submitted that the proof or otherwise of conspiracy is generally a matter of inference and there is no material to establish vital link with the crime or meeting of minds amongst the accused to commit murder of the non-applicant no.4. He invited our attention to the judgment of the Apex Court in the case of *Baliya Alias Bal Kisan Vs State of Madhya Pradesh*, reported in *(2012) 9 SCC 696*, and *Kehar Singh and others Vs. State (Delhi Administration)* reported in *(1989) 3 SCC 609*, in support of his submissions that the prosecution needs to prove the

essential ingredients of Section 120-B of the Indian Penal Code, such as meeting of minds or agreement between the accused to commit murder of the non-applicant no.4.

9. Shri Avinash Gupta, learned Senior Advocate alongwith Shri A.A. Gupta, learned Advocate for the non applicant no.4 and Shri T.A.Mirza, learned APP for the State, submitted that there is sufficient material collected by the prosecution in the form of WhatsApp messages between Anurag Dakhane and the informant as regards the contract given by the applicant to kill the informant through Sinu Anna and Gajanan Pal. They also submitted that there are conversations between Sinu Anna and the applicant regarding contract to kill the applicant. They further submitted that in view of transcriptions between Sinu Anna, Gajanan Pal and the applicant, the essential ingredients of Section 120-B of the Indian Penal Code are fulfilled.

10. The scope and reach of the powers of this Court under Section 482 of the Code of Criminal Procedure in entertaining the prayer for quashing criminal proceeding is well defined. The fundamental test is to ascertain whether taking the allegations in the complaint or the material in the charge sheet to

be true, without adding or subtracting anything at the stage of challenge to the maintainability of the proceedings, *prima facie*, case for trial, had been made out. It is only on such examination, the answer has to be in the negative and, then an interference in exercise of power under Section 482 of the Code of Criminal Procedure, for quashing the said proceedings is called for. The High Court, at this juncture, is not called upon to invoke an exercise to inquire into the truth or otherwise of the allegations made. The limited scrutiny is, for being satisfied, whether the allegations made in the FIR or the material in the charge sheet disclose cognizable offence or not.

11. The Apex Court has repeatedly sounded note of caution to the effect that the power of quashing criminal proceedings should be exercised very sparingly and with circumspection that too in the rarest of rare case. In emphatic words, it has been laid down that the Court would not be justified in embarking on an inquiry as to reliability, genuineness or otherwise of the allegations made in the First Information Report and that the inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. The power can be exercised only when the Court comes to the conclusion that there

would be manifest injustice or there would be abuse of process of the Court and not otherwise.

12. In the backdrop of position of law stated above, we have carefully considered the material in the Charge-sheet. The statement of Sinu Anna recorded by the Investigating Officer; WhatsApp messages between Anurag and informant; call recording details between Sinu Anna and Gajanan Pal; recording of conversations between Sinu Anna and the applicant in the form of transcriptions of call, prima facie, show meeting of minds and the agreement between the applicant and Gajanan Pal with Sinu Anna to kill the non-applicant no.4.

13. The voice samples, WhatsApp messages, voice recording of mobile conversations between Sinu Anna and Gajanan Pal, Sinu Anna and the applicant have been sent to forensic analyst and the report is awaited.

14. Insofar as the ratio laid down by the Hon'ble Apex Court in the case of *Baliya Kishan* (supra) is concerned, we have no doubt that it is necessary for the prosecution to prove agreement between two or more persons to cooperate for

accomplishment/performance of illegal act or an act, which is illegal itself, through illegal means. There is no dispute about the ratio laid down by the Hon'ble Apex Court in paragraph 17 of the judgment of *Baliya Kishan*, which reads as under:

“17. The offence of criminal conspiracy has its foundation in an agreement to commit an offence or to achieve a lawful object through unlawful means. Such a conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn. Naturally in evaluating the proved circumstances for the purposes of

drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused”.

15. We are also bound by the ratio of the Apex Court in the case of ***Kehar Singh and others*** (supra). The Apex Court in paragraph no 260 has held as under:

“260. The concept of criminal conspiracy will be dealt with in detail a little later. For the present, it may be sufficient to state that the gist of the offence of criminal conspiracy created under Section 120-A is a bare agreement to commit an offence. It has been made punishable under Section 120-B. The offence of abetment created under the second clause of section 107 requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by the wordings of Section 107 (Secondly): "engages in any conspiracyfor the doing of that thing, if an act or illegal omission

takes place in pursuance of that conspiracy”

*The punishment for these two categories of crimes or also quite different. Section 109 IPC is concerned with the punishment of abetments for which no express provision is made under the Indian Penal Code. A charge under Section 109 should, therefore, be along with some other substantive offence committed in consequence of abetment. The offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under section 120-B for which a charge under section 109 IPC is unnecessary and indeed, inappropriate. The following observation of Das, J., in *Pramatha Nath Taluqdur v. Saroj Ranjan Sarkar*. [1962] (Supp) 2 SCR 297 at 320 also supports my view:*

"Put very briefly, the distinction between the offence of abetment under the second clause of Section 107 and that of criminal conspiracy under section 120-A is this. In the former offence a mere combination of persons or agreement between

them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence.

So far as abetment by conspiracy is concerned the abettor will be liable to punishment under varying circumstances detailed in sections 108 to 117. It is unnecessary to detail those circumstances for the present case. For the offence of criminal conspiracy it is punishable under section 120-B."

16. In the light of the above judgments of the Apex Court , we are satisfied that there is *prima facie* material in the charge-sheet in the form of WhatsApp messages between Anurag Dakhane and the non-applicant no.4, transcription of voice recording of conversations between Sinu Anna and the applicant and transcriptions of mobile conversations between Sinu Anna and Gajanan Pal, which prima facie show the involvement of the applicant and the veracity of the accusations cannot be examined under Section 482 of the Code of Criminal Procedure.

Considering the nature of the allegations and the material produced by the prosecution in the form of the Charge-sheet, this is not a case where Charge-sheet can be quashed, at this stage. The report of Forensic Analyst is yet to be received. It is for the prosecution to prove its case against the applicant in the full-fledged trial. We are, therefore, satisfied that there is prima facie material against the applicant in the charge-sheet, which prima facie shows essential ingredients of offence under Section 120-B of Indian Penal Code. We find no merit in the application.

Criminal Application is, therefore, dismissed.

17. It is made clear that the observations made in this order are only for the purpose of deciding legality of the charge-sheet filed against the applicant. The Trial Court shall decide proceedings against the applicant on its own merits without being influenced by any of the observations made in this judgment.

JUDGE

JUDGE