

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

CRIMINAL APPLICATION (APL) 952 OF 2018

Shivaji s/o. Mohanrao Patil,
aged about 58 yrs, occ. Retired,
r/o. Nerla, Walwa (Islampur),
District Sangli

..... **APPLICANT**

...VERSUS...

The State of Maharashtra,
Through Police Station Officer,
Police Station Dabki Road,
Akola, Dist. Akola

...**NON-APPLICANT**

Mr. R.M. Daga, counsel for applicant.
Mr. M.K. Pathan, APP for non-applicant.

CORAM: ROHIT B. DEO, J.
DATE : 04.02.2021

ORAL JUDGMENT:

Heard Mr. R.M. Daga, the learned counsel for the applicant and Mr. M.K. Pathan, the learned APP for non-applicant / State.

2. The petitioner, who shall be hereinafter referred to as the accused, is arraigned as accused 5 in the Final Report submitted in Crime 134/2015, for offence punishable under sections 370, 417, 419, 420, 468, 471 read with section 34 of Indian Penal Code and sections 39, 45 and 46 of the

Maharashtra Money Lending Act, 2014.

3. The crime is registered on the basis of report dated 2.12.2015 lodged by Santosh Gawali with the Police Station, Dabki Road, Akola. The gist of the report is that informant obtained handloan of Rs. 20,000/- from accused Anand Jadhav. Inability to pay the principal and interest resulted in default. Accused Anand Jadhav resorted to threats and pressure to force the informant to repay the loan. Accused Anand Jadhav suggested that the informant sell his kidney. The informant consented since he was persistently harassed to repay the loan. The informant alleges that he met accused Devendra Shirsat alongwith accused Anand Jadhav and accused Shivaji Koli was contacted. Accused Devendra Shirsat took the informant to a Nagpur hospital. Accused Devendra Shirsat and Shivaji Koli then met one Devendra Verma and it was agreed that Rs. 4 lacs shall be paid to the informant. Ultimately, the accused Devendra Shirsat took the informant to Mumbai, and then alongwith accused Shivaji Koli they went to Sri Lanka alongwith Devendra Verma and his wife. One kidney was removed and Devendra Shirsat was the beneficiary of the implant. Devendra Shirsat informed that the balance amount

of RS. 1 lac shall be paid to the informant after receiving the same from accused Shivaji Koli. The said amount was not paid and the informant alleged that he was cheated since he received only Rs. 3 lacs.

4. Perusal of the chargesheet and the accompanying material reveals that the only role which is attributed to the applicant accused is that co-accused Raghvendra Verma disclosed that he summoned his friend Ashish Vijaykumar Bhabda r/o. Ahmadnagar to Nagpur and asked him to pay Rs. 7 lacs to accused Shivaji Koli. Aashish Bhabada in turn asked his acquaintance – present applicant Shivaji Patil to pay the said amount of Rs. 7 lacs to Shivaji Koli and accordingly the applicant did pay the amount of Rs. 7 lacs which was kept with him by Aashish Bhabade to accused Shivaji Koli.

5. Mr. R.M. Daga, the learned counsel for applicant - Shivaji Patil would submit that even if the version of the prosecution is accepted at face value, no case is made out to proceed against the applicant accused. The only role attributed is that Aashish Bhabada was asked to pay Rs. 7 lacs to accused Shivaji Koli and instead making the payment himself, he kept

the amount with the applicant accused and asked him to pay the amount to accused Shivaji Koli, which was duly done.

6. Mr. R.M. Daga would then submit, that apart from the fact that the role attributed does not make out any offence, the material pressed in service in support of the allegation, irrelevant and innocuous as the allegation is, is not admissible.

7. In view of the submission canvased by Mr. R.M. Daga, I called upon the learned APP Mr. M.K. Pathan to invite my attention to the alleged incriminatory material in the Final Report or the documents filed alongwith the Final Report. Mr. M.K. Pathan invites my attention to a document styled as "Identification Panchanama" dated 13.12.2015. The said document purports to be a memorandum under section 27 of the Indian Evidence Act. The recital in the Identification Panchanama is that accused Shivaji Koli disclosed that he received Rs. 7 lacs from co-accused Raghvendra Verma through the applicant – accused Shivaji Patil. The fact discovered, according to the prosecution is the location of the business establishment of the applicant and the identification of the applicant as the person, who delivered the amount of Rs. 7 lacs

to accused Shivaji Koli.

8. Assuming that any evidentiary value can be attached to the identification or the facts allegedly discovered pursuant to the disclosure statement of accused Shivaji Koli, qua the applicant the facts allegedly discovered would not be admissible evidence.

9. The other incriminating material pointed out by Mr. M.K. Pathan is the 161 Cr. P. C. statement of Aashish Bhabada.

10. All that is said in the statement is that he was asked by accused Raghvendra Verma to pay Rs. 7 lacs to Shivaji Koli. According to the 161 Cr.P.C. statement, accused Raghvendra Verma handed over Rs. 7 lacs to Aashish Bhabada who in turn requested his friend Shivaji Patil, the applicant herein, to pay the amount to accused Shivaji Koli. Aashish Bhabada states that when Shivaji Koli contacted him concerning the payment, he told Shivaji Koli to collect the amount from the applicant after showing some identification papers. It is further stated that the applicant Shivaji Patil later

on conveyed that the amount was collected by accused Shivaji Koli after showing the identification papers.

11. In my considered view, even if every word in the statement of Aashish Bhabada is accepted as gospel truth, the complicity of the applicant accused is not discernible.

12. In the teeth of the material on record, or rather the absence of the material, the accused preferred application under section 227 of Criminal Procedure Code (“Code”) seeking discharge, which is rejected by the learned Sessions Judge, Akola vide order dated 15.9.2018.

13. The learned Sessions Judge refers to the statement of Aashish Bhabada, the gist of which is considered supra. The learned Sessions Judge then refers to the Identification Panchanama, referred to supra. The reasons recorded by the learned Sessions Judge in support of the rejection of the discharge application are reflected in paragraph 9 of the order impugned, which reads thus:

“9. In the present case before us the papers filed with the chargesheet, itself shows that the prosecution is essentially relying upon the chain of circumstances so as to establish the offence

which was pertaining to racket regarding illegal sale and purchase of kidney, which is menace growing in the society. During the course of investigation prosecution has recorded statements of several witnesses so as to establish the illegal sale and purchase of kidney by the accused. So far as the role of accused No. 5 Shivaji Patil is concerned, no-doubt, the role is limited to transfer of cash of Rs. 7 lakh by the present accused. For this purpose the prosecution is relying upon the statement of Aashish Bhabada, as well as one identification panchanama prepared in presence of two Government witnesses. In my view, when the case of the prosecution of such magnitude is resting upon solely circumstantial evidence then each circumstance not only becomes important, but also provides nexus to the other chain of circumstances. In such set of circumstantial evidence one particular circumstance cannot be considered in isolation, but will have to be seen with other set of circumstances. Moreover, the significance and value of the same would be a matter of appreciation of evidence when the evidence will be led by the prosecution by calling the witnesses. Merely because no details are provided, the case of prosecution cannot be suspected since the material placed on record can be tested only at the time of evidence on merits. Merely because the role of accused used restricted to hand over of amount of Rs. 7Lakh, it cannot be said that there is no prima facie material to proceed against the accused. Needless to mention, it is now well settled by catena of decisions at the time of dealing with discharge application appreciation of evidence is not permitted nor warranted and only prima facie material to stand trial is to be seen in proper perspective”.

14. In my considered view, the learned Sessions Judge committed an error in assuming the existence of prima facie

material against the applicant accused. The learned Sessions Judge does note that role attributed to the applicant accused is limited to transfer of Rs. 7 lacs to the accused Shivaji Koli. However, the learned Sessions Judge observes that the case is based on circumstantial evidence and that one particular circumstance cannot be considered in isolation. The learned Sessions Judge further observes that the consequence and value of the circumstance is a matter of appreciation of evidence.

15. Sections 227 and 228 of the Code may now be noted:

*“227. **Discharge.** - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*

*228. **Framing of charge** - (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—*

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, [or any other Judicial Magistrate of the first class and direct

the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused .

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried” .

16. The duty of the Sessions Judge is to ascertain, upon consideration of the police report and the documents under Section 173 of the Code, whether the charge is groundless, and to discharge the accused if he considers the charge to be groundless. However, if the Sessions Judge is of the opinion that there is a ground for presuming that the accused has committed an offence which he is competent to try, the Sessions Judge is required to frame a charge.

17. It is trite law that at the stage of framing the charge, the Court is not expected to act as a mere post office. A limited sifting of material on record is expected, the purpose

of which is to ascertain whether there is a case for proceeding with the trial. The Sessions Judge is not expected to conduct a mini trial. The material on record need not be sifted meticulously or minutely to assess the relative probability of acquittal or conviction. Indeed, existence of strong suspicion, which is not subjective, but is based on some material, is sufficient to frame charge.

18. The observations of the Supreme Court in ***Dipakbhai Jagdishchandra Patel vs. State of Gujarat, (2019) 16***

SCC 547 in paragraph 23 are relevant, and read thus :

“23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion

must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.”

19. In ***State (NCT of Delhi) v. Shiv Charan Bansal, (2020) 2***

SCC 290, the Supreme Court articulates thus :

*“39. The Court while considering the question of framing charges under [Section 227](#) of the Cr.PC has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case has been made out against the accused. The test to determine prima facie case would depend upon the facts of each case. If the material placed before the court discloses grave suspicion against the accused, which has not been properly explained, the court will be fully justified in framing charges and proceeding with the trial. The probative value of the evidence brought on record cannot be gone into at the stage of framing charges. The Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the ingredients constituting the alleged offence. At this stage, there cannot be a roving enquiry into the pros and cons of the matter, the evidence is not to be weighed as if a trial is being conducted. Reliance is placed on the judgment of this Court in *State of Bihar v. Ramesh Singh* where it has been held that at the stage of framing charges under Sections 227 and 228 CrPC, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused had committed the offence, then the court should proceed with the trial.”*

20. In the context of the first incriminating material, which is the Identification Panchanama recorded pursuant to

the section 27 of the Evidence Act - disclosure of the co-accused, in *Dipakbhai Jagdishchandra Patel vs. State of Gujarat*, the Supreme Court considers the catena of decisions and notes the decision of the Seven Judges Bench of the Supreme Court in *Haricharan Kurmi v. State of Bihar*, AIR 1964 SC 1184 . The observations in *Haricharan Kurmi v. State of Bihar* which are referred to by the Supreme Court, read thus:

“As a result of the provisions contained in S.30, Evidence Act, the confession of a co-accused has to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

Thus, the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusions deducible from the said evidence.

...In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the

accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt.”

The Supreme Court concludes thus :

“54. Proceeding on the basis that it is a confession by a co-accused and still proceeding further that there is a joint trial of the accused and that they are accused of the same offences (ignoring the fact that other accused are absconding and appellant appears to be proceeded against on his own) and having found that there is no recovery from the residence of the appellant of the counterfeit notes and that there is no other material on the basis of which even a strong suspicion could be aroused, we would find that the mandate of the law requires us to free the appellant from being proceeded against. Accordingly, we allow the appeal and the petition filed under [Section 482](#) of the Cr.PC. The Order impugned passed by the Sessions Judge framing the charge against the appellant will stand set aside and the appellant will stand discharged.”

21. In my considered view, the learned Sessions Judge erred in not appreciating (i) that the alleged incriminating material in the form of the disclosure statement of the co-accused is not admissible. Even while deciding a discharge application, the Court is entitled to examine the admissibility of the incriminating material as opposed to the probative value thereof. While the Court may not weigh the probative value of the material as if a mini trial is being conducted, a limited enquiry to ascertain whether the alleged incriminating material

can translate in admissible evidence, is permissible. I have already noted, that the 161 Cr.P.C. statement of witness Aashish Bhabada is not inculpatory, rather, if the statement is holistically read, the suggestion is that the applicant accused had no knowledge of the consideration for the payment of Rs. 7 lacs to accused Shivaji Koli. The witness Aashish Bhabada states that he was requested by accused Raghvendra Verma to help him to deliver amount of Rs. 7 lacs to Shivaji Koli and that he in turn requested the applicant accused to do the needful. Witness Aashish Bhabada further states that he informed the accused Shivaji Koli to collect the amount from the applicant accused after showing his identification papers. In my considered view, even if the entire statement is taken as gospel truth, there is nothing incriminating against the applicant accused.

22. The trial cannot be an empty ritualistic formality. It is true that strong suspicion is sufficient to frame charge. Equally settled is the position of law that the suspicion cannot be whimsical and must be supported by material, which would be admissible in the trial. In the factual matrix, there is no material whatsoever on record to even arouse strong suspicion

against the applicant accused. Even assuming that the incriminating material is admissible, all that can be said is that one of the accused contacted Aashish Bhabada with a request that he should arrange to deliver certain amount to accused Shivaji Koli. Aashish Bhabada was not in a position to oblige and he in turn requested the applicant accused to do the needful. The applicant accused handed over the amount to the accused Shivaji Koli after satisfying himself of his identity.

23. In the light of the discussion supra, there is no case made out as would proceed against the applicant accused.

24. The order impugned is quashed and application Exh. 37 in Session Trial 109/2016 seeking discharge under section 227 of the Code, is allowed.

Judge