

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

16 CRIMINAL WRIT PETITION NO.220 OF 2022

SHAIKH MUJTABA RAFIQUE @ MUSTAFA
VERSUS
THE STATE OF MAHARASHTRA AND ANR

...

Advocate for Petitioner : Mr. M. R. Sonawane
APP for Respondent-State : Mr. S. P. Deshmukh

...

WITH

APPLN/1248/2022 IN WP/220/2022

ANSAR KHAN S/O HUSAIN KHAN
VERSUS
THE STATE OF MAHARASHTRA AND ANR.

...

Advocate for Applicant : Mr. S. J. Salunke
APP for Respondent No.1-State : Mr. S. P. Deshmukh
Advocate for Respondent No.2 : Mr. M. R. Sonwane

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 20-06-2022

ORDER :

1. Criminal Application No.1248 of 2022 has been filed by the original informant. Said application stands allowed in terms of prayer Clause 'B' and is disposed of.
2. In Writ Petition No.220 of 2022, the petitioner challenges the order below Exhibit 12 in Sessions Case No.280 of 2018 rejecting the

said application filed by the present petitioner for discharge under Section 227 of the Code of Criminal Procedure. The said application has been rejected by the learned Additional Sessions Judge, Aurangabad on 16-08-2021, and therefore, the petitioner intends to invoke the Constitutional powers of this Court under Article 226 and 227 of the Constitution of India.

3. Heard learned Advocate Mr. M. R. Sonawane for petitioner, learned APP Mr. S. P. Deshmukh for respondent No.1-State, and learned Advocate Mr. S. J. Salunke for respondent No.2.

4. In the nutshell the learned Advocate for the petitioner has submitted that there is nothing on record to connect the petitioner with the crime. The entire charge-sheet does not say about his direct involvement. The case of the prosecution rests on circumstantial evidence. It is the prosecution story that the present petitioner had given contract to kill the deceased. Though CDR of the accused persons have been produced on record which show that the petitioner had contacted some of the accused, yet what they had talked with each other is not before the Court. The four persons from the FIR against whom allegations were made were never made as an accused, but the present applicant who was stated as accused

No.5 has been made as accused No.1 now. Though his name appears to have been taken by co-accused under Section 27 of the Indian Evidence Act, but that piece of the evidence is not admissible, and therefore, with such defective evidence he cannot be asked to stand the trial.

5. The learned APP supported the reasons given by the learned Additional Sessions Judge while rejecting the application Exhibit 12.

6. The application was filed by the present petitioner before the learned Trial Court under Section 227 of Code of Criminal Procedure for discharging him. He has been named as an accused No.1 in Crime No.302 of 2017 registered with Cantonment Police Station for the offence punishable under Section 302, 201, 120-B read with 34 of the Indian Penal Code. Along with him more seven persons have been made as accused. The charge is for the murder of one Husen Khan who was conducting a business of developer/plot purchaser and seller. It is to be noted that in the FIR which has been lodged by the son of the deceased. he has stated that the present accused was amongst those persons with whom his father had enmity and they had the intention to grab the land. Perusal of the entire charge-sheet would show that role has been attributed to each of

the accused and as regards the present petitioner/original applicant is concerned, as per the learned Trial Judge there is prima facie evidence for proceeding ahead. The prosecution itself has come with a case of circumstantial evidence and the motive for the murder is stated to be the property. There appears to be evidence on record to show that the petitioner and deceased had entered into the transaction in respect of properties. During the course of the investigation the Investigating Officer has collected the evidence in the form of CDR regarding contact between the present petitioner and original accused No.4. The details have been reflected in paragraph No.9-A of the Trial Court's order, and also it has been so reflected in paragraph No.14. The Trial Court accepts the position that the case of the prosecution is rested on circumstantial evidence. The stage under Section 227 of the Code of Criminal Procedure is not such a stage where we can scrutinize the evidence. Unless there is evidence, the scrutiny of the same cannot be undertaken for any purpose. Whatever the petitioner is saying in defence, cannot be taken as a true fact unless proof thereof is adduced. Another piece of evidence is the statement of the other accused persons under Section 27 of the Indian Evidence Act and then the alleged discovery. How far that piece of evidence would be admissible in

nature would be put to test only at the time of trial and not before that. There are statements of the witnesses under Section 161 and 164 of Cr.P.C. So also there is evidence on record to state as to what the petitioner used to do. The wife of the deceased in her statement under Section 164 of Cr.P.C. has states that the present petitioner was with the deceased till 01.00 a.m. on 27-12-2017. She also states that since her husband did not return for a considerable time, she had given ring to him twice, but he did not pick it up. When she again gave a phone call at about 02.30 a.m. at that time it was picked up by the police who had then informed that deceased has met with an accident. Therefore, according to her she had seen deceased with the present petitioner lastly. The witnesses have given motive for the petitioner to behave in such a way. Now the prosecution story is that the present petitioner had given contract to kill deceased, and therefore, this Court is in agreement with the observations by the Trial Court that there is less possibility of a direct evidence in such matters. The other persons also might be having some reason to kill the deceased, but that cannot be the ground for discharge of the petitioner.

7. When a detailed order has been given taking into consideration

the scope of the inquiry that is required to be made under Section 227 of the Code of Criminal Procedure, there is no question of invoking Constitutional powers of this Court. Another fact is that when there are disputed facts which require evidence, then this Court under its writ jurisdiction would be the last Court to interfere. Let the said fact be established after the evidence is recorded. Hence, the petition stands dismissed.

8. The interim protection, granted earlier if any , stands vacated.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.