

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 15 OF 2021

STATE (Through P.I., Ponda Police Station)

Ponda, Goa.

...Applicant

Versus

Suhas Naik, (Major), S/o Narayan Naik,

Aged 56 years, resident of H. NO. 500/1,

Haldai Vazem, Shiroda, Goa, Ponda – Goa.

...Respondents

Mr. S. G. Bhobe, Public Prosecutor *for the Applicant.*

Mr. Surendra G. Dessai, Senior Advocate along with Mr. Pavithran A. V. and Mr. T. Rane, Advocates *for the Respondent.*

CORAM: SANDEEP K. SHINDE, J.

Reserved on : 18th August, 2022

Pronounced on : 19th August, 2022

ORDER

1. This revision application under Section 397 read with Section 401 of the Code of Criminal Procedure (Cr.P.C.), questions the legality, propriety and correctness of order dated 08.09.2021, by

which learned Additional Sessions Judge, Panaji, discharged Respondent–accused no.2 in Sessions Case no. 8 of 2020, of the offences punishable under Section 302 read with 120–B of the Indian Penal Code (IPC).

2. Briefly stated, prosecution case is :

That on 13.12.2019, Shri Gaurish Vilas Naik lodged his complaint to the effect that on 13.12.2019, he had received a phone call from his cousin brother informing that his uncle Rajendra Pundalik Naik was found lying on the road side at Vazem, near the house of Ankush Naik with bleeding injuries on his head and he has been taken by Hari Naik to Primary Health Centre, Karai. He further informed that his uncle was referred to Goa Medical College (GMC) Bambolim. When he reached the GMC Bambolim, his uncle was in unconscious state and was accompanied with his son Rahul Naik and one Hari Naik. Upon inquiry, he came to know that Suhas Naik assaulted his uncle Rajendra at about 01.30 hours over an issue of khazan. In this connection, crime no. 257/19 under Section 307 of Indian Penal Code was registered by PSI Ajit Umarye, of Ponda Police Station and investigation was taken up. PSI visited GMC Bambolim and found that injured Rajendra Naik was in unconscious state and

was not fit to give his statement. Therefore, PSI Ajit Umarye recorded the detailed complaint of Gaurish Naik, nephew of injured Rajendra Naik at GMC Bambolim. Where-after, accused Suhas Narayan Naik was apprehended and placed under arrest on 13.12.2019. On 14.12.2019, Rajendra Pundalik Naik (injured) who was admitted in the GMC, Bambolim, had expired. Post mortem examination over the dead body of deceased was conducted and certified the cause of death as due to head injury caused by blunt object and/or surface which was ante mortem and fresh at the time of death and fatal in ordinary course of nature.

3. Thus, it is prosecution's case that on 13.12.2019, at about 01.45 hours, Suhas Naik assaulted Rajendra Pundalik Naik and thereafter forced his nephew Shri Nilay S. Naik, accused no. 1, who was at Sanvordem, to come down to Shiroda, who then went to the house of the deceased Rajendra Naik at Haldai and called him near the house of Nitin Naik under the pretext of settlement of dispute happened between Suhas Naik and him and thereafter at 02.15 hours, assaulted him with cricket bat on his head causing him serious injury, to which he succumbed at GMC, Bambolim, on 14.12.2019.

4. Upon completing the investigation, prosecution has filed the final report and the case was committed to the Court of Sessions for trying the accused for offences punishable under Section 302 read with Section 120-B of the IPC. Pending trial, the learned Additional Sessions Judge in exercise of powers under Section 227 of Cr.P.C., discharged Suhas Naik, accused no.2 by order dated 08.09.2021.

5. State has questioned the correctness, legality and propriety of that order in this revision.

6. Heard Mr. Bhobe, learned Public Prosecutor for the State and Mr. Surendra Desai, learned Senior Counsel for the Respondent-accused no.2.

7. Suhas Naik, respondent is accused no.2; whereas his nephew, Nilay Naik is accused no. 1.

8. Mr. Bhobe, learned Public Prosecutor for the State, vehemently submitted that the learned Sessions Judge while discharging the respondent-accused, largely relied on the observations of this Court in order dated 24.08.2020, by which the accused was granted bail. Mr. Bhobe, has invited my attention to paragraph no. 19 of the impugned order to contend that observations therein were verbatim

reproduction of paragraph no. 17 of the order by which this Court had granted bail to Respondent-accused. Mr. Bhobe further submitted that the learned Sessions Court while exercising the jurisdiction under 227 of the Cr.P.C., ought to have reevaluated the material to find out whether the facts taken at the face value disclosed the existence of the ingredients constituting the offence under Section 302 and 120-B of the IPC. Mr. Bhobe, therefore, submitted that the learned Sessions Judge having not exercised jurisdiction vested in him under Section 227 of the Cr.P.C., the order impugned calls for interference, in revisional jurisdiction.

9. Mr. Surendra Desai, learned Senior Counsel appearing for the accused, on the other hand, has taken me through the observations in paragraph no. 15 and onward of the impugned Order, to contend that the learned Sessions Judge, while exercising jurisdiction under 227 of the Cr.P.C., has not only referred to observations made by this Court in the order granting bail to the Respondent, but had equally referred to the statement of witnesses and other materials brought on record by the prosecution in the course of investigation.

10. Undoubtedly, the learned Sessions Judge, in paragraph no. 15 and onward, has referred to statement of witnesses and to material

collected at the time of investigation and, therefore, it cannot be said that learned Sessions Judge simply relied on the observations in the bail order passed by this Court and thereby failed to exercise the jurisdiction, as contended by Mr. Bhobe, learned Public Prosecutor for the State. For this reason, the contention of Mr. Bhobe is rejected.

11. Insofar as jurisdiction to discharge accused under Section 227 of Cr.P.C. is concerned, it has been held by the Supreme Court in the case of *State of Tamil Nadu Tr. Insp. of Police vs. N. Suresh Rajan & Ors¹* that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. And, at this stage, only the probative value of material has to be gone into and the Court is not expected to go deep into material to go on trial. Thus let me ascertain whether learned Trial Court confined itself within the four corners of jurisdiction, while discharging respondent–accused no.2.

¹ (2014) 11 SCC 709

12. The evidence on record reveals that on 12.12.2019, at around 12.03 at night, Respondent-accused no. 2, had altercation with deceased and in the scuffle, the Respondent-accused is said to have suffered minor injuries. It appears from the statement of complainant that scuffle between accused no.2 and the deceased was on account of sluice gate and the witnesses who have given their statement had gone to rescue them, where-after, the accused no.2 and the deceased went home. This was the first incident. The statement of the two witnesses suggest that on seeing the first incident, they rang up nephew of respondent accused no.2, and informed of the incident, whereupon the accused no.1 allegedly informed the witnesses that he would come after an hour as he was in Sanvordem. The evidence further reveals that the accused no. 1 came at around 02.10 a.m. as a pillion on a scooter of one Mr. Kaushal, with cricket bat in his hand and assaulted the deceased as a result of which, deceased fell on the ground and became motionless. The witnesses, in their statement under Section 164 of Cr.P.C., attribute role to the accused no.1 alone for mounting assault on the deceased with the cricket bat on the vital part of his body. That was alleged, '*second incident*'. It may be stated that, at the material time, when the assault was mounted on the deceased, the accused no.2 was at his house. Prosecution case is that soon after the first incident, the accused no.2 called up accused no.1

on his mobile and informed the incident to him. Prosecution would rely on the call details recorded, (CDR) to contend that the conversation between the accused no.2 and accused no.1 soon after the first incident, was sufficient to hold and infer that they hatched the conspiracy to eliminate the deceased. In context of these allegations, my attention was invited to the statement of the wife of the deceased Surekha Naik. She would disclose that the accused no.1 had been to their house at around 02.00 a.m. on 13.12.2019, where- after he had brief talks with her husband. Thereafter, accused no.1 left their house and she went to sleep. It is only next day at 10.00 a.m., when her husband went to Karai to his bar, she came to know that Rajendra Naik (deceased) was found lying near the house of Ankhush Naik and was shifted to the hospital.

13. The question for consideration is, whether material brought on record, taken at their face value, disclosed the existence of ingredients of Section 302 read with 120-B of IPC and/or offence of criminal conspiracy. The most important ingredient of the offence of criminal conspiracy is the agreement between two or more persons to do an illegal act. In a case where conspiracy is alleged, the Court must inquire whether the two persons were independently pursuing the same end or they had come together with unlawful object. The

former does not render them conspirators but the latter does, as held in the case of *State of Maharashtra vs. Som Nath Thapa & Ors.*²

14. Be that as it may, to establish the offence of conspiracy, some kind of physical manifestation of agreement is required to be established. The expressed agreement need not be proved. Moreover, a conspiracy is a continuing offence which continues to subsists till it is executed. During its subsistence, whenever any of the conspirators does any act or series of act, he would be held guilty under Section 120-B of the IPC. Let me now apply this test to the facts in the case. In the case at hand, admittedly, when the second incident had taken place i.e. the alleged assault on the deceased by the accused no.1, accused no.2 was at his home. He came to know about the alleged offence, (second incident), on the next day in the morning after 10.00 am. There is no material on record to suggest that soon before the alleged assault, or thereafter, the respondent-accused no.2 was in contact with accused no. 1 or vice versa so as to ascertain, whether his nephew eliminated/assaulted the deceased. It is not the prosecution's case that after the incident, either accused no.1 had informed the accused no.2 about the assault, by calling on his phone or on other otherwise. It is not the prosecution case that accused no.1

² AIR 1996 SC 1744

carried cricket bat after meeting his uncle–accused no.2. The conspiracy being a continuing offence, which continues to subsists till it is executed, however, in the case at hand, the accused no.2 was unaware of the assault till the next date in the morning and, therefore, the evidence collected in the course of the investigation does not imply or suggest that there was agreement between the accused no.1 and accused no. 2 to achieve the object i.e. to eliminate the deceased. Therefore, it cannot be said the respondent–accused hatched the conspiracy in furtherance of their common object.

15. Therefore, in view of the facts of the case and for the reasons stated above, in my considered view, the learned Sessions Judge has not committed illegality or impropriety in discharging the accused no. 2 in exercise of powers under Section 227 of the Crp.C.

16. In the result the revision application is dismissed and disposed of accordingly.

SANDEEP K. SHINDE, J .

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
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