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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

BAIL APPLICATION NO. 1168 OF 2023

SHIVAJI S/O. GANPAT DASHARATHE
VERSUS
THE STATE OF MAHARASHTRA.

...

Mr. V.P. Raje, Advocate for the applicant,
Mr. A.S. Shinde, Advocate for respondent.

CORAM : S.G. CHAPALGAONKAR, J.

RESERVED ON : 1st December, 2023.

PRONOUNCED ON : 18th December, 2023.

ORDER :-

1. The applicant seeks regular bail in connection with Crime No.247 of 2021 dated 18th August, 2021 registered with Hingoli City Police Station, District Hingoli for the offences punishable under Sections 302, 201, 120B, 364, 397 r/w. 34 of IPC.

2. The investigation has been set in motion on the basis of the information given by one Asif S/o.Yusuf Navrangabadi, who alleges that his father Yusuf Navrangabadi was employed as a driver on Scorpio jeep bearing registration No. MH-10/BC 4792. As usual, he parked the vehicle besides Zilla Parishad ground waiting for passengers. On 11.8.2021, his father informed that his vehicle is hired by passengers to attend Kanduri at Parbhani Dargah. Therefore, he is proceeding towards Parbhani, he would be coming home late in the night. At 8.00 p.m. when his mother attempted call on mobile of the father, his mobile had gone off. On 12th August, 2021, he received message from Hingoli police that the vehicle of his father was found in front of a Dhaba in Osmanabad District. Three unknown persons had possessed the vehicle and police officer from Bemdbi Police Station has snapped their photographs. His father was not with them. Accordingly, Missing Report No. 23 of 2021

dated 12.8.2021 came to be registered.

During the investigation, police gathered the information that one of the culprits resides at village Jodmakhi, Taluka Basmat, his name is Shivaji Dasharathe (present applicant). Accordingly, he was nabbed by the police. On interrogation, he disclosed that he, alongwith his two companions namely, Akash Mhaske and Jay Shelke hatched a plan to hire the vehicle and rob it. Accordingly, they hired the vehicle from Zilla Parishad Ground at Hingoli under the pretext of attending a function at Parbhani. They consumed Liquor at Ruchi Dhaba. They assaulted the driver Yusuf and killed him by throttling/strangulation, threw his dead body in the field of sugarcane. They had parked the vehicle in front of Sahyadri Dhaba on Tuljapur Road because the diesel tank of the vehicle had gone empty. The hotel owner inquired them and one police officer namely Chaudhari snapped their photographs. They were handed over in the custody of employees of the Dhaba. However, they escaped. On 17.8.2021 dead body of Yusuf was located. It was in highly decomposed condition.

3. on the basis of aforesaid information, the crime No. 247 of 2021 was registered. The applicant is alleged to have been apprehended on 17.8.2021 and under the discovery panchanama, his statement was recorded leading to discovery of dead body of deceased Yusuf in the field of Smt. Gangubai Jadhav at Kulburga, Taluka, AUSA, Dist. Latur.

4. On completion of investigation charge sheet has been filed, wherein, date of arrest of the applicant is shown as 19.8.2021. His application for grant of regular bail came to be rejected by the Sessions Judge vide order dated 12.1.2023. Hence, this application.

5. Mr. Raje, the learned counsel for the applicant would submit that case of the prosecution is based on circumstantial evidence. The applicant is arrested on suspicion. He is behind bars for more than 30 months by this

time. The trial is at nascent stage and it would take its own time. He would submit that there is no admissible or acceptable material on record by which the complicity of the applicant in commission of offence can be established. The prosecution relies on two circumstances, the first circumstance is discovery of dead body at the instance of applicant under Discovery Panchanama dated 17.8.2021 and second circumstance is alleged to be identification parade dated 16.11.2021. He would submit that both the aforesaid circumstances cannot establish complicity of applicant on the basis of admissible piece of evidence. Therefore, the applicant deserves to be enlarged on bail.

6. The learned APP, however, contends that the applicant has been identified by two witnesses, during identification parade, which confirmed that the applicant was lastly seen while hiring the vehicle alongwith co-accused persons besides Zilla Parishad ground, Hingoli. Further, the applicant was seen at Dhaba alongwith the vehicle of the deceased. The dead body of the deceased has been discovered on the basis of disclosure statement of the applicant, which is clinching circumstance. He would further invite attention of this court to the order dated 6.4.2022 in Criminal Bail Application Nos. 249 of 2022 and 259 of 2022 passed by this Court, whereby the prayer for grant of bail by the co-accused has been rejected.

7. Having considered the submissions advanced, it is apparent that the FIR has been lodged on 18.8.2021. Earlier, missing report No. 23 of 2021 was recorded on 12.8.2021 in respect of deceased Yusuf. The Scorpio Jeep of the deceased was seen in front of Sahyadri Dhaba on Tuljapur road in possession of the accused persons. The owner of the Dhaba suspected the movements of the accused persons. One Mr. Chaudhari police officer had snapped photographs of the vehicle and accused persons. However, accused persons escaped from the spot. During further investigation, the applicant has been apprehended on 17.8.2021. His confessional statement came to be recorded before police. Then panchanama was prepared leading to tracing

out the dead body of deceased Yusuf. It appears that during the course of investigation, the statement of one Ramzan has been recorded, who had seen the accused persons when they hired the vehicle of deceased at Hingoli. Said Ramzan identified the applicant and co accused persons during Test Identification Parade.

8. This Court, while deciding the bail Application No. 249 of 2022 and 259 of 2022 filed by co-accused persons considered the aforesaid evidence and rejected their plea for grant of bail.

9. Mr Raje, the learned advocate the applicant would submit that the date of arrest of the applicant is shown as 19.8.2021. His Discovery Panchanama is dated 17.8.2021. The statement of applicant, which is part of the charge sheet is also dated 17.8.2021. He would therefore submit neither the applicant was in the custody of the police, nor was he accused, when so called memorandum panchanama under Section 27 of the Evidence Act was prepared leading to discovery of dead body. According to him, such confessional statement or discovery panchanama does not constitute admissible evidence in terms of Sections 25, 26 and 27 of the Indian Evidence Act. In support of his submissions, he relies upon the judgment of the **Supreme Court in the case of "Rajesh and another vs. State of Madhya Pradesh" AIR 2023 SC 4759**, wherein, the Honourable Supreme Court of India, observed in para. 22 as under :-

"22. Section 26 of the Indian Evidence Act, 1872 (for brevity, 'the Evidence Act'), provides that no confession made by any person whilst he is in the custody of a police officer shall be proved against such person, unless it is made in the immediate presence of a Magistrate. Section 27, thereafter, is in the nature of an exception to Section 26 of the Evidence Act. It states that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Therefore, it is

essential under Section 27 of the Evidence Act that the person concerned must be ‘accused of an offence’ and being in the ‘custody of a police officer’, he or she must give information leading to the discovery of a fact and so much of that information, whether it amounts to a confession or not, may be proved against him. In effect, both aspects, viz, being in ‘the custody of a police officer, and being ‘accused of an offence’, are indispensable pre-requisites to render a confession made to the police admissible to a limited extent, by bringing into play the exception postulated under Section 27 of the Evidence Act.”

9. Per contra, learned APP Mr. Shinde, relying upon the judgment of the Supreme Court of India in the matter of **“State of UP Vs. Deoman Upadhyaya” reported in AIR 1960 SC 1125**, contends that the law does not contemplate formal accusation against the accused at the time of making statement sought to be proved. As such, even if it is assumed that the applicant was not formally referred as accused, his statement leading to discovery can be proved during the course of evidence.

10. Pertinently, the judgment relied upon by the learned APP is delivered by the Full Bench of the Supreme Court, whereas, judgment in the matter of **Rajesh (supra)** is delivered by a “three judge Bench” of the Honourable Supreme Court of India recently in the year 2023, which lays down that to bring the statement of the accused within the exceptions carved out under Section 27 of the Evidence Act, the person concerned must be “accused of offence” so also, he must be “in the custody of the police officer”. After these two conditions are satisfied, then only the statement can be made admissible in terms of Section 27 of the Evidence Act.

11. Keeping in view the aforesaid interpretation adopted by the Supreme Court of India, it is apposite to observe that, prima facie, the so called discovery statement made by the applicant/accused does not pass the test of admissibility under section 27 of the Evidence Act. Therefore, barring the so called confessional statement or discovery of the dead body, there is no other evidence on record by which complicity of the applicant in commission of

offence can be brought on record.

12. So far as the Test Identification Parade is concerned, it was carried out on 16.11.2021, i.e. 3 months of the arrest of the applicant. It is trite that delay in identification parade is fatal to the prosecution case. Further, the identification parade itself can be a corroborative piece of evidence but cannot form sole basis for conviction. Pertinently, the cause of death of the deceased could not be ascertained since the body was in advanced stage of decomposition. Therefore, even it is difficult at this stage to conclude that it is a case of homicidal death.

13. One more facet of matter requires attention while deciding plea of applicant for bail. The applicant is behind bars for more than 2 and ½ years. It is reported that the trial would take its own course. The progress of the trial is not observed with expected pace. It is trite that indefinite incarceration of the under-trial prisoner is contrary to the spirit of Article 21 of the Constitution of India. Although criminal antecedents to discredit the applicant is brought to the notice, for the reasons as stated above, his further detention need not be continued. Hence, a case is made out for grant of bail, however, subject to certain conditions.

: O R D E R :

- (I) The application is allowed.
- (ii) Applicant – Shivaji S/o. Ganpat Dasharathe, be released on bail on furnishing P.B. and S.B. of Rs. 1,00,000/- (rupees one lakh) with one or more solvent sureties of the like amount, in Crime No. 247 of 2021 dated 18th August, 2021 registered with Hingoli City Police Station, District Hingoli for the offences punishable under Sections 302, 201, 120B, 364, 397 r/w. 34 of IPC, on the following conditions :-
 - (a) He shall not tamper with the prosecution witnesses.
 - (b) He shall attend each and every effective date of trial before the trial court.

- (c) He shall not leave the State of Maharashtra without permission of the trial court.
- (d) He shall furnish his permanent residential address and contact numbers with the concerned police station.
- (iii) The application stands disposed of.

[S.G. CHAPALGAONKAR]
JUDGE

grt/-