

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.5039 OF 2015

Niranjan @ Anjanbhai Shah & Anr. Petitioners

versus

The State of Maharashtra & Anr. Respondents

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- Mr. K. H. Holambe Patil a/w K. K. Holambe Patil a/w Nitin S. Murkute, Advocate for Petitioners.
- Mr. A. R. Patil, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 25th SEPTEMBER, 2023

P.C. :

1. Heard Mr. K. H. Holambe Patil, learned counsel for the Petitioners and Mr. A. R. Patil, learned APP for the State.

2. Though the Respondent No.2 is served, no one appears for him.

3. The Petitioners are the original accused Nos.4 and 6 in Regular Criminal Case No.101/2000 before the 5th Judicial

Magistrate First Class, Baramati. They have challenged the order dated 21/02/2014 passed below Ex.83 by the learned Magistrate rejecting the Petitioners' application for discharging them from the case.

4. The Petitioners have also challenged the order dated 24/07/2015 passed by the Additional Sessions Judge-1, Baramati, in Criminal Revision Application No.28 of 2014 dismissing their Revision Application and upholding the order passed by the learned Magistrate.

5. The case arises out of the C.R.No.164/1999 registered at Baramati City Police Station on 23/11/1999 u/s 407, 411, 201, 471 r/w 34 of the Indian Penal Code. The prosecution case is that the FIR was lodged by an employee of M/s Dynamics Dairy. The complainant was to deliver 850 cartons of milk products valued of Rs.6,16,250/- on 02/11/1999. They were delivered to Bharat Transport and were to be transported to Nagpur. After completing the formalities, of preparing

invoices and bills those 850 cartons were loaded in the truck bearing No.MH-04-7903 belonging to Bharat Transport of Mr. M. H. Khan. Baljitsingh Jogendarsingh was the driver and one Dhrabjan Gurudayal Singh was the owner of the truck. After a few days, the first informant noticed that the truck did not reach its destination and those 850 cartons of milk products were misappropriated. On these allegations, the FIR was lodged. The investigation was carried out and the police arrested the accused including the present Petitioners. After completion of the investigation, the charge-sheet was filed in June 2000.

6. The prosecution case is that, 848 cartons of milk powder each weighing 10 kgs, were to be transported. However, during transit, they were opened. The milk products were kept in plastic bags weighing 20 kgs each. It is the prosecution case that out of those bags, 164 bags were sold to the Petitioners and the remaining 260 bags were kept in Jaylaxmi warehouse. The prosecution has relied on the Panchanama dated 07/03/2000 to substantiate those allegations.

7. Learned counsel for the Petitioners submitted that the said Panchanama is the only material, where there is some reference to the Petitioners. He submitted that the said Panchanama cannot be read in the evidence, as, reference to the Petitioners' names is by way of the statement of co-accused Dinesh Joshi. This statement purportedly was recorded u/s 27 of the Indian evidence Act. Nothing was recovered from the Petitioners. The statement amounting to confession was made to the police and therefore it is hit by section 25 and 26 of the Indian Evidence Act. He relied on the judgment of the Hon'ble Supreme Court in the case of ***Suresh Budharmal Kalani @ Pappu Kalani Vs. State of Maharashtra***, as reported in ***(1998) 7 Supreme Court Cases 337*** to support his contention.

8. He further submitted that the learned Magistrate rejected their application without assigning any reasons and had passed only a cryptic order. He further submitted that the learned Additional Sessions Judge, also did not apply his mind

to the legal issues and has merely observed that there was strong circumstance and suspicion against the present Petitioners.

9. Learned APP on the other hand supported both the impugned orders and relied on the Panchanama dated 07/03/2000. He, however, conceded that apart from this Panchanama, there is absolutely nothing against the Petitioners in the entire charge-sheet. He relied on the affidavit-in-reply filed by API Waghmare, attached to Baramati City police station.

10. I have considered these submissions. Since the said Panchanama dated 07/03/2000 is the only piece of evidence, it needs to be considered carefully. That Panchanama refers to the memorandum of the statement given by the co-accused Dinesh Joshi. In that statement made to the police in presence of the Panchas, he has stated that, he along with co-accused Jagdish Chheda had taken charge of those cartons containing milk products. They were transferred into plastic bags of 20 kgs each. Out of those plastic bags, 164 plastic bags were sold to the

Petitioner No.1 and the remaining 260 cartons were kept in Jaylaxmi warehouse. Pursuant to this statement, the police carried out the investigation and the 260 bags were found from Jaylaxmi warehouse. However, 160 cartons allegedly sold to the Petitioners, were not recovered.

11. The confession made by an accused to the police is hit by section 25 and 26 of the Indian Evidence Act. Such statement can be read in evidence u/s 27 of the Evidence Act for a limited purpose. In the present case, nothing was recovered from the Petitioners pursuant to the confession of the co-accused Dinesh Joshi. Therefore, the statement made by Dinesh Joshi before the police is inadmissible.

12. The observations of the Hon'ble Supreme Court in the aforementioned case of Suresh Kalani (supra) in paragraph Nos.6 and 7 are important. Those two paragraphs are as follows:

“6. Thus said, we may turn our attention to the confession made by Dr. Bansal and Jayawant

Suryarao. Under Section 30 of the Evidence Act, 1872, a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since, admittedly, Dr. Bansal has been discharged from the case and would not be facing trial with Kalani, his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr. Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage, the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr. Bansal for framing charges against Kalani.

7. So far as the confession of Jayawant Suryarao is concerned, the same (if voluntary and true) can undoubtedly be brought on record under Section 30 of the Evidence Act to use it also against Kalani but then question is: what would be its evidentiary value against the latter? The question was succinctly answered by this Court in *Kashmira Singh V. State of M. P* with the following words :

“The proper way to approach a case of this kind is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence

and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.”

The view so expressed has been consistently followed by this Court. Judged in the light of the above principle, the confession of Suryarao cannot be called in aid to frame charges against Kalani in the absence of any other evidence to do so.”

13. Thus, it is held that at the stage of framing of the charge, the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence. In the present case, the Panchanama referred to hereinabove, cannot be translated into legally admissible evidence against the present Petitioners. This being the only material against the present Petitioners, there is no basis on which the charges can be framed against them. The learned Magistrate has not given any reason in rejecting the Petitioners’ application for discharge. Learned Additional Sessions Judge has overlooked this legal aspect and has merely

observed that there was strong suspicion against the present Petitioners.

14. Considering above discussion, charges cannot be framed against the present Petitioners. Hence the Petition is allowed and the Petitioners are discharged from Criminal Case No.101/2000 pending before the 5th Judicial Magistrate First Class, Baramati.

15. The Petition is disposed of.

(SARANG V. KOTWAL, J.)