

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

CRIMINAL APPLICATION (BA) NO.534 OF 2023

Yogesh Subhashrao Bhakre

Vs.

State of Maharashtra Through Police Station Officer, Police Station, Chandur Bazar,
District Amravati

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R. M. Daga, Counsel for applicant.
Mr. A. M. Kadukar, APP for respondent/State.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 12/07/2023

1. The present application is preferred for seeking bail under Section 439 of the Code of Criminal Procedure in connection with Crime No.558/2022 registered with Police Station, Chandur Bazar, District Amravati for the offence punishable under Section 302 of the Indian Penal Code. The applicant is arrested on 24.09.2022.

2. The crime is registered on the basis of report lodged by Vinayakrao Raghunathrao Bhakre father of the deceased on an allegation that the family of the deceased and the family of the applicant are residing near to each other at village Dilalpur. The applicant was friend of the deceased and was in visiting terms at the house of the deceased. The applicant developed illicit relations with the wife of the deceased and therefore, Sandip was

disappointed. In order to continue relations with the wife of the deceased, the applicant intended to eliminate the deceased. Therefore, on 22.09.2022 at about 5 p.m., the applicant had taken the deceased with him from Dilalpur to Nanori village and thereafter, the dead body of the deceased was found on the next day evening. The cause of the death ascertained by the Medical Officer is death due to strangulation. On the basis of the said report, police have registered the crime against the present applicant.

3. It is the contention of the present applicant that he is implicated merely on suspicion. There is no such illicit relationship between him and the wife of the deceased. He was visiting the house of the deceased as deceased was his friend. As far as the allegation is concerned, there is no iota of evidence to connect with the alleged offence. Now the investigation is completed, the charge sheet is filed. As there is no evidence against the present applicant to connect him with the alleged offence, he be released on bail.

4. The said application is strongly opposed by the State on the ground that the statement of the witnesses and the statement of the wife of the deceased show that deceased went along with the accused. Thus, the deceased was lastly seen with the present applicant, thereafter, wife of the deceased has received some

WhatsApp messages showing that he has eliminated the deceased. Thus, there is a *prima facie* material against the present applicant to connect him with the alleged offence. The death of the deceased is caused by strangulation. Considering the *prima facie* material against the present applicant, the application deserves to be rejected.

5. Heard learned Counsel Mr. Daga for the applicant. He reiterated the contentions and submitted that the evidence and the nature of the last seen is very weak type of evidence. The entire case is rested on circumstantial evidence, when the case is rested on circumstantial evidence the chain of the circumstances must be completed. Here in the present case, except the last seen, there is no material to connect the present applicant with the alleged offence. In fact, the statement of the mother of the deceased shows that she had seen the present applicant at about 9 p.m. in the same evening. Thus, the theory of the last seen is also falsified due to her statement. If that circumstance is kept aside, there is absolutely no evidence to connect the present applicant with the alleged offence. Now, the investigation is completed and charge-sheet is filed. Considering the nature of the evidence, no purpose will be served by keeping the applicant behind bar.

6. On the contrary, learned APP vehemently submitted that the statement of the parents and the statement of the wife of deceased indicates the involvement of the present applicant with the alleged offence. The death of the deceased is caused due to the strangulation. If applicant/accused is released on bail, he will tamper with the prosecution evidence. Considering the gravity of the offence, the application deserves to be rejected.

7. Having heard the learned Counsel for the applicant as well as the learned APP and on perusal of the FIR, it reveals that as per the allegation on 22.09.2022 in the evening at about 5 p.m. to 6 p.m., the applicant and deceased went together. Thereafter, the dead body of the deceased was found on the second day in the evening. The statement of the mother of the deceased is also recorded under Section 164 of the Code of Criminal Procedure. As per her statement also, the deceased and the applicant went together at about 5 p.m. to 6 p.m. On that evening, the deceased did not return back, however, she has witnessed the present applicant at about 8.30 p.m. to 8.45 p.m. She has called her son Sandip but there was no communication between them and his cellphone was switched off. Thereafter, her husband has searched him, but he could not find the deceased and the next day evening the dead body of the deceased was found. Thus, learned

Counsel for the applicant submitted that the statement of the mother and the statement of the father is contradictory. There are two other statements of independent witnesses who witnessed the victim and the present applicant together in the evening at about 6 p.m. There is no witness to show that the applicant and deceased were together. The medical opinion is also not sought by the Investigating Officer to ascertain the exact time of death, which is material when the case is rested on the circumstantial evidence. The statement of the wife of the deceased is also recorded. As per her statement, the present applicant has sent her messages and informed her that he has eliminated the deceased. But the investigation is also not carried out to ascertain the fact whether such messages were sent by the present applicant to the wife of the deceased. Thus, the chain of circumstance is not completed, reveals from the investigation papers.

8. The learned Counsel Mr. Daga for the applicant placed reliance on the recent judgment of the Hon'ble Apex Court in **Criminal Appeal No.972/2013 Jabir and others Vs. State of Uttarakhand** wherein the legal principle regarding the appreciation of the evidence on circumstance like last seen is discussed and the Hon'ble Apex Court held that importantly, the time gap between when the deceased was seen in the company of the accused and the probable time of his death, based on

the post mortem report, which was conducted two days later, but was silent about the probable time of death, though it stated that death occurred approximately two days before the post mortem, is not narrow and being the serious inconsistencies in the depositions of the witnesses, the conviction was set aside.

9. It is well settled by a catena of decisions that undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."

10. In the light of the above well settled legal position, in the present case admittedly postmortem is silent regarding the probable time of death. The dead body was found next day in the evening, there is a long time gap and there is no investigation to explain the said time gap by the Investigating Officer. At this stage, except the last seen theory there is no material against

the present applicant to connect him with the alleged offence. Considering the nature of the material which is available against the applicant to connect him, the applicant has made out the case for releasing on bail. Accordingly, I proceed to pass following order.

- (i) The application is allowed.
- (ii) The applicant Yogesh Subhashrao Bhakre is released on bail in Crime No.558/2022 registered with Police Station, Chandur Bazar, District Amravati for the offence punishable under Section 302 of the Indian Penal Code, on executing P.R. bond in the sum of Rs.25,000/- with one solvent surety in the like amount.
- (iii) The applicant shall attend Police Station once in a week on Monday between 10 a.m. to 1 p.m., till conclusion of the trial.
- (iv) The applicant shall not induce, threaten or promise any witnesses who are connected with the alleged crime.
- (v) The applicant shall furnish his cellphone number and address with the address proof.

The application is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate