

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

CRIMINAL REVISION APPLICATION NO. 111 OF 2021

APPLICANTS

- : 1. Laxman Ramkisan Patil, Aged about :
41 years, Occupation : Labourer, R/o. -
Ramkisan Patil, Plot No. 126,
Chindwada Road, Panjra, Koradi
Colony, Nagpur, Tq. & District :
Nagpur.
2. Vinay Ganesh Bhoyar, Aged about :
35 years, Occupation : Labourer, R/o.-
New Nanda Plot, Pande Layout,
Koradi Road, Nagpur, Tq. & District :
Nagpur.

//VERSUS//

NON-APPLICANTS

- : 1. State of Maharashtra through Police
Station Officer, Ramdaspath Police
Station Akola, Tq. & Dist. Akola.
2. Himmatlal Anandrao Kakad, Aged
about: 38 years, Occupation: Service,
R/o. - Yashvant Colony, Near Adarsh
Colony, Akola, Tq. & Dist. Akola

Mr. B.K. Suchank, Advocate for the Applicants.

Mr. H.D. Dubey, APP for Non-applicant No.1.

CORAM : G. A. SANAP, J.

DATED : 12th JANUARY, 2023.

ORAL JUDGMENT

01] Heard.

02] **Admit.** Matter is taken up for final disposal by consent of the learned advocates for the parties. Respondent No.2 though served, has failed to appear before this Court.

03] In this revision application, challenge is to the order dated 2nd September, 2021, passed by the learned Additional Sessions Judge, Akola, whereby the learned Additional Sessions Judge was pleased to reject the application made by the applicants, who are the accused Nos.2 and 3 respectively in Sessions Case No.57 of 2018, for their discharge.

04] It is the case of the applicants that they have been roped in this crime on the basis of the confessional statement of the co-accused. The confessional statement of the co-accused is not legally admissible evidence. There is no other evidence to establish their involvement in the commission of crime. The Test Identification Parade (for short "TIP") was not conducted. There is also no material in the charge-sheet to come to a conclusion that they have committed the offence, for which they are proposed to be charged.

05] This application was opposed by the non-applicant No.1-State. It is the case of the non-applicant No.1-State that the informant was working with Prashant Shah as a courier boy. He was assigned the duty to carry gold and gold-made items from Akola to Mumbai and from Mumbai to Akola. On 7th February, 2017, in the evening at 7:40 p.m., he boarded a train from Chhatrapati Shivaji Maharaj Terminus Railway Station, Mumbai with the gold ornaments and the gold in his jacket and in one brown colour bag. In the morning of 8th February, 2017, he alighted from the train at Akola Railway Station at about 7.00 a.m. and went to motor-cycle stand. He collected his mother-cycle from the parking slot. When he started coming out of the parking slot, outside the Railway Station, one person stopped his motor-cycle on the pretext of making enquiry with regard to the train, which had come to the platform. Another two unknown persons put the knife at his neck and forced him to handover the brown colour bag to them. In all, the four persons snatched the bag and ran away. All these persons were unknown to informant. On the basis of the report, a Crime bearing No.66 of 2017 came to be registered under Section 394 of the Indian Penal Code, 1860 (for short "IPC"). During the course of investigation, the involvement of all six persons was revealed and, therefore, the offence under Section 395

IPC came to be added. It is the specific case of prosecution that the informant is the witness to the incident and, therefore, the prosecution would be required to establish the identification of the accused in the Court. It is further case of prosecution that there is one independent witness who had seen the incident and the accused involved in the incident.

06] The learned Additional Sessions Judge on the basis of the material on record came to the conclusion that no case is made out for grant of the application for discharge and rejected the application. Against this order, the applicants-accused Nos.2 and 3 are before this Court.

07] The learned advocate for the applicants-accused Nos.2 and 3 submitted that the learned Additional Sessions Judge has committed the patent illegality by rejecting the application for discharge. The learned advocate submitted that the TIP was not conducted during the course of investigation to establish the complicity of the accused Nos.2 and 3 in the commission of crime beyond doubt. The learned advocate took me through the memorandum and the recovery panchnama of the accused No.6 and submitted that on the basis of the disclosure made by him in his memorandum statement, the accused Nos.2 and 3 came to be

added, as accused in this case. The learned advocate submitted that there is no evidence to *prima facie* establish the involvement of the accused Nos.2 and 3 in the commission of crime.

08] The learned advocate for the applicants-accused Nos.2 and 3, relying upon the decisions in the cases of *Dipakbhai Jagdishchandra Patel Vs. State of Gujarat and Another* reported in *2019 (16) SCC 547* and *Laxmi Koli Babita & Another Vs. State of Maharashtra* reported in *2005 All.M.R.(Cri.) 571*, submitted that on the basis of the confession of the co-accused, which is not a legally admissible evidence, the prosecution against the accused Nos.2 and 3 cannot be continued and they are entitled to be discharged. In these decisions, it is held that the confession or statement of the co-accused is not a legally admissible evidence against the other accused. If the confession of the co-accused is the sole evidence, then the said evidence has to be held to be legally inadmissible.

09] As against this, the learned Additional Public Prosecutor for non-applicant No.1/State submitted that in this case, the Investigating Officer for some reason or the other has failed to conduct the TIP. He submitted that the mistake committed by the Investigating Officer cannot be the ground to

give the benefit of doubt to the accused. He submitted that the identification of the accused persons involved in the commission of crime will have to be undertaken at the stage of the trial and more particularly, at the stage of the evidence of the informant and one independent witness, who had witnessed the incident. He, therefore, submitted that the case in question is not a fit case to allow the application for discharge.

10] It is true that in the report as well as his subsequent statement, the informant has stated that four persons were involved in the commission of crime. The charge-sheet has been filed against six persons. The witness, who had seen the incident, has also stated that four persons were involved in the commission of crime. The Investigating Officer has failed to conduct the TIP. It is to be seen that the involvement of the accused Nos.2 and 3 and the other accused was specifically stated by the accused No.6 in his memorandum, recorded under Section 27 of the Indian Evidence Act, 1872. There is no semblance of doubt in my mind on the point that the statement of the co-accused is not the legally admissible evidence. The accused cannot be prosecuted on the basis of the sole statement of the co-accused. In this case, it is seen that the information provided by the accused No.6 in his

memorandum statement led to the arrest of the remaining accused. The Investigating Officer got the clue for the purpose of further investigation on the basis of the statement made by the accused No.6 in his memorandum. In my opinion, this statement could only be made use of to provide a lead and clue in the course of investigation and not for any other purpose.

11] In this case, the statement of the co-accused namely accused No.6 is not the only evidence against the accused persons. The identity of the accused involved in the crime would be required to be established by the prosecution at the stage of the trial. The witnesses namely the informant and the independent witness would be required to testify before the Court and identify the accused persons involved in the commission of crime. At this stage, with certainty, it cannot be said that the informant and the other witness would not be in a position to identify the accused Nos.2 and 3, who have applied for discharge. They may be identified, being involved in the commission of crime or may not be identified, but because of this, at this stage, the clean chit cannot be given to the accused Nos.2 and 3.

12] It is not out of place to mention that the Investigating Officer was required to display due diligence and conduct the TIP.

Perusal of the report would show that the accused persons involved in the commission of crime were unknown to the informant as well as to the witness. Further perusal of the report should show that in his report, the informant has stated that if the accused are shown to him, then he would be in a position to identify them. The question is whether the failure on the part of the Investigating Officer to conduct the TIP would be a ground to give benefit of doubt to the accused Nos.2 and 3 at this stage.

13] In my view, the answer to this question has to be an emphatic law. The legal position is well-settled with regard to the identification of the accused in the commission of crime. In the case of *Ronny Alias Ronald James Alwaris and Others Vs. State of Maharashtra* reported in (1998) 3 SCC 625, the Hon'ble Apex Court has held that the identification of the accused persons in the Court is the substantive piece of evidence, while the evidence of the identification of the accused in TIP is the corroborative piece of evidence. It is held that since the identification of the accused in the Court is a substantive piece of evidence, failure to hold the test identification parade during the course of investigation cannot cause a dent to the identification of the accused in the Court to the satisfaction of the Court and for the reasons to be supplied.

14] The evidence of the informant and the independent witness is yet to be recorded. The identification of the accused involved in the commission of crime would be the important plank of the case of the prosecution. Therefore, it cannot be said that in this case the accused Nos.2 and 3 have been roped in only on the basis of the statement of the co-accused i.e. accused No.6. In the facts and circumstances and in the backdrop of the settled legal position of law on the point in the case of ***Ronny Alias Ronald James Alwaris (supra)***, the law laid down in the decisions relied upon by learned advocate for the applicants/accused Nos.2 and 3 is of no help to the case of the accused at this stage.

15] The revision, therefore, stands dismissed.

(G. A. SANAP, J.)

Vijay