



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

CRIMINAL APPLICATION (BA) NO. 314/2023

Swapnil s/o Tarachand Gawande V/s State of Maharashtra

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. Shashank Manohar, counsel for applicant.

Ms. Trupati Udeshi, APP for the non-applicant/State.

CORAM : **URMILA JOSHI-PHALKE, J.**
DATE OF RESERVE : **09/01/2024.**
DATE OF DECISION : **18/01/2024.**

1. The present application is preferred by the applicant for grant of bail under Section 439 of the Code of Criminal Procedure, 1973, in connection with Crime No. 521/2022, registered with Police Station Chandrapur City, District Chandrapur, for the offences punishable under Sections, 302, 449, 506, 120-B, 182 and 201 of the Indian Penal Code, 1860.

2. The applicant is arrested on 23/09/2022 since then he is behind the bar.

3. Crime No. 521/2022 is registered on the basis of report lodged by wife of the deceased namely Sunita Manoj Rasekar, on an allegation that she was residing along with her husband - Manoj Ramesh Rasekar along with two children and mother-in-law. On 22/09/2022, at about 2.00 a.m. in the midnight, somebody entered in her

bedroom, covering his face by wearing a monkey cap and wearing black clothes, showing her knife, and pressed the neck of her husband by means of pillow and committed his murder. He has also threatened her to hand over to him whatever gold ornaments she is having and thereafter, he committed the theft by snatching the golden Mangalsutra of her mother-in-law and left the place. On the basis of the said report, the Police have registered the crime against the unknown person.

4. During the investigation, the Investigating Officer arrested the present applicant and wife of the deceased, as it is revealed to him that there were illicit relations between the present applicant and the informant and they have hatched the present conspiracy. Co-accused Sunita Manoj Rasekar, called the present applicant in her house for elimination of her husband and the present applicant has committed the murder by pressing the neck of the deceased. It is alleged by the prosecution that during the investigation, it revealed that the daughter of co-accused Sunita Manoj Rasekar was studying in 7th Standard, and the present applicant is a teacher. As the informant was visiting the school of her daughter got acquaintance with him and they have developed illicit relationship between them. In the meantime, co-accused Sunita disclosed to the present applicant that her husband is not behaving with her properly and was harassing him, therefore, they have hatched the plan to commit the murder of the deceased, and accordingly, on the date of

incident, the co-accused allowed the present applicant to enter in her house and assisted him for committing the murder of her husband/deceased.

5. During the investigation, the statement of the witnesses are recorded to show that the co-accused made an extra-judicial confession to one Rakesh Pramod Tembhurkar on 23/09/2022 itself. The incriminating article i.e. lock is also recovered on the basis of the information given by the present applicant. The investigating agency further placed reliance on the CDR report showing that prior to the incident, there was a call from the mobile phone of the present applicant on the mobile phone of the co-accused. Thus, there is a prima-facie material against the present applicant to connect him with the alleged incident.

6. Mr. Shashank Manohar, learned counsel for the applicant submitted that except the extra-judicial confession, there is no material on record to connect the present applicant with the alleged offence. During the investigation, the Investigating Officer has not collected any material to show that there was any illicit relation with the co-accused of the applicant. The prosecution relied upon the statements of the daughter of the deceased and the co-accused which only shows that co-accused used to visit the school of her daughter, and was talking with the present applicant. The statement only show that the co-accused used to send some food to the present

applicant. Except the statements of the daughter of the deceased and the co-accused, there is absolutely no material to connect the present applicant.

7. He submitted that as far as the extra-judicial confession is concerned, though confession is made by the co-accused to the witness Rakesh on 23/09/2022, however, first time, he has disclosed it on 12/10/2022 i.e. after 20 days when his statement is recorded.

8. He further submitted that the statement of the mother-in-law of the co-accused is also recorded to show that there was an illicit relationship between the applicant and the co-accused and the co-accused has allowed the present applicant to enter in the house. In fact, the mother-in-law of the co-accused was present at the time of drawing panchanama on 22/09/2022. At the relevant time, she has not narrated any such incident and her statement was recorded first time on 25/09/2022 i.e. after three days and she has disclosed a complete different story.

9. The another statement on which the prosecution has relied upon is the statement of the son of the deceased, who also narrated the role of the present applicant. The entire prosecution story shows that the person who entered in the house was covering his face with a monkey cap. Though the Test Identification parade is held on 10/11/2023, but the said Test Identification

parade is not substantial evidence. Moreover, the recitals of the FIR and the statements of the witnesses itself show that the person was wearing a monkey cap, so there was no opportunity for the prosecution witnesses to see the assailant. Therefore, the identification parade held is also not helpful to the prosecution. He submitted that extra-judicial confession alleged to be made before the witness Rakesh Tembhurkar who disclosed it to the police after 20 days. The said evidence is doubtful. He further submitted that extra-judicial confession itself is a very weak type of evidence which is not helpful to the prosecution to prove the charge. The confession was surrounded by suspicious circumstances.

10. In support of his contention, he placed reliance *Tejinder Singh alias Kaka V/s State of Punjab*¹ wherein it is held that extra-judicial confession alleged to be made before sarpanch by some of accused and sarpanch disclosed it to the Police Officer after 16 days is unnatural. He also relied in the case of *Balwinder Singh Vs State of Punjab*² wherein it is held that the confession which is surrounded by the suspicious circumstances is not helpful to the prosecution. On the same point, he placed reliance in the case of *State of M.P through CBI etc. V/s Paltan Mallah and others etc.*³ wherein it is held that extra-judicial confession of the co-accused that other accused gave him money to murder trade union leader,

1 2013 CRI. L.J.3130.

2 AIR 1996 SC 607.

3 AIR 2005 SC 733.

however, no substantive evidence against other accused persons, no conviction can be based on extra-judicial confession.

He also placed reliance on *Siddanki Ram Reddy V/s State of Andhra Pradesh*⁴, wherein it is held that eyewitnesses have little time to see accused, substantive evidence should be sufficiently corroborated by a Test Identification parade held soon after occurrence and any delay in holding Test Identification parade may be fatal to the prosecution case. On the same point, he placed reliance in the case of *Gireesan Nair and others V/s State of Kerala*⁵ wherein also, it is held that in a cases where the eyewitnesses had an ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial.

11. Per contra, learned APP submitted that the act executed by the present applicant with the help of co-accused, who is wife of deceased, is a cold-blooded murderer. The extra-judicial confession to the witness is supported by the recovery of the incriminating article at the instance of the present applicant. The C.D.R. report showing that there was a call from the present applicant to the co-accused, prior to the incident, and identification parade wherein the applicant is identified by the witnesses, sufficiently show the involvement of the present applicant in the alleged offence. Therefore, considering

⁴ (2010) 7 SCC 697.

⁵ (2023) 1 SCC 180

the nature of offence which is committed by the present applicant for which the punishment of life imprisonment and death is provided and the circumstances in which the alleged incident has taken place, the present application needs to be rejected.

12. After hearing learned counsel for the applicant and after going through the investigation papers, there is no dispute as to the fact that initially, the crime is registered on the basis of the report lodged by wife of the deceased against the unknown person. The investigation papers further show that both the accused were arrested on 23/09/2022, after registration of the crime. The Investigating Officer has visited the alleged spot of incident and drawn the spot panchanama. The spot of the incident is shown by the mother of the deceased namely Sulochana Rasekar. The recitals of the spot panchanama show that mother of the deceased has narrated the incident that when she was sleeping with her grand-daughter in another room, and the deceased was sleeping along with the co-accused and son, thereafter somebody entered in the room and committed the murder of the deceased.

13. On 22/09/2023, the Investigating Officer has issued a letter to the Superintendent of Police for obtaining the C.D.R. record of the present applicant and the co-accused. First time, the statement of the mother of deceased is recorded on 25/09/2022, wherein she has

narrated the incident showing the involvement of the present applicant in the alleged incident. It is pertinent to note that when she was present at the time of drawing the spot panchanama, she did not disclose anything about the illicit relations between the present applicant and the co-accused. She has also not narrated that the co-accused was awaking at about 1.30 p.m. due to some reason.

14. Her statement shows that at about 2.00 p.m. when she woke up, she saw that some unknown person was sitting on the chest of her son and pressing his neck, at the relevant time, her daughter-in-law was sitting near to her son. The extra-judicial confession on which the prosecution placed reliance, according to Rakesh Pramodrao Tehumrkar (which was made to him on 23/09/2022) he is residing in the said locality i.e. Vishwakarma Chowk, Balaji Ward near to the house of the deceased. He has not disclosed this fact to the Police, though the Police visited the house for the purpose of spot panchanama. First time his statement was recorded on 12/10/2022 when he disclosed the said incident.

15. From the investigation purpose, it reveals that the applicant is arrested on 23/09/2022. From the investigation papers, nothing reveal that on what basis, the applicant is arrested on 23/09/2022. The investigation papers are silent, whether the investigating agency has received any C.D.R. report on 23/09/2023. The letter issued by the Investigating Officer for obtaining the C.D.R.

report is on 22/09/2022. The mobile phone of the present applicant and the wife of the deceased were forwarded to the Chemical Analysts. The C.A. report shows that he did not find any data relevant to the case. According to the case letter, he found a clear WhatsApp Chat in the mobile phone registered in the name of Sunita Manoj Rasekar, who is the co-accused. He found that the mobile phone was completely formatted and appeared to be a new phone. Due to which, the data recovery was not successful and there was no data found relevant to the case. Thus, during the analysis of the mobile phone, nothing incriminating is found connecting any communication between the present applicant and the co-accused.

16. The learned APP vehemently submitted that the co-accused has received the phone call of the present applicant at about 00.27 a.m. and the duration of the call was of 16 Seconds. The CDR Report, nowhere shows that when the CDR reports are forwarded to the investigating office, the said CDR reports are without certificate under Section 65-B of the Indian Evidence Act. Thus, except the said phone call absolutely, there is no material to show that any communication between the present applicant and the co-accused on the day of incident. Though the prosecution relied upon the statement of the son of the deceased, who states about the communication between the present applicant of the co-accused at the time of incident, the said statement was recorded on 23/11/2022 under Section 164 of the Code of

Criminal Procedure. His police statement is also recorded on 09/11/2022 i.e. after 15 days of the incident. Prior to recording of the statement, there is no whisper regarding the involvement of the present applicant in the alleged offence. The question which arises is that on 23/09/2022, on what basis the investigating officer has arrested the present applicant. The same is not answered by the investigating agency.

17. It is well settled that there is neither any rule nor law that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The Courts have considered the evidence of extra-judicial confession which comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witnesses are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction.

18. Considering the above all facts, I am of the view that, at the time of considering the bail application,

the evidence is not to be evaluated or appreciated, but for the purpose of ascertaining whether the prima-facie case is made out against the present applicant or not, some facts required to be seen. Admittedly, till recording of the statement of the mother-in-law, there was no clue for the investigating agency regarding the involvement of the present applicant. However, the present applicant was arrested on 23/09/2022. As per the summary in the charge-sheet, there was no good relationship between the co-accused and her husband and therefore, she narrated the incident to the present applicant and they have hatched the conspiracy. To ascertain this fact, the investigating agency has neither recorded any statement of the witnesses nor placed any material to substantiate. As observed by the Hon'ble Apex Court in various judgments, the extra-judicial confession, though a weak piece of evidence which can be considered if the evidence about extra-judicial confession comes from the mouth of the witness / witnesses who appeared to be unbiased, not inimical and in respect of whom, nothing is brought out which may tend to indicate that he may have motive for attracting the untruthful statement to the accused. The words spoken by the witnesses must be clear, unambiguous and mistakenly convey that accused is the perpetrator of the crime. Admittedly, no exact words uttered by the co-accused are stating by the witness - Rakesh, to whom the alleged extra-judicial confession is made.

19. The learned counsel for the applicant rightly relied upon the judgment of the Hon'ble Apex Court in the case of **Tejinder Singh alias Kaka V/s State of Punjab** cited supra, wherein also the fact shows that extra-judicial confession alleged to be made to the sarpanch and the sarpanch disclosed it after 16 days is held to be unnatural. Similar is the case, here also, though confession is made by the co-accused to the witness Rakesh on 23/09/2022, however, first time, he has disclosed it on 12/10/2022 i.e. after 20 days.

20. The prosecution further placed reliance of the Test Identification Parade. The said Test Identification parade is held on 10/11/2023 i.e. after a delay of approximately more than one and half month. The facts of the case show that the person entered in the house by wearing a monkey cap. So the question is, whether there was an opportunity for the witnesses to see the assailant. The delayed identification parade also creates a doubt about the prosecution case. Another circumstance on which, the prosecution relied upon is the recovery of the lock which is searched on the basis of information given by the present applicant. Admittedly, the said recovery is not made under Section 27 of the Indian Evidence Act after recording the Memorandum Statement of the present applicant.

21. The Hon'ble Apex Court in the case of *Subramanya V/s State of Karnataka*⁶, while considering the scope of Section 27 under the Indian Evidence Act held that for the purpose of proving the discovery of clothes of the applicant at his instance by drawing a panchanama under Section 27 of the Indian Evidence Act. The prosecution has to prove and establish the discoveries in accordance with law.

22. It is held that the investigating officer first to call the two independent witnesses at the Police Station itself, once the two independent witnesses would arrive at the Police Station, thereafter, in their presence, the accused should be asked to make an appropriate statement as he may desire in regard to point out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses, the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchanama that the investigating officer may draft in accordance with law. This first part of the panchanama for the purpose of Section 27 of the Indian Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and to point out the place where the weapon of offence or any other article

6 2022 SCC Online SC 1400

used in the commission of the offence had been hidden. Once the first part of the panchanama is completed thereafter the police party along with the accused and the two independent witnesses would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered, then that part of the entire process would form the second part of the panchanama. As such the law accepts that, the investigating officer to draw the discovery panchanama as contemplated under Section 27 of the Indian Evidence Act.

23. In the present case, the investigating agency has drawn one panchanama showing it as a Kruti Panchanama and relied upon Kruti/verification panchanama. As per the investigating agency, during the said verification panchanama, the applicant has shown the place where he shown the said lock, and the packet of insecticides. Admittedly, none of the witnesses have described the said lock, at the time of recording the said statement.

24. Thus, considering the entire material, the applicant has made out the case to release him on bail. The entire case is resisted on circumstantial evidence and the extra-judicial confession. Though prosecution has tried to show that, mother of the deceased is an eye witnesses of the said incident, but her statement is recorded after

three days. On the date of arrest, absolutely there was no material with the investigating agency to prosecute the accused/applicant for the said offence. As per the allegation, the applicant and the other co-accused were having extra-marital relationship which is not supported by any of the statement of the witnesses. Now, the investigation is completed, charge-sheet is filed. Considering the nature of the evidence collected by the investigating agency during the investigation, and considering the fact that now charge-sheet is filed, further incarceration of the present applicant is not required and therefore, the application deserves to be allowed by imposing certain conditions. Accordingly, I proceed to pass following order:

- a) The applicant – Swapnil s/o Tarachand Gawande, in connection with Crime No.521/2022 registered at Police Station Chandrapur City, Police Station, Chandrapur, for the offence punishable under Sections, 302, 449, 506, 120-B, 182 and 201 of the Indian Penal Code, 1860 is released on bail on executing PR. bond in the sum of Rs.50,000/- with one solvent surety in the like amount.
- b) The applicant shall not enter into the vicinity of the Vishwakarma Square, Balaji Ward, Chandrapur, District Chandrapur till the culmination of the trial.

- c) The applicant shall not induce, threat or promise to any witnesses who are acquainted with the facts of the present case and shall not tamper with the prosecution evidence.
- d) The criminal application is **disposed of**.

[URMILA JOSHI-PHALKE, J.]