



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPLICATION (BA) NO.1119/2023

Lakhan s/o Hemraj Hiranwar

..VS..

The State of Mah., thr.PSO PS Sitabuldi, District Nagpur

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

Court's or Judge's Order

.....
Shri Anil S.Mardikar, Senior Counsel assisted by Shri C.R.Thakur,
Advocate for the Applicant.
Shri V.A.Thakare, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 10/01/2024

PRONOUNCED ON : 18/01/2024

1. Heard.

2. By this application under Section 439 of the Code of Criminal Procedure, the applicant seeks bail in connection with Crime No.139/2023 registered with the non-applicant/police station for offences punishable under Sections 302 and 323 read with Section 34 of the Indian Penal Code.

3. The applicant is arrested on 15.4.2023 and since then he is in jail.

4. The offence came to be registered on the basis of report lodged by Roshan Vilas Sakinala. As per his report, deceased Ishwar Ramchandra Borkar, who is resident of Nagpur, is his friend. According to him, the deceased had called him to Nagpur and, therefore, he along with his friend Akash

Waghmare came prior to two days of the incident to Nagpur from Rajura, district Chandrapur. In the intervening night of 25.3.2023 and 26.3.2023, at about 3:00 am, when they were cheat chatting near Bhola Petrol Pump on VIP road, three boys, having age group of 20-25 years, came on vehicle Scooty. One of them was wearing black shirt. The boy, wearing the black shirt, asked them why they are in his area and started assaulting Akash and Bhola by fists blows. At the relevant time, the deceased has also raised his hands. He was fallen on the ground and the person, who was wearing black shirt, took out a knife from his pant pocket and gave blow of that knife on the person of the deceased. He as well as his friend fled away from the spot as they have apprehended that they would be killed. The deceased also ran away on his vehicle Activa towards Gawali Pura locality. After some time, the deceased was found in an injured condition and, therefore, he was admitted in the hospital. During treatment, the deceased died on 5.4.2023. On the basis of the said report, the police registered the crime.

5. Learned Senior Counsel Shri Anil S.Mardikar for the applicant, submitted that the First Information Report was lodged against unknown persons. Neither the complainant nor prosecution witnesses described assailants by giving their descriptions. The investigating agency was not having any clue about involvement of the applicant, till 15.4.2023. On what

basis the applicant was arrested, is nowhere reflected by investigating papers. The statement of eyewitnesses also show the involvement of unknown persons. The applicant was shown as suspected and merely because the applicant and other co-accused were not found in the house in the early morning, they were shown as accused. The applicant was put in Test Identification Parade and none of witnesses identified him. Only incriminating circumstance, on which the prosecution relied upon, is recovery of incriminating weapon "knife" at the instance of the applicant. The said recovery is after a long gap on the basis information given by the applicant. The said recovery is from flowing water of river. The statement of the accused and recovery panchanama nowhere show exact place from which the alleged recovery was made. Moreover, the place of recovery is accessible to all. The another circumstance, on which the prosecution relied upon, is recovery of clothes of the applicant i.e black shirt, which according to the prosecution was described by eyewitnesses. The alleged incident has taken place in the intervening night of 25.3.2023 and 26.3.2023. The applicant is arrested after 15-18 days of the incident and the recovery is after four days of his arrest. It is highly improbable that he will wear the clothes which were on his person at the time of the incident. Thus, except the recovery at the instance of the applicant, there is no material to connect him with the

alleged offence. Now, the investigation is already completed and chargesheet is filed. Further incarceration of the applicant is not required. Though the alleged offence is of a serious nature, the entire case is rested on circumstantial evidence. However, circumstances on which the prosecution relied upon are insufficient to attract the offence against the applicant. As such, the applicant be released on bail.

6. In support of his contentions, learned Senior Counsel for the applicant placed reliance on the decisions in the case of **Gaffar Khan s/o Rashid Khan vs. State of Mah., thr. Police Station Officer, Police Station Shirkhed, district Amravati, reported in 2017 ALL MR (Cri) 3501** and **Manjunath and ors vs. State of Karnataka, reported in 2023 SCC OnLine SC 1421.**

7. *Per contra*, learned Additional Public Prosecutor Shri V.A.Thakare for the State strongly opposed the application on the ground that though the offence is registered against unknown persons, during investigation, it revealed to the investigating officer that the applicant was not at his house at the time of the incident. The other co-accused were also not found in their respective houses. The incriminating article is seized at this instance as well as the clothes of the applicant are also seized which are matching with the description narrated by

the complainant and other eyewitnesses. At this stage, whether recovery was proper or not cannot be seen, but circumstances are sufficient to connect the applicant with the alleged offence. He further submitted that clothes of the applicant are also seized at his instance. The applicant was not identified as witnesses were threatened prior to the test identification parade regarding which separate crime is already registered and the involvement of the concerned is revealed. From above circumstances, *prima facie* case is made out against the applicant and the bail application deserves to be rejected.

8. After hearing learned Senior Counsel for the applicant and learned Additional Public Prosecutor for the State and after perusing investigating papers, it revealed that the alleged incident has taken place in the intervening night of 25.3.2023 and 26.3.2023 at about 3:00 am near petrol pump on VIP road. The First Information Report is lodged against unknown persons. The circumstances on which the prosecution relied upon are circumstances of recovery of the weapon and production of clothes by the applicant. As per the prosecution, the applicant is the person who gave a blow of knife on the deceased and he was described as a person wearing a black shirt.

9. The another circumstance is, seizure of the weapon

on the basis of the memorandum statement of the applicant.

10. Admittedly, the alleged recovery was on 18.4.2023 i.e. after four days of the arrest of the applicant. As per the memorandum statement made by the applicant, the knife was recovered from the well, wherein there was flowing water, in presence of one witness namely Shankar Wadwani. Recital of the panchanama nowhere shows the place exactly from which the alleged weapon was recovered. There was a flowing water in the river. The statement of this witness Shankar, also nowhere states from which place exactly the said incriminating article was recovered.

11. It is well settled that while considering the recovery, under Section 27 of the Evidence Act, which is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false.....

12. Learned Additional Public Prosecutor for the State placed reliance on the decision in the case of **Golakonda**

Venkateswara Rao vs. State of A.P., reported in (2003)9 SCC 277 wherein the similar observation is made and admissibility of such statement is considered by the Honourable Apex Court in the case of **Subramanya vs. State of Karnataka, reported in 2022 SCC Online SC 1400** and the the Honourable Apex Court held that scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in *Pulukuri Kottaya and Others v. Emperor*, reported in AIR 1947 PC 67 and held that the evidence of discovery of pistol at the instance of the appellant cannot, by itself, prove that he who pointed out the weapon wielded it in the offence. It is further held that mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it.

13. In the light of the observation of the Honourable Apex Court, in the statement by the applicant, the exact place is not mentioned. The discovery panchanama and the statement of witness namely Shankar Wadwani also not disclose the exact place from which the alleged weapon was seized. Admittedly,

the place from which the weapon is recovered is the river wherein water is flowing. In such circumstances, the recovery of the weapon after 15-20 days of the incident is difficult to accept.

14. The another circumstance, on which the prosecution relied upon, is the recovery of clothes which were on the person of the applicant. Admittedly, the said recovery is after four days after arrest of the applicant. The description of clothes of the assailant was narrated prior to that by witnesses. As per the discovery panchanama, the said clothes were on the person of the applicant when the same were seized. The arrest panchanama dated 15.4.2023 nowhere shows description of clothes and, therefore, this recovery of clothes also creates a doubt.

15. As regards the test identification parade, it is submitted by learned Additional Public Prosecutor for the State that accused persons are not identified as they were threatened by one Sachin Mehroliya. To support the said contention, subsequent First Information Report was lodged against said Sachin and chargesheet is placed on record. It is submitted by learned Additional Public Prosecutor for the State that CDR shows that there was communication by said Sachin and the applicant. The CDR report shows call from mobile phone of Sachin on SIM Card No.8767560084 which is in the name of

Vivek Hiranwar. Thus, there were no calls either between the applicant and said Sachin or the relative of the applicant and said Sachin.

16. Admittedly, at the time of the subsequent First Information Report, the applicant was already arrested and, thereafter, the applicant is not concerned with the subsequent First Information Report regarding the threatening.

17. Admittedly, evaluation of the material is not required while considering the bail application. But, while considering whether there was *prima case* or not, the above said discussion is required.

18. After going through investigation papers, admittedly, the entire case is rested on circumstantial evidence and as per the settled law, when the case is rested on circumstantial evidence, burden is on the prosecution to establish chain of circumstances.

19. Here, except circumstance of recovery of the knife at the instance of the applicant, there is no other circumstance to connect the applicant with the alleged offence. In fact, from investigation papers. it is difficult to ascertain on what basis the applicant was arrested on 15.4.2023 when no material was there with the investigation agency to show his connection with

the alleged offence. From investigation papers, it reveals that merely on the basis of the initial enquiry, it revealed that the applicant was not at his house at odd hours and suspicion was raised and on the basis of the suspicion he was arrested.

20. Considering the nature of material on record; investigation is already completed, and chargesheet is filed, further incarceration of the applicant is not required as basic rule is to enlarge the bail and not to keep the accused behind bar by way of punishment.

21. In this view of the matter, the application deserves to be allowed as per order below:

ORDER

(1) The criminal application is **allowed**.

(2) Applicant - Lakhan s/o Hemraj Hiranwar, in connection with Crime No.139/2023 registered with the non-applicant/police station for offences punishable under Sections 302 and 323 read with Section 34 of the Indian Penal Code, shall be released on bail on his executing a P.R.Bond in the sum of Rs.25,000/- with one solvent surety of the like amount.

(3) The applicant shall attend the trial court on each and every date without seeking any exemption, unless there are

exceptional circumstances.

(4) The applicant shall not directly or indirectly make any inducement and threat or promise to any person acquainted with the facts of the present case.

(5) The applicant shall furnish his cell phone number(s) and address with the address proof. Additionally, he shall furnish names of his two relatives and their addresses with proof.

(6) Needless to mention that the observations made in this order are purely *prima facie* for deciding the present application for grant of bail only and learned Judge before whom the trial will be conducted shall not get influenced by the said observations.

The application stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!