



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

CRIMINAL APPLICATION (BA) NO. 635 OF 2024

Chandan s/o Devchand Hingankar Vs 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. A.M. Jaltare, counsel for applicant.

Mr. N.B. Jawade, APP for the non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 14/08/2024.

1. The applicant came to be arrested on 12/01/2024, in connection with crime No. 7/2024, registered with police station Koradi, District Nagpur for the offence punishable under Section 302, 201 read with Section 34 of the Indian Penal Code, 1860.

2. The crime is registered on the basis of a report lodged by the wife of the deceased, on an allegation that her marriage with the deceased was performed on 25/11/2007 and after marriage, she was cohabiting with the deceased at Sarni, District Betul (Madhya Pradesh). They stayed there till 2009, and thereafter, again, they came to Nagpur and were residing at Paradise Society, Khamla, Sonegaon, District Nagpur, on a rental basis. She stayed with the deceased till 2016, but as the deceased was not treating her well therefore, she started residing with her mother along with her son and daughter. Thereafter, she came to reside at Ganeshpeth in 2008. There was no communication between her and her husband, but she came to know that

her husband had started the Cement Bricks Factory at Suradevi on his own land. On 10/01/2024, the police approached her, and therefore, she went along with the police at Koradi Police Station, wherein she was informed that the police received the information that one dead body is buried near the said cement factory, and in her presence, the applicant has given the extra judicial confession, as the deceased was not treated well and was always humiliating and insulting him with the help of Manohar Kawadu Dudhbarwe eliminated him on 08/06/2023 at about 9.00 to 9.30 pm. and buried his dead body near the cement factory. On the basis of said report, police have registered the crime against the present applicant.

3. Learned counsel Mr. A.M. Jaltare, for the applicant, submitted that the entire case is based on circumstantial evidence. As per the investigating officer, the place of the dead body, wherein it was buried, was discovered at the instance of the present applicant on the basis of his statement recorded under Section 27 of the Indian Evidence Act, 1872.

4. He submitted that, in fact, this investigation is contradictory by their own documents, and he invited my attention towards the general diary entry dated 10/01/2024, recorded at 4.28 pm, which shows that the investigating agency came to know that the dead body of Vilas Velchand Hingankar was buried in the agricultural field, and therefore, to remove the said dead body from the

said place, they informed the Deputy Collector as well as the Panchas, and the vehicle was also arraigned for the same. The another general diary entry he has shown, i.e. on 10/01/2024 at about 14.31, which also shows that they have mentioned that the present applicant and his servant Manu were brought to the police station for inquiry purpose. The communication dated 10/01/2024, communicated to the Forensic Lab, and the communication to the Senior Police Officer also discloses that the investigating officer was aware that, where the dead body was lying and thereafter, the accused was arrested on 12/01/2024, and the investigating officer has shown that at his instance, the place where the dead body was buried is recovered.

5. He submitted that, this entire investigation is a tainted investigation, and only to implicate the present applicant, this evidence is created. He further submitted that as far as the involvement of the present applicant by the informant is concerned, is on the basis of extra judicial confession by the present applicant which is very weak type of evidence.

6. He further submitted that during the investigation, the investigating officer has recorded the statements of Lalita Sunil Pathrabe and Durgesh @ Ombahadur Thapa to show that it was the applicant who was involved in the alleged crime to eliminate the deceased. He submitted that, in fact, the applicant was not last seen in the company of the deceased. There is no evidence as to the fact that there was

some enmity between two brothers, and therefore, the present applicant has eliminated the deceased. The statement of the relative also nowhere discloses that there was such type of enmity that the applicant had a motive to eliminate the deceased. Thus, the entire case is based on circumstantial evidence. He submitted that the statement of Durgesh shows that co-accused has made extra judicial confession to him, from which it reveals that it is the applicant and the said co-accused have eliminated the deceased. Thus, considering the nature of evidence, which is collected during the investigation, it falls short to connect the present applicant with the alleged incident.

7. He invited my attention towards the recent decision of the Hon'ble Apex Court in the case of ***Rajesh and another Vs State of Madhya Pradesh [2023 (13) Scale 1]***, wherein in para-27, it is observed that, it was his arrest which resulted in actual 'police custody', and the confession made by him, before such arrest and prior to his being 'accused of any offence', would be directly hit by Section 26 of the Evidence Act and there is no possibility of applying the exception under Section 27 to any information given by him in the course of such confession, even if it may have led to the discovery of any fact. In consequence, the purported discovery of the dead body, the murder weapon and the other material objects, even if it was at the behest of the Rajesh Yadav cannot be proved against him, as he was not 'accused of any offence' and was not in 'police custody' and at the point of time he allegedly made a confession.

8. Learned counsel for the applicant submitted that the case of the present applicant is on a better footing. The investigating agency was very well aware about the fact that the dead body was buried near the cement brick factory, and the statement of the present applicant was recorded on 11/01/2024 i.e. prior to his arrest; therefore, he was not actually in police custody, and in view of the observation of the Hon'ble Apex Court, it is hit by Section 26 of the Evidence Act.

9. Per contra, the learned APP strongly opposed the said application and submitted that, admittedly, the entire case is based on circumstantial evidence. However, in the circumstances, the statement of the present applicant, extra judicial confession of the present applicant, as well as other co-accused, the statement of the witnesses shows that the said land wherein the dead body was buried was levelled by the present applicant, and the statement of one witness which shows the present applicant purchased a huge amount of salt from one shop. This circumstance sufficiently shows the involvement of the present applicant with the alleged offence. In view of that, the application deserves to be rejected.

10. After hearing learned counsel for the applicant and learned APP for the State, perused the investigation papers, from which it reveals that the entire case is based on circumstantial evidence. It is well settled that when a case is based on circumstantial evidence, the circumstances which

unerringly point out towards the guilt of the accused to be established by the prosecution. Admittedly, the statement of the present applicant was recorded when he was not in police custody. Thus, in view of the observation of the Hon'ble Apex Court in the judgment of ***Rajesh and another (supra)***, as he was not in 'police custody' when the said statement was made, it is hit Section 26 of the Indian Evidence Act, 1872, and therefore, there is no possibility of allowing the exception under Section 27 of the Indian Evidence Act, 1872.

11. The investigation papers further show that prior to the applicant was taken into custody, the investigating agency was aware about the burying of the dead body in the agricultural field. The general diary entry substantiates the same. Therefore, the contention of the prosecution that the place where the dead body was buried was discovered, at the instance of the present applicant, is hit by Section 26 of the Indian Evidence Act, 1872.

12. As far as the other circumstances are concerned, the prosecution placed reliance on the extra judicial confession, which is a very weak type of evidence. It can be accepted if it is corroborated by other circumstantial evidence. The other circumstances on which the prosecution relied upon the statements of the witnesses. Admittedly, at this stage, the nature of the evidence or the quality of the evidence is not to be appreciated, but at this stage, whether prima-facie case is made out or not is to be considered. Considering the

nature of the evidence which was collected during the investigation, the applicant has made out a case to use the discretion in his favour. Moreover, the investigation is already completed and charge-sheet is already filed, further incarceration of the present applicant is not required. In view of that, the application deserves to be allowed. Accordingly, I proceed to pass the following order;

- a] The application is allowed.
- b] The applicant- **Chandan s/o Devchand Hingankar** shall be released on bail, in connection with crime No. 7/2024, registered with police station Koradi, District Nagpur for the offence punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code, 1860, on executing P.R. Bond in the sum of Rs. 25,000/- with one solvent surety in the like amount.
- c] The applicant shall attend the concerned police station twice in a month on 1st and 15th day of every month between 10.00 a.m. to 01.00 p.m. and investigating officer shall record his presence.
- d] The applicant shall attend the proceedings before the Sessions Court without seeking any exemptions unless there are exceptional circumstances.

e] The applicant shall not induce, threat or promise any witnesses who are connected with the alleged offence.

The criminal application stands **disposed of** accordingly.

[URMILA JOSHI-PHALKE, J.]