

ORDER PASSED BELOW EXH. 208 IN SESSIONS CASE No. 103/2018

This is an application U/s. 227 of Cr. P. C. for discharge, filed by accused No. 11 Gaurav Subhash @ Bajirao Pawar.

Facts germane to the decision of the application are as under :-

02. It is the case of the prosecution that on 07/06/2018 there was some dispute between Raosaheb Patil, Prashant Dagajirao Patil and accused Nos. 1 to 6 and 9 to 11 on account of erection of 'danda' (Pole) at the occasion of festival of Dandi Pournima. There were some hard talks between accused No. 6 and Yogesh Patil. Consequently, Raosaheb Patil has called accused No. 6 to his house at 52 Saraswati Colony, for inquiring into the matter, but accused No. 4 did not let him go and instead sent accused No. 3. Raosaheb Patil was trying to give some understanding to accused No. 3 at that time son of Raosaheb Patil namely Vaibhav Patil has slapped accused No. 3.

03. It is the case of the prosecution Due to all these happenings accused Nos. 1 to 6 and 9 to 11 were upset and they conspired to teach a lesson to Raosaheb Patil and his family. They all gathered near Swastik Talkies owned by accused No. 1 to discuss the issue. They were aware about the daily routine of Raosaheb Patil. On next day i.e. on 08/06/2018 accused No. 4 asked accused No. 6 to keep a vigil over the movements of Raosaheb Patil. They collected the weapons like sword, kukari, knife, rod etc, also managed a Skoda Car for use in case of emergency.

04. The prosecution case further discloses that on 08/06/2018 accused No. 6 was stationed outside the house of Raosaheb Patil. He was informing accused No. 4 and other accused persons regarding the movements of Raosaheb Patil. Some of the accused were sitting in

Samadhan Beer Bar. After sometime, Raosahb Patil along with some other person (cited as eye witnesses) came out of the house. They started in two vehicles i.e. Maestro moped bearing No. MH-18-AS-5778 and Scorpio bearing No. MH-18-W-5778.

05. It is the case of the prosecution when both the vehicles were passing through the road near the house of accused Nos. 4 and 6 at that time accused Nos. 2, 3, 5, 7, 8, 11, 12, and 13 intercepted both the vehicles. They compelled Raosaheb Patil to alight from the vehicle. Thereafter, these persons took out their arms and started giving blows to Raosaheb Patil. Other persons travelling in the vehicle tried to save Raosaheb Patil, but accused persons also gave deadly blows to them. Son of Raosaheb Patil Vaibhav tried to save his father. At that time accused Nos. 2, 3, 5 circled him and accused No. 6 stabbed him accused No. 4 also caused multiple injuries with a kukari on his head and face. Eye witnesses tried to run away from the spot, but they were chased and beaten by accused No. 7, 12 and 13. After the incident, accused persons disappeared from the spot saying that they have done away with Raosaheb Patil and his son Vaibhav (रावसाहेब व त्याचे मुलाचा काटा काढला).

06. There was double murder and several eye witnesses were injured. Prashant Dagajirao Patil (younger brother of Raosaheb Patil) lodged a complaint against 8 persons in Deopur Police Station, Dhule. Accordingly, CR No. 75/2018 was registered. During the investigation police found complicity of 5 more persons and final report / charge-sheet was filed against total 13 persons for the offence punishable U/s. 302, 307, 341, 120B, 109, 143, 147, 148, 149, r/w Section 4/25 of Indian Arms Act and Section 37 (1) (3) r/w 135 of the Bombay Police Act.

07. In this backdrop accused No. 11 Gaurav has moved this application for his discharge U/s. 227 of Cr. P.C.. It is mainly contended that there is no sufficient material against him to frame charges. Incident in question has occurred between 5:30 pm to 6:00 pm on 08/06/2018. On that day between 3:25:53 to 5:59:59 he was in a mobile shoppe by name Tanisha Mobile situated at Signal Chouk, Dhule. He has also produced pen drive of CCTV footage of the shop to show his presence in the shop.

08. According to accused No. 11 at the relevant time he was not present at the spot of incident. He has no concern with the alleged crime. There is nothing on record to show that he was part of conspiracy and in such circumstances there is no sufficient material to frame charge against him and he is entitled to be discharged.

09. Say of prosecution is called for. Learned DGP has strongly opposed the application thereby contending that plea of alibi has to be considered at the time of trial and not at the stage of framing charge or seeking discharge. CCTV footage or other evidence sought to be relied upon by applicant / accused cannot be considered at this stage, and application is liable to be rejected.

10. Original complainant Prashant Dagajirao Patil has also filed his detailed say at Exh. 211 and prayed for rejection of the application.

11. I have heard learned advocate Mr. N. S. Chavan for applicant / accused. According to him as per the settled law plea of alibi has to be raised at the first available opportunity. CCTV footage are relevant piece of evidence to establish plea of alibi. According to learned counsel they have tried to provide CCTV footage to investigating

officer, but same has not be accepted. Court is not debarred from relying upon the same. To support this argument he relied on the judgment of *Nitya Dharmananda @ K. Lenin & Anr. V/s. Sri. Gopal Sheelum Reddy also known as Nithya Bhaktananda and Anr., 2017 CJ (SC) 1460*, wherein the Hon'ble Supreme Court, has made following observations in para 9.

“ 9. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator / prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet. It does not mean that the defence has a right to invoke Section 91 Cr. P. C. de hors the satisfaction of the court, at the stage of charge”.

12. He also pointed out judgment of *Lakhansing @ Pappu V/s. State of LCT Delhi, 2011 CJ (Del) 3396*” wherein the Hon'ble Delhi High Court has held that plea of alibi will have to be taken at the earliest opportunity.

13. On the other hand, learned public prosecutor Mr. Tavar has argued that as many as five eye witnesses have stated regarding presence of applicant / accused No. 11 Gaurav on the spot of incident. According to him, at the time of considering an application U/s. 227 of Cr. P. C., Court has to consider record of the case and the documents submitted therewith by the prosecution. Court cannot consider any material filed by the accused or sought to be relied upon by him. To buttress this argument, he cited a full bench judgment of Hon'ble Supreme Court in case of *State of Orissa V/s. Debendra Nath Padhi*,

AIR 2005 SC 359” wherein Hon'ble Supreme Court has made following observations in para 8.

“ 8. What is to the meaning of the expression the record of the case as used in Section 227 of the Code. Though the word ' case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit ' the case' to the Court of Session and send to the Court ' the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.”

14. I have already stated the facts of the case in some detail. As per the case of the prosecution, there was some dispute regarding fixation of direction of pole (Danda) at the occasion of Dandi Pournima on previous day. Thereafter, a conspiracy has hatched to teach a lesson to deceased Raosaheb Patil and his family members. To achieve the object of that conspiracy, accused persons were in full preparation and armed with deadly weapons. They launched a preplanned attack to achieve the goal of conspiracy.

15. Applicant accused No. 11 Gaurav is raising a plea of alibi. However, it is worth to mention that there is charge of criminal conspiracy and murder U/s. 120B and 302 of Indian Penal Code. Offence of Criminal Conspiracy has its foundation in an agreement to commit an offence and presence of a particular conspirator / accused at the spot of incident of scene of crime is not necessary.

16. Accused is intending to rely on CCTV footage of a mobile shop. Whether these CCTV footage are gathered from the proper source and by following appropriate legal procedure and whether they are admissible in evidence can only be ascertained at the time of trial, and more particularly after the evidence of parties. As observed by Hon'ble Supreme Court in case of Debinath Padhi no provision in the code grants to the accused any right to file any material or document at the stage of framing charge, and hence, even otherwise, the CCTV footage cannot be considered at this stage.

17. The crystallized judicial view is that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. Per contra, if the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any, cannot show that accused committed the particular offence then the charge can be quashed.

18. There are statements of as many as 5 eye witnesses who have stated regarding presence of applicant / accused No. 11 at the spot of incident. Upon consideration of the record of the case, and documents submitted therewith and after hearing both the parties I am of the opinion that there is prima-facie case and sufficient ground for proceeding against accused No. 11, and he is not entitled to be discharged. Application is sans merit and deserves to be rejected.

19. Since I am not considering the CCTV footage produced by the accused, it would not be proper on my part to make any comment regarding merits or demerits of the plea of 'alibi'. Needless to say that said point or defence of alibi is kept open, and accused may raise the same at an appropriate stage of the trial. Hence, the following order.

ORDER

The application Exh. 208 is hereby rejected.

Dhule :
Dated : 02/09/2021

(Aejaz H. Sayyed)
Addl. Sessions Judge-3, Dhule.

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I certify that the contents of this PDF File are word to word as per original Judgment/Order.

Name of the Steno : Pravin R. Pande
Name of the Court : Aejaz H Sayyed
Court of District Judge-3 and
Addl. Sessions Judge, Dhule
Judgment delivered on : 02/09/2021
Judgment signed by P.O.: 03/09/2021
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