

IN THE COURT OF SESSIONS JUDGE, YAVATMAL

(Presided over by Shri K.R.Pethkar)

Sessions Trial No. 49/2019

State -Vs- Kiran and others

Order Below Exh.38

[Passed on this 26th Sept. 2019]

1.. Heard learned Advocate Shri Rajesh Chavhan for accused No.2 and learned A.P.P. Shri Pande for the State. This is an application under section 227 of Cr.P.C. for discharge of accused No.2 from the present case.

2.. The accused states that there is no material against him so as to connect him with the alleged crime. The first information report as well as statement of the first informant shows that accused neither have any dispute with the deceased nor he was involved in the actual incident of assaulting and thereby causing death of Sanjay Mangulkar. The only allegations made against him by the first informant and her daughter in their statements is that on the day of incident they saw deceased Sachin Mangulkar standing at Moha Fata alongwith him, Kiran Khadase, Babu Tayade and the present applicant was also present there and they were speaking with the deceased in a loud voice. The call detail record of the mobile number of the accused/applicant shows that at the time of

alleged incident applicant/accused was not present at Moha Fata at any time during the day of the incident. There is no material on record to show that applicant hatched the conspiracy with co accused persons to commit the murder of deceased Sachin. The applicants is roped in the offence falsely. Hence, the application for discharge of applicant/accused No.2.

3.. The state has given its reply at Exh.41 stating that deceased Sachin was doing business of sand excavation and transportation alongwith accused Kiran Khadase and applicant/accused No.2. Before some days of the incident, there was dispute between the applicant/accused No.2 and the deceased alongwith co accused persons. On 29-12-2018 the first informant and her daughter while going to State Bank Chowk in their Bollero vehicle saw the deceased Sachin Mangulkar was standing at Moha Fata alongwith the applicant/accused No.2, accused Kiran Khadse and accused Babu Tayade and they were present there. They were speaking in loud voice with deceased Sachin. Due to the dispute of sand business, applicant/accused No.2, accused Kiran Khadse and accused Babu Tayade had hatched criminal conspiracy and with

the help of accused Bhima Khade and Gajanan Kumare committed murder of Sachin Mangulkar. The name of the applicant is specifically mentioned in the report and in the statements of the witnesses. The F.I.R. itself speak about the evidence against the applicant. The application is devoid of merits. Hence it has prayed that the application for discharge be rejected.

4.. Learned Advocate for the accused has submitted that the report and the statements of the witnesses are contradictory to each other. The applicant/accused was not present on the spot at the time of the alleged incident. There is no material on record to connect the applicant/accused in the crime. There was no dispute between the applicant/accused No.2 and deceased with respect to the sand business. The mere name of the applicant/accused No.2 in the F.I.R. is not sufficient to held that he has hatched criminal conspiracy with co-accused persons. There is no material on record to frame the charge against the applicant/accused. The Hon'ble High Court while giving bail to the applicant/accused No.2 has made several observations in his favour and the same are binding on this

Court.

5.. He has further submitted that statement under section 164 of Cr.P.C. is not a substantive piece of evidence. It can only be used for contradiction or corroboration for the statement which is previously recorded under section 161 of Cr.P.C. The statement under section 164 and 161 of the Cr.P.C. of the first informant are not corroborative to each other. The first informant has put forth different story all together in her statement u/s 164 of Cr.P.C.

6.. He has submitted that in the report and in the statement of the first informant and her daughter, there is no whisper about any assault made by this applicant/accused No.2. The report and the statement categorically state as to who is the author of the assault. The statement of the first informant under section 164 of the Cr.P.C. is recorded after one year from the date of alleged incident. The first informant had the knowledge that the applicant/accused had participated in the assault on her husband, then what prevented her to mention the said fact in her report and as to who had restrained her to mention the said fact in the report. The report and the

statement of the first informant under section 164 Cr.P.C. clearly shows that she has falsely implicated the applicant/accused in the offence. There is no corroboration to the statement of the first informant before the Magistrate. The police had arrested the applicant/accused and seized his clothes and in the investigation it did not transpire that there were stains of blood on clothes which were on his person. He has prayed that the applicant/accused be discharged in this crime. In support of his submission he has relied upon the authority of Hon'ble Supreme Court.

7.. Learned A.P.P. has submitted that prima-facie there is sufficient material on record to frame the charge against the applicant/accused. The name of the applicant/accused is mentioned in the F.I.R., report and in the statements of the witnesses which reflects that the applicant hatched the conspiracy to commit the murder of deceased Sachin alongwith co-accused persons and the prosecution will prove the same by adducing its cogent evidence. He has prayed that the application for discharge is devoid of merits and the same be rejected.

8.. In the case of Baij Nath Shah vs State of Bihar reported in 2010 AIR (SCW) 390 the Hon'ble Supreme Court has referred its judgment in case of Ram Kishan Singh Vs Harmit Kaur and another reported in AIR 1972 SC 468 wherein the Hon'ble Supreme Court has observed that a statement of 164 Cr.P.C. is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-a-vis statement made in Court.

9.. In case of Awadhumbhar Digambar Jagdame and another vs State of Maharashtra reported in 1999 Cr.L.J. 1936 wherein the Hon'ble Supreme Court has referred its judgment in case of Ram Kisan supra.

10.. In case of Yogesh @ Sachin Jagdish Joshi -Vs- State of Maharashtra reported in 2008 All MR (Cri.) 3222 SC the Hon'ble Supreme Court has observed that :-

“Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surround circumstances and the conduct of the accused.”

11.. In case of State -Vs- Dr Gajraj Singh reported

in 2017 (1) JCC 511 (reported SSC Online) Delhi High Court, wherein the Hon'ble High Court has observed that as per the statements recorded under Sections 161 Cr.P.C. the police was called after the doctor scolded both the prosecutrix and their mother for not following the line. Even during trial the two statements, that is, one recorded under Section 161 Cr.P.C. and other under Section 164 Cr.P.C. are not reconcilable.

12.. In case of State represented by the Deputy Superintendent of Police, Vigilance and Anti Corruption Tamil Nadu -Vs- J. Doriswami etc. reported in 2019(7) Cri. 422. the Hon'ble Supreme Court observed that :-

“While considering the case of discharge sought immediately after the charge-sheet is filed, the Court cannot become an Appellate Court and start appreciating the evidence by fining out inconsistency in the statement of the witnesses as was done by the High Court in the impugned order running in 19 pages. It is not permissible.”

13.. The report of the first informant states that her husband was doing the business of sand alongwith Kiran Khadse and Sachin Mahalle from Yavatmal and from last few days there was a dispute between them about the business as a result her husband closed the business of sand. Her report further states

that on 29-12-2018 she herself alongwith two sons, mother-in-law and sister-in-law were proceeding in a Bollero Jeep near State Bank Chowk to eat Panipuri. At that time she saw that near Moha Fata her husband was standing and near to him Kiran Khadse, applicant/accused Sachin Mahalle and Babu Tayade were talking with him in loud voice.

14.. The report states that in the night at 9.15 p.m. after dinner the first informant and her daughter Kasturi went for walking. They heard shout and when they reached near the house of Mankar, the first informant and her daughter went ahead and saw that her husband Sachin was lying in a pool of blood and Bhima Khade and Gajanan Kumare were having sharp edged weapons in their hands and they were giving blows on the person of her husband.

15.. The statement of the first informant was recorded by the J.M.F.C. Yavatmal on 22-1-2019 and in the said statement she had stated that after coming out of house she went ahead and saw that Kiran Khadse, applicant/accused Sachin Mahalley and Babu Tayade were assaulting her husband and thereafter her brother-in-law came there and when she

rushed there, the three assailants ran away from there. Her husband was lying in a pool of blood. Kiran Khadse, applicant Sachin Mahalley and Babu Tayade had committed murder of her husband as there was dispute between them about the business of sand.

16.. The Hon'ble Bombay High Court while deciding Criminal Application (Bail) No. 227/2019 of the applicant/accused had made following observations :-

“To prove conspiracy, Investigating Officer recorded conversation on mobile between accused Bhim and the applicant. It appears from the conversation that accused Bhim informed the applicant about killing of deceased. Conversation between them does not show that the present applicant was conspirator. Whereas the present applicant exclaimed as ' अरे बापरे कायच्यासाठी' ”. The same shows that he was feeling bad about the incident. Conversation between Bhim and the applicant nowhere shows that the applicant is the conspirator of crime. There is no other evidence to show conspiracy between the applicant and main accused Bhim and Gajanan.”

17.. With due respects to the Hon'ble Bombay High Court the above observations were made by the Hon'ble High Court on the basis of the material which was placed before it and the said observations are restricted for the purpose of regular bail only, as it has not decided the matter finally. It is pertinent

to note that the statement of the first informant recorded by the J.M.F.C. under section 164 of the Cr.P.C. was not before the Hon'ble High Court while deciding the application for regular bail of the present applicant/accused No.2. The said statement shows the active participation of the applicant in the actual assault on the deceased.

18.. The variance in the report and the statement of the first informant u/s 164 of the Cr.P.C. is to be considered at the time of trial on merit. The submissions in Para No. 5 and 6 on behalf of applicant/accused are not helpful to him at this stage as this Court is deciding the application for discharge and while deciding the application for discharge, the court has to read the police papers as it is and it has to consider the material brought on record by the prosecution as it is at the time of framing of charge against the accused persons. Prima-facie the statement of the first informant u/s 164 of the Cr.P.C. before the Magistrate, shows that there is sufficient material on record to frame the charge against the applicant/accused. The authority of Hon'ble Supreme Court Ram Kisan Singh cited supra is in the matter which was decided on merits after the leading evidence.

The statement of the first informant under section 164 discloses grave suspicion against the applicant/accused No.2 and the same suspicion is not explained properly.

19.. No doubt there is a variance in the report and statement of the first informant. However this is not the stage to weigh the variance. The statement under section 164 of the first informant shows that the applicant/accused No.2 might have committed the offence. It can be presumed that learned Magistrate while recording the statement of first informant and her daughter had verified the voluntariness of both the first informant and her daughter to make statement and they were under no threate or coercion. In case of Dr. Gajraj Singh cited supra the clean cheat was given to the doctor in the statement which was recorded before Magistrate and in the present case the statement of the first informant under section 164 of Cr.P.C. shows participation of the applicant/accused No.2.

20.. The statement of the first informant recorded u/s 164 of the Cr.P.C. prima-facie shows the active participation of the applicant/accused No.2 at the time of committing offence. Moreover the fact that the first informant is the wife of the

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deceased cannot be over looked. The offence is of serious in nature. There are no grounds to discharge the applicant/accused No.2 from the crime. The application is devoid of merits and same deserves to be rejected. Hence, I pass the following order.

Order

The application for discharge Exh.38 is hereby rejected.

Yavatmal.
Dated : 26-9-2019

[K.R.Pethkar]
Sessions Judge, Yavatmal.

