



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION 524 OF 2002

Mr. Kisan Soma Sathe

Applicant

.. (Orig. Accused no. 4)

Versus

The State of Maharashtra

(At the instance of MIDC Police Station vide C.R.
No.026 of 1993)

.. Respondent

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- Mr. S.R. More, Advocate for Applicant.
 - Ms. P.P. Shinde, APP for Respondent – State.
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 02, 2025.

JUDGMENT:

1. Heard Mr. More, learned Advocate for Applicant and Ms.. Shinde, learned APP for Respondent – State. This Revision challenges rejection of Discharge Application of Applicant – Accused No.4. It was admitted on 11.12.2002 and Trial Courts order was stayed qua the Applicant. Impugned order is dated 02.11.2002.

2. It is seen that there are 13 Accused in the crime which has been registered. The Applicant before me is Accused No.4 whose name is Kisan Soma Sathe.

3. First Information Report (for short “FIR”) came to be filed by Original Complainant, Mr. Firoz Mohammad Sultan on 12.01.1993 alleging that 15 persons with deadly weapons brandishing swords,

iron rods and sticks entered the premises of Blue Steel Company, Road No.20, M.I.D.C., Mumbai and assaulted the watchmen Mr. Soheb Khan and Mr. Naushad Soheb Khan. Soheb Khan was killed on the spot whereas Naushad Soheb Khan succumbed to his injuries later at about 5:30 p.m. In a further assault one more person namely Mr. Irfan Sadikali Ansari was also assaulted leading to his death.

4. Date of incident i.e. 12.01.1992 incidentally is the time when the entire city of Mumbai was affected and gripped by communal riots in the year 1993. First informant Mr. Firoz Mohammad Sultan lodged the Complaint vide C.R. No.26 of 1993 about 9:30 p.m. of the same day. He was working in Noble Electric Company, Andheri nearby. Incident occurred in the premises of Blue Steel Company at M.I.D.C., Andheri. Complaint is lodged against 15 unknown persons wherein First Informant-Complainant has given description of about 8 persons in his FIR. In the Test Identification Parade, Complainant identified some of the Accused.

5. Five of the Accused were arrested who recorded their confessional statement before 3 panch witnesses on 19.01.1993, resulting in recovery of weapons under Section 27 of the Indian Evidence Act, 1872. These five co-accused are Accused No.2 – Mr. Vishnu Shivalkar, Accused No.10 – Mr. Chandu Vani, Accused No.1 -

Mr. Sunil Shivalkar, Accused No.12 – Dashrath Nivale and Accused No.7 – Anand Naik.

6. Mr. More, learned Advocate for Revision Applicant would argue that in the present case name of Applicant has been stated by the above 5 accused persons who were apprehended and arrested for the crime and from whom weapons have been recovered.

7. He would submit that name of Applicant is not stated in the FIR, nor he was arrested alongwith the original 8 accused persons and most importantly when the charge-sheet is filed name of the Applicant is also not reflected therein. He would submit that while recording recovery panchanama of the alleged weapons used by accused, the name of Applicant is reflected therein for the first time being taken by the above 5 accused as one of their accomplice. He would submit that even in those statements there is no role attributed to the Applicant. He would submit that the voluntary statements of the 5 accused persons where name of Applicant is stated are recorded at 21:15 hours in the Tadipar room of M.I.D.C. Police Station, Andheri in the presence of the Police Officers for recovery of alleged weapons used and subsequently hidden by the said 5 accused. He would submit that by order dated 11.12.2002, this Court had stayed the trial for Applicant, which is still in operation.

8. He would submit that in that order this Court has *prima facie* come to the conclusion that no case whatsoever is made out against the present applicant. He would submit the fact that in the entire charge-sheet the name of Applicant is not reflected deserves due consideration by the Court. He would submit that no role or use of weapon whatsoever is attributable to the present Applicant in any of the prosecution pleadings and there is no recovery of any weapon from the Applicant. He would submit that merely because Applicant has been named by the 5 accused persons in their voluntary confessional statements during recording of recovery panchanama, the veracity of those statements in law is needed to be considered by the Court for indictment of the present applicant. He would submit that appended at Annexure "B" is the recovery panchanama of Memorandum dated 19.01.1993. In that statement the pancha witness namely Mr. Ashok Shamrao Surhadkar and Sanjay Ramdas Zunjare, both residents of nearby Bhimnagar Slum Colony, MIDC, Andheri (East) were called by police and in their presence the police recorded the confessional statements of Accused No.2 – Mr. Vishnu Savar, Accused No.10 Mr. Chandu Wani, Accused No.1 – Sunil Shivalkar and Accused No.12 – Dashrath Nimle and Accused No.7 - Anand Naik which are recorded in that order therein in excerpts.

9. The said Memorandum – Recovery panchanama begins at 21:15 hours and pertains to recovery of weapons wherein the aforesaid 5 accused who recorded their voluntary statements agreed to show to the pancha witnesses the place where the weapons used by them were kept hidden after committing the crime in question. I have perused Annexure “B” – at page No.11 which is the Memorandum panchanama. It is in 6 pages. It states that after recording the aforesaid voluntary confessional statements of the 5 accused persons, the pancha witnesses alongwith police and then went to the place where the weapons were hidden by the 5 accused and the said weapons were recovered and seized. Post recovery and seizure of the weapons, on 19.01.1993 itself the panchanama is declared to be completed and closed at 23:00 hours.

10. On the first 5 pages it is seen that while describing the incident which occurred, the 5 accused have named their other 12 associates. All 5 accused have named the other 12 associates in an identical fashion. The name of Applicant Kisan Soma Sathe is reflected in the list of names in the statement recorded by the 5 accused before the pancha witnesses at the time of drawing up of the recovery panchanama - Memorandum dated 19.01.1993. Save and except the above reflection of Applicant's name, he is indicted as Accused on the basis of the aforesaid statements indictment of the applicant is made.

Mr. More would draw my attention to the provisions of Section 30 of the Indian Evidence Act and would contend whether such a confession of a co-accused against a co-accused would be relevant and admissible in evidence. It is seen that no further steps have been taken by the Investigating Officer for showing the role of the Applicant or to unearth any corroborative evidence against Applicant to link him to the crime in question, save and except the recording of the above voluntary confessional statements of co-accused before the pancha witnesses.

11. Question raised before me is whether merely on the basis of the name of Applicant appearing in the voluntary confessional statements of co-accused, can the Applicant be charged and tried in the present case. Admittedly, there is no other evidence. *Prima facie*, save and except the alleged confessional statements of co-accused there is no other material or evidence placed on record by Prosecution to corroborate the role or nexus of Applicant as acceptable evidence to connect the Applicant to the crime in question. Thus in the absence of any acceptable evidence to link the Applicant to the crime in question which the prosecution has failed to place on record despite several years having passed by and there being no other evidence brought on record to implicate the Applicant, in a case like this where conspiracy is primarily alleged between the Accused persons, case of prosecution

cannot be held to be adequate for indicting the Accused to the crime of criminal conspiracy.

12. Merely on the basis of alleged Confessional Statement of the co-accused qua the Applicant and more specifically in the absence of any corroborative evidence it would not be safe to indict and convict the applicant.

13. The Supreme Court has in the case of ***Indra Dalal Vs. The State of Haryana***¹ considered conviction based only on confessional statements and recovery of vehicle used in the crime in that case and has set aside the conviction by observing as under in paragraph Nos.16 and 17 of the said decision:-

“16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practising oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countless by this Court as well as the High Courts.

17. The word “confession” has nowhere been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when

1 (2015) 11 SCC 31

they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is, other than a police officer, shall also become inadmissible.

14. Thus, it is seen that even Section 26 of the Indian Evidence Act, 1872 comes to the rescue of the applicant as the confessional statement of the 5 accused is made before the police officers in the Police Station and not before the Magistrate. What is intriguing in the present case is the sheer lapse of time and no material brought on record by the prosecution to show the nexus of Applicant.

15. Hence, on a close scrutiny of the said recovery panchanama namely Memorandum dated 19.01.1993 appended at Annexure "B" – page No.31 of the Revision Application, I am of the opinion that even after so many years, nothing is brought on record by the prosecution and thus in the absence of any other corroborative evidence the Application for discharge ought to have been allowed by the Trial Court.

16. Under the Indian Evidence Act, 1872 such confessional statements of the co-accused have minimal evidentiary value and in the absence of any other corroborative evidence on the basis of such statements, charge cannot be framed. Such is the present case as

apart from disclosing the name of Applicant, no other act or role is attributed to the Applicant.

17. Mr. More has placed reliance on the decision of Supreme Court in the case of the *Suresh Budharmal Kalani alias Pappu Kalani Vs. State of Maharashtra*² in Support of this submissions in the present case.

18. It is seen that the impugned order merely proceeds on the premise that the statements of co-accused are not confessional statements but are voluntary statements given by them admitting to the crime and resulting in recovery of weapons and therefore the said voluntary statements cannot be equated with confessional statements. This is the sole reason stated in the impugned order to reject the Discharge Application.

19. If that be the case then nothing prevented the prosecution from bringing on record any other material on record to corroborate the available evidence against Applicant.

20. A voluntary statement is a statement made by a person exercising his/her free will whereas a Confessional Statement is one in which a person admits to have committed an act. In the present case statement of the 5 accused is infact a confessional statement made and given in the present case because they have admitted to disclose the

² 1998 SCC (Cri.) 1625

place where they had kept the weapons hidden after committing the crime and the said weapons are recovered in the presence of panchas. Hence, such statements cannot be anything other than confessional statements. Reading of the same also clearly indicate that they are made voluntarily to confess to the crime, the weapons used and for recovery of weapons which are recovered and seized.

21. The only distinguishing finding that the aforesaid statements are voluntary statements in paragraph No.6 of the impugned order is therefore incorrect. As stated above by virtue of the said statements, the 5 accused have in fact confessed their act in the crime by use of weapons. They have not attributed any role to the Applicant. Hence, I am of the opinion that the impugned order deserves to be interfered with in view of the provisions of Sections 26, 27 and 30 of the Indian Evidence Act, 1872 as applicable to the facts in the present case. Implication of the co-accused only on the basis of a disclosure statement without any corroboration is not legally admissible. Admittedly, there is no other evidence placed on record. In this regard in the recent decision of the Supreme Court in the case of *Dilip Kumar Vs. The State of M. P.*³, the Supreme Court while authoritatively referring to the previous decision of the Supreme Court authored by Vivian Bose, J. in the case of *Kashmira Singh Vs. State of*

3 M.Cr.C. No.2748 of 2022, decided on 12.04.2022.

M.P⁴ regarding admissibility of a confessional statement given by a co-accused has held in paragraph Nos.15 to 18 as under:-

"15. A close scrutiny of the charge sheet reveals that apart from the aforesaid memo and the bank statement of Dangi brothers, there is no other material available on record to suggest that the present petitioner Deeep had also facilitated the sale of fake fertilizer which was prepared by Suresh Dangi and other accused persons. There is also no evidence available on record to suggest that the present petitioner Deeep obtained from Suresh Dangi any amount over and above the requisite amount of the sale of gypsum granules to him, which can be said to be connected with the sale of fake fertilizer.

16. Regarding admissibility of the confessional statement given by a co-accused and of the petitioner, a reference may be had to the decision rendered by the Supreme Court, authored by Vivian Bose, J. in the case of Kashmira Singh v. State of Madhya Pradesh (supra), the relevant paras 8, 9, 10 and 11 of the same read, as under:

"8. Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in Bhuboni Sahu v. King. 'It does not indeed come within the definition of 'evidence' contained in Section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination."

Their Lordships also point out that it is "obviously evidence of a very weak type ... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities." They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence". In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding

4 AIR 1952 SC 159 : 1952 SCR 526

credibility because the Judge refuses to believe him except insofar as he is corroborated?

9. *In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chucker-buty where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused" or, to put it in another way, as Reilly J. did in In re Periyaswami Moopan*

"the provision goes no further than this-- where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence".

10. *Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.*

11. *Then, as regards its use in the corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. Two of us had occasion to examine this recently in Rameshwar v. State of Rajasthan. It follows that the testimony of an accomplice can in*

law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. As the Privy Council observe in Bhuboni Sahu v. King:

"The tendency to include the innocent with the guilty is peculiarly prevalent in India, as judges have noted on innumerable occasions, and it is very difficult for the court to guard against the danger ... The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused."

(emphasis supplied)

17. *Testing the facts of the case at hand on the anvil of the aforesaid dictum of the Supreme Court, this Court finds that the only material evidence against the present petitioner is the memo prepared under Section of the Evidence Act by the co-accused and certain bank transactions of the co-accused in which he has sent certain amount to the present petitioner through NEFT. In such facts and circumstances of the case, if the petitioner who is in the business of manufacturing Gypsum Granules and Allied products, and if in the legitimate business transaction the aforesaid granules were purchased by the other accused persons and in turn they use it in the manufacture of fake fertilizer, such act, in the considered opinion of this Court, would not amount to an offence for the present petitioner and he cannot be held guilty for the aforesaid act of the co-accused persons in the absence of any other material available on record to connect the petitioner with the offence, as has already been observed above.*

18. *Resultantly, the petition stands allowed and the charge sheet, so far as it relates to the present petitioner is concerned, as also the further proceedings initiated in the trial Court against him stands quashed."*

22. In the preset case, save and except the statement recorded there is no other material evidence to corroborate the role of Applicant. There has to be some independent evidence which in some measure implicates or shows nexus of the Accused to the crime in question. As held by the Supreme Court, the danger of using the testimony of a co-accused against another is in no way lessened when

the evidence is not on oath and cannot be tested by cross examination. Hence the Court will have to exercise caution. In view of the fact that prosecution has failed to place on record any corroborative evidence persuades me to interfere with the impugned order dated 02.11.2002 passed by the Sessions Court while rejecting the Discharge Application of the Revision Applicant before me.

23. The said impugned order dated 02.11.2002 is therefore quashed and set aside. Resultantly the Discharge Application of Applicant before the Trial Court stands allowed. Applicant is discharged from Crime No.26 of 1993.

24. Criminal Revision Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

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