

Aakash Ganeshbhai Makwana vs State Of Gujarat on 30 April, 2024

NEUTRAL

R/CR.MA/6844/2024

CAV JUDGMENT DATED: 30/04/2024

undefin

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION (FOR REGULAR BAIL - AFTER
CHARGESHEET) NO. 6844 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Sd/-

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | No |
| 2 | To be referred to the Reporter or not ? | No |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

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AAKASH GANESHBHAI MAKWANA

Versus

STATE OF GUJARAT

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Appearance:

MR. JAL UNWALLA, LD. SR. ADV. WITH LD. ADV. DARSHAN M
VARANDANI(7357) for the Applicant(s) No. 1

KUMAR H TRIVEDI(9364) for the Respondent(s) No. 1

MR. MAULIK M SONI(7249) for the Respondent(s) No. 1

MR. DHAWAN JAYSWAL, LD. ADDL. PUBLIC PROSECUTOR for the
Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Date : 30/04/2024

CAV JUDGMENT

1. Rule returnable forthwith. Learned APP Mr. Dhawan Jayswal waives service of notice of rule for and on behalf of the respondent-State and Mr. Kumar Trivedi waives service of notice of rule for and on behalf of the respondent No.1.

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2. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973, for regular bail in connection with the FIR being C.R. No.I-11205035230524 of 2023 registered with the Nakhatrana Police Station, Kachchh West Bhuj of the offence punishable under Sections 306, 389, 120B, 34 and 201 of IPC.

3. Learned senior advocate Mr. Jal Unwalla assisted by learned advocate Mr. Darshan Varandani appearing for the applicant submits that the present applicant-accused was arrested on 02.01.2024 and since then he is in jail. He also submits that in the present case, the investigation has already been concluded and the charge-sheet has also been filed. Learned senior advocate Mr. Unwalla further submits that the first information report has been filed against total nine persons wherein the applicant-accused has been shown as accused No.6. The applicant-accused is an advocate by profession. There is a delay in filing the FIR as the incident took place during the period between 04.05.2023 and 03.06.2023, for which, the FIR came to be lodged on 05.06.2023, and as such, there is a delay of two days in registering the FIR. Learned senior advocate Mr. Unwalla also submits that the entire controversy began with the registration of the FIR against the deceased by the accused No.2, due to which he committed suicide. He further submits that the allegations against the applicant-accused are that the applicant-accused, along with the other co-accused, hatched a criminal conspiracy to extort Rs.4 Crore from the deceased by tricking him in a honey trap, for which, the accused No.2 has been used as a NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined tool. The accused persons succeeded in their attempt and an FIR under Section 376 of the IPC was lodged against the deceased, due to which, apprehending defamation in the Society, the deceased committed suicide. Learned senior advocate Mr. Unwalla submits that during the course of investigation of the FIR filed by the accused No.2 against the deceased, statement of the complainant was recorded wherein she has described the entire sequence of events of the incident in a very graphical manner and what was stated by the accused No.2 in the said statement, has been picked and pasted in the impugned FIR and, therefore, reliance cannot be placed upon the said version of narration of facts as it is based upon the confessional statement of the co-accused, and as such, the basic foundation of the registration of the complaint itself is not sustainable. The only allegation levelled against the applicant-accused is that he has provided certain guidance to the accused No.2 in the commission of the crime. Learned senior advocate Mr. Unwalla submits that the applicant-accused has been implicated in the present offence on the basis of the confessional statement of the accused No.2 and the impugned FIR is also based upon the same set of facts as narrated by the accused No.2 in her confessional statement and, therefore, when it is a settled legal position that the confessional statement made by any accused itself is not admissible in evidence, then the FIR based upon the same cannot be sustained in any

manner. Learned advocate Mr. Unwalla submits that the applicant-accused never met the deceased nor had ever talked with him. There is no Call Data Record produced by the investigating agency showing any NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined conversation of the applicant-accused along with the deceased.

4. Learned senior advocate Mr. Unwalla submits that the essential ingredients to constitute offence under Section 306 are (i) the abetment (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. Here in the case on hand, none of the above referred ingredients have been made out to constitute the offence of abetment against the applicant-accused. There should be any evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide and, therefore, it would be travesty of justice to keep the applicant in judicial custody. The only evidence produced against the applicant-accused is in the form of CCTV footage to indicate his presence at the G.K. General Hospital and at his office at Bhuj where all the accused persons alleged to have been gathered and prepared a plan. However, only on the basis of said evidence, the applicant-accused cannot be dragged into the offence as number of his clients were visiting his office in a daily routine and it might be that the other co-accused persons also went to his office as his clients. Learned senior advocate Mr. Jal Unwalla further submits that the other co-accused persons, having graver role than that of the applicant-accused, have already been enlarged on bail either by the trial court or by this very Court. The applicant-accused does not have any past antecedents. Learned senior advocate Mr. Unwalla, in the last, submits that the Hon'ble Apex Court, in the case of Bandlamuddi Atchuta Ramaiah & Anr. vs. State of A.P., reported in (1996) SCC 133 held that the statement contained NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined in the FIR furnished by one of the co-accused in the case cannot, in any manner, be used against another accused. Even as against the accused, who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it as an admission under Section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession. Admittedly, here in the case on hand, the statement of the co-accused was recorded altogether in a different proceedings and at the time of registration of the impugned FIR, the prosecuting agency has put reliance upon the said statement and by incorporating the entire statement in the FIR, the applicant-accused has been implicated in the present offence.

5. In such circumstances, referred to above, learned senior advocate Mr. Unwalla prays that there being merit in his application, the same be allowed and the applicant-accused be released on bail.

6. On the other hand, this application has been vehemently opposed by learned APP Mr. Dhawan Jayswal appearing for the respondent-State looking to the nature and gravity of the offence. Learned APP submits that the role of the present applicant-accused is clearly spelt out from the police papers. He further submits that the applicant-accused, in connivance with the other co-accused, planned a conspiracy in his office to dodge the deceased in a honey trap and the applicant-accused is the kingpin of the entire conspiracy. It is in the office of the NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined applicant-accused that the entire conspiracy was hatched and a script was prepared as to how the deceased can be dragged

into the honey trap, and the applicant-accused is the person who prepared the lady accused No.2 and made her understand how to execute her role, and by doing so, their intention was to extort huge volume of money from the deceased businessman by blackmailing him. Unfortunately, they succeeded in their attempt and an FIR under Section 376 IPC was registered against the deceased. However, as the deceased was the reputed businessman having deep root in the society, he could not bear the same and due to fear of being defamed in the society, has committed the suicide. Learned APP also submits that the applicant-accused is an advocate by profession and very well aware about the legal complexities. He also submits that after the occurrence of the incident, the police began the preliminary investigation, during which period, the entire scam has been unearthed. Moreover, after registration of the FIR, the applicant-accused absconded for some time and, therefore, warrant under Section 70 also came to be issued against him. The present applicant-accused appears to be the writer of the entire script, under whose instructions, the entire plan has been executed. The Call Data Record also suggests that the applicant-accused was in constant touch with the other co-accused Komal Jethva, Aziz, Viveksinh, Gujjugiri Goswami and Paresh Patel. The applicant-accused also visited the G.K. General Hospital where the lady accused No.2 was also present which is evident from the CCTV footage of the said hospital. Learned APP submits that the offence committed by the applicant-accused is very serious in nature, due to which one innocent person has lost his life.

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Therefore, this is a fit case wherein discretionary power of this Court is not required to be exercised in favour of the applicant-accused.

7. Learned advocate Mr. Kumar Trivedi appearing for the original complainant submits that at the time of registration of the FIR, the prosecuting agency has put reliance upon the statement made by the accused No.2 in the separate proceedings and, thereafter, pursuant to the registration of the complaint, investigation was ensued, and during the course of investigation, on the basis of some concrete materials found against the applicant-accused, charge-sheet came to be filed against him. From the role attributed to the applicant-accused in the charge-sheet papers, it appears that the applicant-accused is the kingpin of the entire conspiracy, under whose guidance and instructions, the other accused have played their individual roles and, therefore, his bail application may not be entertained and the applicant-accused may not be released on bail. Learned advocate Mr. Trivedi further submits that apart from the above, he has adopted all the arguments canvassed by the learned APP and prays that the present application, being devoid of any merit, be rejected.

8. I have heard the learned advocates appearing on behalf of the respective parties. I have perused the police papers as well as other documents produced by the applicant along with the memo of the application. It is found out from the record that the applicant-accused is in judicial custody since 02.01.2024. The investigation is already completed and after submission of the charge-sheet, present bail application is preferred. It appears from the materials available on record NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined that the present applicant-accused is shown as an accused No.6 in the charge-sheet. The entire dispute arose with the registration of complaint of rape by the lady accused No.2 against the deceased which led the deceased to commit suicide. It appears that the applicant-accused is an advocate by profession,

and as such, as a part of his job, he has to visit different places and has to meet with different persons or clients and, therefore, it might be that the accused persons went to the office of the applicant-accused regarding some legal proceedings. The only evidence produced by the investigating agency against the applicant-accused is in the form of a CCTV footages of the camera installed outside his office and of the G.K. General hospital, however, only on the basis of the said evidence, presumption of being guilty of the offence cannot be drawn as the said evidence speaks nothing except the presence of the accused at a particular place and also does not reveal anything as to whether for what purpose the applicant-accused went to the hospital and for what purpose the accused persons gathered at the office of the applicant. It also appears that on the basis of the confessional statement made by the co-accused, the name of the applicant-accused has come on surface and it is the settled legal proposition of law as held by the Hon'ble Apex Court in catena of decisions that the confessional statement made by the accused before the police is not admissible in evidence and cannot be used as a piece of evidence against any other accused, rather the same cannot be made an evidence against its maker also. It also appears from the record that the applicant-accused never met the deceased nor had ever talked to the deceased. There is no evidence produced on record NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined establishing any nexus between the applicant-accused and the deceased.

9. So far as the allegations of abetment are concerned, in order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. This aspect is missing in this case. It is apparent on the face of the record that there is no evidence on record to indicate that the applicant-accused had contacted the deceased or had talked to the deceased at any point of time. In this regard, I may quote with profit the relevant observations made by the Hon'ble Apex Court in the case of Gurcharan Singh v. State of Punjab reported in (2020) 10 SCC 200, which reads as under;

"13. Section 107 IPC defines "abetment" and in this case, the following part of the section will bear consideration:

"107. Abetment of a thing.--A person abets the doing of a thing, who--

First.--Instigates any person to do that thing; or *** Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing."

14. The definition quoted above makes it clear that whenever a person instigates or intentionally aids by any act or illegal omission, the doing of a thing, a person can be said to have abetted in doing that thing.

15. As in all crimes, mens rea has to be established. To prove the offence of abetment, as specified under Section NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined 107 IPC, the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove mens rea, there has to be something on record to

establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. The ingredient of mens rea cannot be assumed to be ostensibly present but has to be visible and conspicuous. However, what transpires in the present matter is that both the trial court as well as the High Court never examined whether the appellant had the mens rea for the crime he is held to have committed. The conviction of the appellant by the trial court as well as the High Court on the theory that the woman with two young kids might have committed suicide possibly because of the harassment faced by her in the matrimonial house is not at all borne out by the evidence in the case. Testimonies of the PWs do not show that the wife was unhappy because of the appellant and she was forced to take such a step on his account.

16. The necessary ingredients for the offence under Section 306 IPC were considered in S.S. Chheena v. Vijay Kumar Mahajan [S.S. Chheena v. Vijay Kumar Mahajan, (2010) 12 SCC 190 : (2011) 2 SCC (Cri) 465] where explaining the concept of abetment, Dalveer Bhandari, J. wrote as under : (SCC p. 197, para 25) "25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

17. While dealing with a case of abetment of suicide in NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined Amalendu Pal v. State of W.B. [Amalendu Pal v. State of W.B., (2010) 1 SCC 707 : (2010) 1 SCC (Cri) 896] , Dr M.K. Sharma, J. writing for the Division Bench explained the parameters of Section 306 IPC in the following terms :

(SCC p. 712, paras 12-13) "12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

13. In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."

18. In Mangat Ram v. State of Haryana [Mangat Ram v. State of Haryana, (2014) 12 SCC 595 : (2014) 5 SCC (Cri) 127] , which again was a case of wife's unnatural death, speaking for the Division Bench, K.S.P. Radhakrishnan, J. rightly observed as under : (SCC p. 606, para 24) "24. We find it difficult to comprehend the reasoning of the High Court [Mangat Ram v. State of NEUTRAL CITATION R/CR.MA/6844/2024 CAV JUDGMENT DATED: 30/04/2024 undefined Haryana, Criminal Appeal No. 592-SB of 1997, decided on 27-5-2008 (P&H)] that "no prudent man is to commit suicide unless abetted to do so". A woman may attempt to commit suicide due to various reasons, such as, depression, financial difficulties, disappointment in love, tired of domestic worries, acute or chronic ailments and so on and need not be due to abetment. The reasoning of the High Court that no prudent man will commit suicide unless abetted to do so by someone else, is a perverse reasoning."

10. Considering the facts and circumstances of the case as also the nature of allegations, arguments advanced by learned counsel for the parties, the period for which the applicant is in jail, contents of FIR as also essentials to attract Section 306 IPC and without expressing any opinion on merits of the case, I find it to be a fit case for enlarging the applicant on bail.

11. Hence, the present application is allowed and the applicant is ordered to be released on regular bail in connection with FIR being C.R. No.I-11205035230524 of 2023 registered with the Nakhatrana Police Station, Kachchh West Bhuj, on executing a personal bond of Rs.15,000/- (Rupees Fifteen Thousand only) with one surety of the like amount to the satisfaction of the trial Court and subject to the conditions that he shall;

[a] not take undue advantage of liberty or misuse liberty;

[b] not act in a manner injuries to the interest of the prosecution;

[c] surrender passport, if any, to the lower court within a week;

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[d] not leave the State of Gujarat without prior permission of the Sessions Judge concerned;

[e] mark presence before the concerned Police Station on alternate Monday of every English calendar month for a period of six months between 11:00 a.m. and 2:00 p.m.;

[f] furnish the present address of residence to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;

12. The authorities will release the applicant only if he is not required in connection with any other offence for the time being. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter. Bail bond to be executed before the lower Court having jurisdiction to try the case. It will be open for the concerned Court to delete, modify and/or relax any of the above conditions, in accordance with law.

13. At the trial, the trial Court shall not be influenced by the observations of preliminary nature qua the evidence at this stage made by this Court while enlarging the applicant on bail.

14. The present application stands allowed accordingly. Rule is made absolute to the aforesaid extent.

Direct service is permitted.

(DIVYESH A. JOSHI,J) VAHID