

(2001) 05 BOM CK 0004

In the Bombay High Court

Case No : Criminal Application No. 768 of 2001

Ashok Ananda Hange

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-05-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 172, 173, 313, 439
Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (2001) ALLMR(Cri) 1319 : (2001) 2 DMC 267 : (2001) 3 MhLj 760

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : Day Warunjikar, for the Appellant; D.S. Mhaisprkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Pratibha Upasani, J.—This is an application for bail made by the applicant/original accused Ashok Ananda Hange, who is charged for offences punishable under Sections 498-A and 302 of the Indian Penal Code, vide C.R. No. 168 of 2000 registered by Miraj Rural Police Station, Miraj, District Sangli.

2. Applicant's application for bail came to be rejected by the IV Additional Sessions Judge, Sangli by his order dated 22nd February, 2001. Charge-sheet is already filed by the police.

3. The case of the prosecution is that the applicant's marriage took place with deceased Kalpana in the year 1996 and she was residing with the applicant/accused at Village Bedag. The prosecution case further is that the applicant used to ill-treat her and was demanding suitcase, clothes and gold. The deceased Kalpana had gone to her parents place because of this persistent illegal demand made by the applicant, and she lived with her parents for about two years. However, some relatives of deceased Kalpana somehow, convinced her, and brought her back to her matrimonial home. The accused also used to suspect her character, and used to abuse and beat her. On 8th October, 2000, at about 9.30

a.m., as per the prosecution story, the applicant/accused poured kerosene on the person of Kalpana and set her on fire. Kalpana was admitted to Mission Hospital, Miraj, where her dying declaration came to be recorded by the police. Crime came to be registered against the accused. In the dying declaration, Kalpana clearly implicated the accused, stating that there was persistent demand of gold, clothes and suitcase by the accused, and for that purpose, he was abusing and beating her. She also stated in the said dying declaration that the accused was suspecting her character, and therefore, on 8th October, 2000, at about 9.30 a.m., he poured kerosene on her body and set her on fire. She had 73% burn injuries. She succumbed to her injuries in the hospital on 11th October, 2000.

During the course of investigation, statements of various witnesses, including those of the relatives of the accused, so also, relatives of deceased Kalpana, including the statements of her parents came to be recorded by the police. After completing routine investigation, police filed charge-sheet in the Court of the Judicial Magistrate, First Class, Miraj.

The accused came to be arrested on 23rd November, 2000, and since then, he is in custody. Thereafter, the case was committed to the Court of Sessions, Sangli, where the applicant/accused made application dated 1st February, 2001, praying that the statements recorded by police of the witnesses, namely, Ramchandra Hange, Laxman Hange, Keshav Khade, Ramchandra Jagtap, Mangal Hange, Kamal Hange, etc. be produced before the Court, and the Court should go through those statements in the interest of justice. Thereafter, he made application for bail, which came to be rejected by a reasoned, order dated 22nd February, 2001 by the IV Additional Sessions Judge, Sangli.

4. The contention of Mr. Warunjikar for applicant is that since the learned Additional Sessions Judge, in para 5 of the impugned order dated 22nd February, 2001, has made reference to the statements of Ramchandra Hange, Laxman Hange, Ramchandra Jagtap, Sampada Hange and Kamal Hange, etc. copies of those statements be given to him and necessary directions to that effect be given to the prosecution accordingly.

5. It was the contention of Mr. Warunjikar for applicant that all these persons whose names are given above, and whose statements were before the learned Additional Sessions Judge, were in his favour, stating that when the deceased was burning, he was standing in front of their house, and that, all these statements actually would reveal that he was not involved in the burning incident of his wife, hinting thereby that the dying declaration of Kalpana was concocted and untrue. He submitted that principles of natural justice required that he should be provided with the copies of the statements of those witnesses also, which were before the learned Additional Sessions Judge. He further argued that it was unfair that only copies of those statements on which the prosecution wanted to rely should be furnished to the accused as per the provisions of Section 173 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C. for the sake of brevity). Mr. Warunjikar was, however, unable to point out

any provision which provided for furnishing of copies to the accused of even those statements of witnesses recorded by the police, on which, the prosecution did not want to rely and which were not filed in the Court along with the charge-sheet.

6. Mr. Mhaispurkar, the learned A.P.P. vehemently opposed the bail application made by the applicant, so also, the request made by Mr. Warunjikar on behalf of the applicant that the accused be furnished with the copies of statements of those witnesses which were not filed along with the charge-sheet, and on which, the prosecution did not want to rely. He argued that this was a very unusual and unprecedented request from the accused, for which there was no provision anywhere in the Cr.P.C. Mr. Mhaispurkar, the learned A.P.P. has vehemently argued that as per provisions of Section 173, Cr.P.C, when the police officer, on completion of investigation, files report in the Court of Magistrate, only following documents are to be forwarded along with the report, and that they are :

(a) All documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded u/s 161 of all the persons whom the prosecution proposes to examine as its witnesses.

7. Mr. Mhaispurkar, the learned A.P.P. has argued that this is the provision which is contained in Sub-section (5) of Section 173 of the Cr.P.C. Drawing attention of the Court to Sub-section (7), Mr. Mhaispurkar, A.P.P. further argued that as per this Sub-section, namely Sub-section (7), where the police officer, investigating the case, finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in Sub-section (5). Mr. Mhaispurkar also drew attention of the Court to Section 172 which makes mention of diary of proceedings in investigation. He submitted that as per the provisions of Section 172 of Cr.P.C, the Criminal Court may look into such case-diaries during the course of inquiry or trial, and the contents of these diaries may be used, not as evidence in the case, but to aid it in such inquiry or trial, and that, as per Sub-section (3) of Section 172, Cr.P.C, neither the accused, nor his agents are entitled to call for such diaries, nor are they entitled to see them, merely because they are referred to, by the. Court. It is argued by Mr. Mhaispurkar that, just because reference is made to the statements of certain witnesses in the order by the learned Additional Sessions Judge, while rejecting the application for bail made by the applicant/accused, it does not mean that the copies of those statements, must be furnished by the prosecution to the accused, even though the prosecution has not filed the copies of those statements along with the charge-sheet u/s 173 of Cr.P.C, and even though, the prosecution does not propose to examine those persons as prosecution witnesses.

8. I have heard Mr. Warunjikar, learned Counsel for the applicant, so also, Mr. Mhaispurkar, the learned A.P.P. at length. I have also gone through the proceedings. I have also carefully considered the provisions of Sections 172 and

173 of Cr.P.C. Section 172 of Cr.P.C. is reproduced below for the sake of convenience :

"172. Diary of proceedings in investigation.- (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to see them merely because they are referred to by the Court; but if they are used by the police office: who made them to refresh his memory, or if the Court uses them for the purposes of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 {1 of 1872) shall apply."

9. For the purpose of present application, Sub-section (2) and Sub-section (3) are material and relevant. These two sub-sections make it abundantly clear that though the Criminal Court may look into the case diaries, and that, it can use such diaries, though not as evidence, but to aid it in the inquiry and trial, the accused or his agents are not entitled to either call for such diaries, nor are they permitted to see these case diaries, merely because the Court has referred to them.

10. Section 173 of Cr.P.C. talks of report of police officer, which he has to file in the Court on completion of his investigation. The said section is reproduced below for the sake of convenience:

"173. Report of police officer on completion of investigation.-(1) Every investigation under this Chapter shall be completed without unnecessary delay

(2)(i) As soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody u/s 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed u/s 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer-in-charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond/the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded u/s 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in Sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, whereupon, such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary he shall forward to the Magistrate, a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2)."

11. The sum and substance is that the police officer, who files charge-sheet in the Court, also files statements recorded by him u/s 161 of Cr.P.C. of all persons

whom the prosecution proposes to examine as witnesses. The section also says that the police officer may furnish to the accused, copies of all or any of the documents referred to in Sub-section (5) of Section 173 of Cr.P.C. Thus, what accused is entitled to have are the copies of those documents and statements of witnesses, on which the prosecution proposes to rely, and nothing else. Section 172 of Cr.P.C. also makes it clear that though Court is entitled to look into the contents of case diary, the defence is not, even though reference is made by the Court to the contents of the case diary. This provision is an enabling provision in the interest of justice, to aid the Court.

12. In the present case at hand, it can be said at this prima facie stage that the dying declaration of deceased Kalpana squarely implicates the applicant/accused. Very vividly the deceased had described the incident of 8th October, 2000, when at about 9.30 a.m. the applicant/accused picked up quarrel with her by saying that her behaviour was not proper and that, she had not brought gold, clothes and suitcase from her parents' house and poured kerosene on her person and set her on fire. The poor woman made hue and cry, and neighbours including her brother-in-law, reached there and extinguished the fire. They got her admitted in Mission Hospital, where her dying declaration was recorded.

13. Having heard both the sides and after considering the provisions of Sections 172 and 173 of the Cr.P.C, in my opinion, the demand of the applicant/ accused for copies of statements recorded by police u/s 161 of Cr.P.C. which are not filed by the prosecution in the Court along with the charge-sheet, and on whom the prosecution is not relying, is untenable.

14. Investigation and enquiry is the job and prerogative of the investigating agency, namely, the police. For this purpose, police may record the statements of various persons. In the present case also, the police have recorded the statements of the relatives of the accused, as well as, relatives of the deceased Kalpana. From these statements, according to prosecution, case under Sections 498-A and 302 of the Indian Penal Code is made out against the accused, and accordingly, charge-sheet has been filed under these sections along with the relevant documents and statements of witnesses, whom the prosecution proposes to examine, at the time of trial. Copies of those statements and documents are furnished to the applicant. Under these circumstances, applicant cannot insist that prosecution is liable to furnish to him copies of other statements of those witnesses also, whom the prosecution does not at all propose to examine. By denying the copies of these statements, no prejudice would be caused to the accused, inasmuch as, the accused can always examine these persons as defence witnesses after the accused statement u/s 313 of the Cr.P.C. is recorded. Thus, it is not that doors of justice are closed by denying furnishing of these statements to the accused, and that, it was incumbent upon the prosecution to furnish copies of these statements, though admittedly, there is no provision anywhere in Cr.P.C. to that effect. The applicant's request, therefore, cannot be acceded to.

15. After hearing both the sides, and after considering the relevant material on record, in my opinion, this is not a fit case for bail and the application for bail was rightly rejected by IV Additional Sessions Judge, Sangli. Hence, the following order

Criminal Application No. 768 of 2001 is rejected.