

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.592 of 2015

IN

CRIMINAL APPEAL NO.572 OF 2015

SALMAN SALIM KHAN**.. APPLICANT***Versus***THE STATE OF MAHARASHTRA****.. RESPONDENT**

Mr.Amit Desai, Sr.Advocate with Mr.Gopal Krishna Shenoy, Mr.Shrikant Shivade, Mr.Niranjan Mundargi, Mr.Anand Desai, Ms.Chandrima Mitra and Mr.Manhar S. Saini, Advocates i/b DSK Legal for the applicant.

Mr.Sandeep K. Shinde, Public Prosecutor with Mr.Deepak Thakre, APP and Mr.PD. Gharat, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.**DATED : 8th MAY, 2015**

P.C. :

1 The Appeal filed by the applicant challenging his conviction in respect of offences punishable under section 304 II of the IPC, 338 of the IPC, 337 of the IPC and offences punishable under the Motor Vehicles Act, has just now been admitted by me.

2 By this application, the applicant/appellant prays that the substantive sentences imposed upon him by the trial court, be suspended during the pendency of the Appeal, and that he be released on bail.

3 I have heard Mr.Amit Desai, learned Senior Advocate for the applicant. I have heard Mr.Sandeep K. Shinde, learned Public Prosecutor with Mr.P.D. Gharat, APP and Mr.Deepak Thakre, APP for the State.

4 The most severe sentence that has been imposed upon the applicant/appellant is in respect of the offence punishable under section 304 II of the IPC. It is of Rigorous Imprisonment for a period of 5(five) years, and a fine of Rs.25,000/-.

5 Though the learned Public Prosecutor did not oppose the admission of the Appeal, he opposed the application for the suspension of the sentence.

6 Mr.Desai, learned Senior Advocate for the applicant, *inter alia*, submitted that the offence punishable under section 304 II of the IPC, was not made out against the applicant/appellant. It is submitted that the evidence to show that the applicant/appellant was driving the vehicle in question at the material time, as was adduced during the trial, is not satisfactory. It is also submitted that there was some evidence to indicate that the accident occurred due to the bursting of tyre, which evidence was not taken into consideration by the learned trial Judge. It is also submitted that the evidence about the applicant being drunk at the material time, was not satisfactory. Mr.Desai also contended that the facts of the prosecution case revealed that, at the material time, there were four persons in the offending vehicle, but the prosecution did not choose to throw light on as to who the fourth

person was. It is also submitted that one Kamaal Khan was, admittedly, present in the vehicle at the material time, and therefore, a material witness, but he was not examined. He submitted that the applicant/appellant has a good case on merits.

7 The learned Public Prosecutor submitted that there was sufficient evidence to indicate that the applicant was driving the vehicle in question at the material time. He submitted that the evidence of bursting of the tyre was of no consequence, as that had happened as a result of the accident itself. He also submitted that the evidence clearly established that the applicant was drunk at the material time, and that the applicant did possess a degree of knowledge which would bring the offence committed by him under the penal provisions of section 304 II of the IPC. The learned Public Prosecutor also submitted that the theory of there being a fourth person present in the offending vehicle, at the material time, is baseless and introduced as an after-thought.

8 It is also submitted that there were valid reasons for not examining Kamaal Khan as a witness for the prosecution.

9 I have carefully considered the matter.

10 The First Information Report was lodged, alleging commission of an offence punishable under section 304A of the IPC. When the charge-sheet came to be filed, the accusation of an offence punishable under section 304 Part II of the IPC, was levelled. When this was challenged by the applicant/appellant, this Court quashed the charge in respect of an offence punishable

under section 304 II of the IPC. The trial then proceeded before the Magistrate on the accusation of the applicant having committed the offence punishable under section 304 A of the IPC. 17 witnesses for the prosecution were examined. It is thereafter that the Magistrate formed an opinion that the offence committed by the applicant amounted to one punishable under section 304 II of the IPC, and committed the case to the Sessions court. After committal, a charge in respect of an offence punishable under section 304 II of the IPC was framed against the applicant, and a *de novo* trial was held.

11 The applicant was on bail throughout the trial. Even after the addition of the charge of an offence punishable under section 304 II of the IPC, his liberty was not disturbed. The applicant is not likely to abscond, if released on bail during the pendency of the Appeal – and there is not even a suggestion to that effect.

12 Under these circumstances, even on the basis that there is sufficient evidence to indicate that the applicant was driving the vehicle in question, at the material time, certainly, a number of arguable points have been raised, which need serious consideration. Among other things, whether the offence allegedly committed by the applicant, would amount to an offence punishable under section 304 II of the IPC, – and not merely an offence punishable under section 304 A of the IPC, would also need examination.

13 This would be of quite some importance as the offence punishable under section 304 A of the IPC, is bailable, and invites a lesser punishment. The applicant/appellant could not be dealt with under the provisions of section 389(3) of the Code of Criminal Procedure only because the sentence imposed upon him, is more than a period of three years which was possible only because of the conviction in respect of an offence punishable under section 304 II of the IPC. When a statutory right to Appeal is conferred upon a convict, and when an Appeal is admitted, indicating that the correctness, legality and propriety of the judgment of the trial court would be examined by the Appellate Court, it would be rather unreasonable to suggest that even where arguable points needing consideration have been raised, the appellant must be detained in custody in execution of the sentence till the Appeal is heard.

14 Normally, in such cases, the State does not oppose the suspension of sentence during the pendency of the Appeal in case of an accused who is on bail during the trial. However, in view of the fact that in this case, some opposition has been offered, I have considered the possibility of directing the Appeal to be expeditiously heard. Neither the learned Public Prosecutor, nor the learned counsel for the appellant has any objection to stipulate that the Appeal shall be heard and decided expeditiously.

15 This is not a case where in spite of the admission of the Appeal, the appellant should be kept in detention till the Appeal is decided. It would be proper to suspend the sentence during the pendency of the Appeal.

16 Application is allowed.

17 Pending the hearing and final disposal of the Appeal, substantive sentences imposed upon the applicant/appellant shall stand suspended, and the applicant/appellant shall be released on bail in the sum of Rs.30,000/-(Rupees Thirty thousand) with one surety in like amount.

18 The applicant shall forthwith surrender himself before the trial court, and execute necessary bail bonds in accordance with this order.

19 The applicant may deposit cash of Rs.30,000/- (Rupees Thirty thousand) in lieu of surety as a temporary measure. This facility shall be available to the applicant for a period of two weeks, within which time the applicant is expected to furnish a solvent surety in the bail amount.

20 The passport of the applicant is already with the Investigating Agency. The applicant has no objection to the retention of the passport by the Investigating Agency, during the pendency of the Appeal.

21 Application is allowed in the aforesaid terms.

22 Hearing of the Appeal is ordered to be expedited.

23 It is decided by consent, that the Appeal shall be heard finally, as far as possible ,in the month of July 2015.

24 Liberty to supply a private paper book.

25 The Appeal be listed on board for directions on 15th June 2015.

26 At this stage, Mr.Desai submits that liberty be granted to the applicant to apply for a permission to travel abroad. It is needless to say that such liberty has not been taken away, and it would be open for him to make such an application to this Court, which, in the event of being made, shall be dealt with, on merits and in accordance with law.

(ABHAY M.THIPSAY, J)