

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.1069 OF 2015
IN
CRIMINAL APPEAL (ST) NO.834 OF 2015**

Mohammad Shahir Shaikh & Anr. ..Applicant/Appellant
V/s.
The State of Maharashtra .. Respondent

Mr.Prashant Sawant a/w Mr.Ashish Dhuri a/w Mr.Nitin Jadahv
a/w Mr.Vishal Ranakhambe, for the applicant/appellant.
Mrs.Anamika Malhotra, APP for the Respondent-State.

**CORAM : A. R. JOSHI, J.
DATE : 28th SEPTEMBER, 2015.**

P.C.

1. Heard learned counsel for the applicant-appellant at length on this application for bail/suspension of substantive sentence during pendency of appeal. Also heard learned APP for the State.

2. The initial charge against the applicant-appellants who are original accused nos.1 and 4 is that of the offence punishable under Section 302 of Indian Penal Code along with other minor offences. After the trial, the Trial Court came to conclusion that instead of convicting the applicant-appellants

for offence under section 302 of Indian Penal Code, the conviction is required to be brought down for the offence under section 304 (Part II) of IPC. As such the trial Court sentenced both the applicants to undergo rigorous imprisonment for 3 years each and to pay fine of Rs.75,000/-, in default simple imprisonment for one year. They are also convicted for the offence punishable under section 504 read with section 34 of Indian Penal Code and sentenced to suffer RI for one month and to pay fine of Rs.5,000/-.

3. Earlier after filing of the appeal along with the application for condonation of delay, it was ascertained by this Court whether the applicants were on bail or were in custody. That time it was revealed that the trial Court awarded punishment for 3 years. They were released on bail for limited period. Admittedly, said period is over and even the appeal was preferred with application for condonation of delay of 101 days. As such admittedly the applicants had overstayed the bail for 101 days without surrender before the trial Court. When this factual position was ascertained by the Court and when

directions were given to the applicants to surrender first and then their application for condonation of delay can be proceeded, they surrendered before the trial Court on 14th September, 2015 and as such they are in custody. By separate order the delay was condoned and the appeal was admitted and now this application for bail is being considered.

4. Though it was argued by learned counsel for the applicants-appellants that there were counter cases out of the same incident taken place in the evening of 29th May 2005, it is apparent that the case lodged at the instance of the present applicants-appellants ended in the acquittal mainly as against the accused then faced the trial. The said counter case was for the minor offences like section 324 of Indian Penal Code read with section 34 of Indian Penal Code. The main allegation in the counter case was against one Javed Qureshi but he died after about 18 days of the incident and as such case against him stood abated. By that point of time his wife and another women relative were not accused but they were subsequently made accused after the present applicants filed application

before the trial Court for direction to the Investigating Officer to conduct further investigation. Now coming back to the allegations against the present applicants and which are established by way of substantive evidence of at least three eye witnesses and also by way of all injury certificates, during the incident of 29th May 2005 present applicants and other two co-accused i.e. original accused nos.2 and 3 came to the house of victim Javed Qureshi and there was some hot exchange of words and in which present applicant no.2, accused no.4 assaulted the victim on his abdomen causing two injuries and in that process present applicant no.1-accused no.1 caught hold Javed. Immediately after the incident Javed was removed to the hospital i.e. Bhakti Vedant Hospital and on the same night he was removed to another hospital namely Holy Spirit and from there he was taken to K.E.M. Hospital. He died at K.E.M. Hospital after 18 days.

5. During the arguments, learned counsel vehemently submitted that the cause of death is Septicemia due to peritonitis in a case of alleged history of stab injury. He further

stated that the victim would have survived that time had he been treated properly and not discharged from Holy Spirit Hospital against the medical advise.

6. Considering the factual position and the substantive evidence of three eye witnesses and considering the injuries sustained on the abdomen by the victim, in the opinion of this Court prima facie it cannot be said that it is a case of grant of bail during pendency of appeal, when the trial Court had convicted them for the offence punishable under section 304 (Part II) of Indian Penal Code. Still in the considered view of this Court considering the factual position there is a debatable issue whether the case would fall under penal provisions of Section 304 Part I and for which the maximum punishment can be upto life. However, that aspect shall be dealt in detail at the time of hearing of the appeal.

7. It must be mentioned that earlier the learned APP was specifically asked whether the State had preferred any appeal challenging the acquittal of the original accused nos.1

and 4 for the offence under section 302 IPC or whether the State is preferring any appeal for enhancement of the sentences for the applicability or otherwise of section 304 Part I, learned APP stated that till this time there are no steps were taken. It is factual position that even the appeal preferred by the applicants is delayed by 101 days. As such it is apparent that the State is not interested in re-agitating this issue as inquired by the Court. Whatever that may be, considering the prima-facie established case against the accused and considering their conviction, in the considered view of this Court this is not a case in which the applicants can be released on bail in the present appeal and the present application is accordingly dismissed and disposed of.

(A. R. JOSHI, J)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/order.