

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 3451 OF 2016
WITH
CRIMINAL APPEAL NO. 390 OF 2016

Sk. Sameer Sk. Abdul Sattar .. Applicant

Versus

The State of Maharashtra .. Respondent

.....
Mr R. S. Deshmukh, Advocate for the applicant
Mr R.B. Bagul, APP for respondent/State
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CORAM : V.L. ACHLIYA, J.
DATED : 27.09.2016.

PER COURT :

1. The applicant has moved this application seeking bail in an Appeal preferred against the Judgment and Order dt. 18.6.2016 passed by the ld. Addl. Sessions Judge, Aurangabad in Sessions Case No. 144/2012, wherein he has been convicted u/s 304, 143, 147 of the Indian Penal Code and sentenced. For committing offence u/s 304 of the IPC, the applicant has been convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 5,000/- and in default, to suffer simple imprisonment for three months. For committing offence u/s 143, 147 of the IPC, the applicant has been convicted to undergo rigorous imprisonment for six months and two years, respectively.

2. The applicant was tried for committing offence u/s 302, 143, 147, 148 and 149 of the Indian Penal Code. In nutshell, the applicant was charged with an allegation that, on 19.12.2011 at about 10.00 p.m., the applicant along with 3-4 associates assaulted Shaikh Munshi Shaikh Ahmed (hereinafter referred as 'deceased') on account of vacating certain plot. They alleged to have assaulted the deceased by fist and kicks. The prosecution has approached with a case that the incident was witnessed by Harising Lalman Londhe (PW4). From the place of the incident, the deceased went to his house and narrated the incident to his wife Najmabee (PW2) and Mirza Mahemood (PW1), the complainant. They carried the deceased to MGM Hospital where he was declared as dead. On the basis of the complaint lodged by PW1 on 20.12.2011, the offence u/s 302, 143, 148 and 149 came to be registered against the applicant and 3-4 unknown persons. The cause of the death was opined due to injury to head and lungs. On conclusion of the investigation, the applicant was tried for the said offence. In order to bring home the guilt against the applicant, the prosecution has examined six witnesses. On conclusion of the trial, the Id. Addl. Sessions Judge has acquitted the applicant u/s 302 of IPC but convicted u/s 304, 143, 147 and awarded sentence as stated above.

3. Mr. Deshmukh, learned counsel for the applicants has strenuously contended that there is no cogent and convincing evidence to establish the complicity of the applicant with the offence for which he was tried and convicted by the trial Court. He has submitted that, though the prosecution has examined Harising (PW4) as sole eye-witness, the said witness has not

named nor identified the applicant as an assailant. Neither any identification parade was conducted nor the witness has identified the applicant in Court. It is, therefore, submitted that, the testimony of PW 4 is of no avail to connect the applicant with the offence for which he was charged and convicted. By referring the testimony of two material witnesses i.e. PW1 & PW2, relied by trial Court to base the conviction the learned counsel submitted their testimony at the most can be termed as oral dying-declaration made to them by the deceased. However, he has pointed out that testimony of these witnesses itself raises doubt as to whether the deceased was alive and in a position to make such statement in the light of the testimony of PW4 who has deposed that the deceased was not in a position to speak. He further submitted that, during the trial, the applicant was on bail and looking to the nature of the offence and evidence on record, the applicant deserves to be released on bail as he has good case to succeed in appeal.

4. Learned APP has opposed the application with contention that, there is cogent and convincing evidence to prove the guilt against the applicant. He has submitted that, there is evidence to show that there was a dispute in between the applicant and deceased on account of property and few days prior to the incident the quarrel had taken place in which the applicant had stated that he would kill him. He has submitted that, the testimony of PWs 1 and 2 cannot be disbelieved only for the reason that PW4 has deposed that the deceased was not in a position to speak. Trial Court has discussed the aspect in a minute detail. He has therefore submitted that the application deserves to be rejected.

5. Having appreciated the submissions advanced in the light of record & proceedings, in my view, the case has been made out to entertain the application. While deciding the application, it is not desirable to scrutinize the evidence in minute detail & made comment in that behalf. The applicant was tried for offence u/s 302 of the IPC. However, the trial Court has acquitted the applicant from said charge and held guilty of offence u/s 304 of IPC. The nature of injuries and the manner in which the incident occurred make out arguable case in favour of the applicant. The entire case of the prosecution is based upon the alleged oral dying-declaration made by deceased to his wife (PW2) and his brother-in-law (PW1). PW1 had a dispute along with applicant on account of land. Except the oral declaration made to PW1 & PW2, there is no corroborative evidence to establish the complicity of the applicant in the commission of offence. In this view, I am of the view that, an arguable case has been made out to be considered in appeal. Therefore, looking to overall nature of offence, evidence and the fact that the applicant was on bail during the trial and the appeal may not be heard within short time, I am inclined to release the applicant on bail subject to certain conditions. Hence, the following order.

ORDER

- (1) Pending disposal of the appeal, substantive sentence awarded by the trial Court stands suspended on deposit of fine.
- (2) Pending disposal of the appeal, the applicant be released on his furnishing bail in the sum of Rs. 75,000/- with one or two sureties in the like amount on the following conditions:

- (i) Applicant shall visit and record his attendance with the Police Station MIDC, CIDCO, Dist. Aurangabad once in a month on last Sunday in between 10:00 a.m. and 11:00 a.m., till disposal of the appeal.
 - (ii) Applicant shall furnish the names, addresses and phone numbers with residential proof of his three close relatives.
 - (iii) In the event of change in address, the Applicant shall inform the concerned Police Station as well as this court his new address.
 - (iv) The applicant shall deposit his passport , if any, with the trial Court.
 - (v) The applicant shall undertake to attend the Court as and when matter is listed for final hearing.
 - (vi) The applicant shall not contact nor cause any threat to complainant or the wife of deceased and indulged himself into any act which amounts to abuse of liberty granted.
- (3) In case of breach of any of the conditions as above, bail granted to the applicants shall be liable to be cancelled.
- (4) Bail to be furnished in trial Court.

[V. L. ACHLIYA]
JUDGE