

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.478 OF 2016

IN

CRIMINAL APPEAL NO.265 OF 2016

SANTOSH SHANIWAR MOKASHI

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.S.V.Kotwal i/b. Mr.Ashish Sawant, Advocate for the Applicant.

Ms.A.A.Takalkar, APP for the Respondent - State.

CORAM : P N. DESHMUKH, J.

DATE : 27th SEPTEMBER 2016.

P.C. :

1 This application is filed by applicant Santosh Mokashi for suspension of substantive sentence imposed upon him and for grant of bail. Heard learned counsel for applicant and learned APP. Applicant is found convicted for the offences punishable under Section 304(II) of IPC and is sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.1,000/-, in default, to suffer simple imprisonment for 1 month.

Admittedly, accused was not on bail pending trial.

2 Learned counsel for applicant has invited my attention to the evidence of complainant as well as PW2 Rahul, who did not support the case of prosecution and has contended that except for evidence of these two witnesses, there is no evidence which needs consideration to establish involvement of applicant in the present crime or offence. It is also contended that inspite of PW1 Dilip, who is brother of applicant, not supporting the case of prosecution, he is not declared hostile. It is contended that the learned trial Judge had relied upon evidence of both these witnesses without any sufficient reason, except for holding that complainant being brother of applicant, is interested in him, being his brother, while PW2 Rahul is stated to be friend of PW1 Dilip.

3 Learned counsel for applicant apart from evidence of above two witnesses, has submitted that there is no evidence which can said to be reliable with regard to recovery of clothes of applicant, as evidence of panch witnesses creates doubt, with regard to the spot where from applicant's clothes came to be attached at his instance, and for that purpose, has referred to relevant evidence from the record, and has therefore submitted that since the recovery of clothes of applicant is not established beyond reasonable doubt, the Chemical Analyser's

Report certifying blood of group of deceased having been found on the clothes of applicant, is of no consequence, as there is every possibility of planting of such blood on the clothes of applicant. It is, therefore, contended that having considered the evidence as aforesaid, application be allowed by imposing stringent conditions upon applicant.

4 Learned APP on the other hand has opposed application and has submitted that there is no explanation put forth by applicant with regard to his clothes having found stained with blood group of deceased. It is further contended that applicant has also failed to establish injuries which are found on his person. It is further submitted that as according to the evidence on record applicant was found lastly in the company of deceased, applicant has to explain under what circumstances she died or had sustained grievous injuries causing her death. Learned APP had thus submitted that as applicant had not put forth any plausible explanation on above aspects, he is not entitled for relief as prayed for. It is, therefore, prayed that application be rejected.

5 With regard to submissions advanced as aforesaid, evidence of PW1 Dilip when perused, reveals that same is silent with

regard to alleged incident, as he has only proved his report which came to be marked as Exhibit 10. In that view of the matter, contents of report do not find corroboration from the oral evidence of complainant. No explanation is put forth by prosecution for PW1 Dilip not deposing with regard to contents of report wherein he has specifically stated that based on information received from one Bhaiya, complainant visited house of applicant, and found applicant assaulting his wife by stone on her head, wherein he intervened. As such, PW1 Dilip, infact from the contents of report appears to be an eye witness to the incident, however, his oral evidence is lacking to corroborate contents of his report. Except for this witness, there is no other eye witness whose evidence can said to be considered on the point of incident of assault.

6 Though prosecution has examined PW2 Rahul as one of the eye witnesses, he has not supported the case of prosecution, as according to him, on the day of incident on hearing commotion in the locality, he came out and found that deceased Geeta was being assaulted and accordingly went at the spot where he found Geeta lying in an injured condition, to whom, he along with PW1 Dilip shifted to hospital. Except for above, his evidence is silent about assault on Geeta by applicant or in that case by anybody else.

7 From the postmortem report on record, probable cause of death is shock due to head injury, however, final cause of death appears to be reserved till the viscera report is received. On specific query put to learned APP it is admitted that no viscera report is collected during the trial. In the circumstances, fact remains that there is no final cause of death certificate on record with reference to death of Geeta, who as per postmortem report is certified to have sustained 2 CLWs to occipital region, 2 abrasions on her shoulder and 2 contusion on her right hand.

8 Though prosecution has mainly opposed the application on the count of applicant's clothes having stained with blood group of deceased, I find much substance when it is submitted on behalf of applicant that evidence with reference to recovery of clothes of applicant is not convincing as it has come in the evidence of PW5 Avinash Patil, panch witness, that as per memorandum statement of applicant, he had concealed his clothes in the corner of bathroom in his house and has further deposed that in pursuance to said statement, investigating agency reached the spot within 45 minutes and had recovered the clothes having found smeared with blood, from behind the bathroom. This witness, while under cross-examination has specifically denied that applicant in his memorandum statement had

stated that he had concealed the clothes behind the bathroom. In that view of the matter, it is specific evidence of PW5 Avinash Patil, panch witness, that as per memorandum statement of applicant, clothes were concealed by him in the corner of bathroom of bathroom of his house and not behind the bathroom, where from it came to be seized. However, in further evidence of this panch witness PW5 Avinash Patil, it has come on record that clothes of applicant came to be seized at his instance from behind the bathroom.

9 Having considered evidence as aforesaid, it creates serious doubt in case of prosecution with regard to recovery of clothes of applicant at his instance and in that view of the matter, evidence in the form of C.A.Report establishing blood of group of deceased found on the clothes of applicant, cannot be given much weight, as possibility of tampering with clothes by planting blood on clothes of applicant with blood group of deceased cannot be ruled out.

10 Even the spot of incident where deceased Geeta was found lying is not established, as according to the report, PW1 Dilip on receiving information from one Bhaiya, visited in front of house of applicant Santosh, while according to the spot panchnama, the spot

situated is shown in front of house of one Narayan and from further contents of spot panchnama, it is stated that house of applicant is at a distance of 120 feet away from the spot. In view of this piece of evidence, case of prosecution – of deceased alleged to have been found in the company of applicant on the night of incident – also does not stand for any reason, as there is nothing on record to establish as to under what circumstances deceased was found on the spot as referred above, who even otherwise, from the evidence on record, is found addicted to liquor and applicant was doubting her character.

11 In that view of the matter and for the grounds as aforesaid, application is liable to be allowed, as per order below :

- i) Applicant shall be released on bail on his executing P.R.Bond in the sum of Rs.50,000/- with one surety in like amount or two sureties in the sum of Rs.25,000/- each.
- ii) While on bail, applicant shall mark his presence with Waliv Police Station, District Thane, once in three months, on the first day of such month, pending appeal.

- iii) Applicant shall provide proof of his residence to the Investigating Officer and change in address in future, if any, to the concerned police station.
- iv) Application is allowed in above terms.

(P. N. DESHMUKH, J.)