

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.633 OF 2017

IN

CRIMINAL APPEAL NO.746 OF 2016

Somnath Bhagwan Shelar	...	Applicant
V/s.		
The State of Maharashtra	...	Respondents

.....

Mr.Vikas B. Shivarkar, Advocate for the Applicant.

Ms.P.N.Dabholkar, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 23rd August 2017.

P.C. :

1 This is an Application under Section 389 of the Code of Criminal Procedure (hereinafter referred to as “Cr.P.C.” for the sake of brevity) by Appellant/Accused No.2 for suspension of sentence and releasing him on bail during pendency of the Appeal filed by him. The Applicant/Accused No.2 along with co-accused came to be convicted of the offence punishable under Section 304 read with Section 34 of the Indian Penal Code (hereinafter referred to as “IPC” for the sake of brevity) by the learned Additional Sessions Judge, Baramati. Though all accused persons

came to be convicted of this offence different sentences are imposed on them by the learned trial Court. So far as the present Applicant/Accused No.2 is concerned, he is directed to undergo rigorous imprisonment for seven years apart from payment of fine of Rs.1,000/- and in default to suffer simple imprisonment for two months.

2 Heard the learned Advocate appearing for the Applicant/Accused. He argued that other accused persons who had filed Appeals before this Court are released on bail. He further argued that short sentence is imposed on the Applicant and he has undergone sentence of about three years and three months up till now. The learned Advocate further argued that as seen from the impugned Judgment and Order, the motive of the alleged offence is not proved. Except P.W.No.1 Ajit (son of the deceased) and P.W.No.11 Aruna (wife of the deceased) other prosecution witnesses have not supported the case of the prosecution. Hence, in his submission, on merits as well as on principle of parity, the Applicant is entitled for his release on bail. The learned Advocate relied on the Judgment of the Honourable Apex Court in the matter of *Bhagwan Rama Shinde Gosai & Ors. v. State of Gujarat* reported in (1999) SCC (Cri.) 553.

3 As against this, the learned Additional Public Prosecutor argued that except in exceptional circumstances, this

Court is not empowered to grant bail by suspending sentence by invoking powers under Section 389 of the Cr.P.C. She placed reliance on the Judgments of the Honourable Supreme Court in the matters of State of *Haryana v. Hasmat* reported in (2004) 6 Supreme Court Cases 175, *Kishori Lal v. Rupa & Ors.* reported in (2004) 7 Supreme Court Cases 638, *Vasant Tukaram Pawar v. State of Maharashtra*, reported in 2005 CRI.L.J. 2531 and *Vijay Kumar v. Narendra & Ors.* reported in (2002) 9 Supreme Court Cases 364 to make out this point.

4 I have considered the rival submissions and also perused record made available including depositions of witnesses as well as police statements.

5 Prosecution case, as reflected from police statement of P.W.No.8 Sunita wife of the present Applicant is to the effect that she has developed love relations with deceased Dadasaheb Shelar. This witness reported to the investigator that on 24th May 2014 at about 12.00 O'clock in the midnight deceased Dadasaheb Shelar came to her house and they indulged into sexual intercourse. At that time, accused persons including the present Applicant/husband of P.W.No.8 Sunita came and then they assaulted Dadasaheb Shelar causing death of said Dadasaheb Shelar.

6 Evidence of P.W.No.1 Ajit and P.W.No.11 Aruna is to the effect that on getting a call from residents of the village, they had been to the house of the present Applicant/Accused No.2 Somnath. They saw Dadasaheb Shelar lying dead in the house of the present Applicant. Evidence of P.W.No.1 Ajit is to the effect that when he saw inside the house of the present Applicant, he noticed present Applicant Somnath and co-accused inside the house and his father Dadasaheb lying on the floor of the house. This witness stated that Dadasaheb was only wearing underwear at that time. In similar fashion. P.W.No.11 Aruna has stated that when she entered inside the house of Applicant, she saw her husband Dadasaheb lying by the side of the wall.

7 After due trial, the learned trial Court concluded that motive of the crime in question is not proved and the offence punishable under Section 302 of the IPC is also not proved by the prosecution. Ultimately, the Applicant and co-accused were convicted of offence punishable under Section 304 of the IPC with the aid of Section 34 of the IPC. *Prima facie*, it is seen that the conviction is based on circumstantial evidence without their being any eye witness' account of the incident.

8 In the matter of **Bhagwan** (supra) relied by the learned Advocate for the Applicant, in paragraph 3, the Honourable Apex Court has held thus :

“When a convicted person is sentenced to fixed period of sentence and when he files appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Of course if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when motion for expeditious hearing the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate court must bestow special concern in the matter suspending the sentence, so as to make the appeal right meaningful and effective. Of course appellate courts can impose similar conditions when bail is granted.”

9 It is thus clear that when the short sentence is imposed on the accused by the trial Court and when there is no possibility of hearing the Appeal in near future, powers under Section 389 of the Cr.P.C. can be exercised. In the case in hand, the Appeal is of 2016. This Court is hearing Appeals of convicts who are behind bar right from the year 2008. As such, in near future, it is not

possible to hear the Appeal filed by the present Applicant who is reported to have already undergone three years and three months imprisonment. The case against him is based only on circumstantial evidence without proof of motive.

10 In the matter of *Hasmat* and *Kishori Lal* (supra) relied by the learned Additional Public Prosecutor, the issue before the Honourable Apex Court was whether a sentence imposed on the convict for the offence punishable under Section 302 of the IPC can be suspended and it is held therein that only in exceptional case benefits of suspension of sentence can be granted in case of conviction under Section 302 of IPC. Similar is the ratio of other rulings cited by the learned Additional Public Prosecutor. The case in hand is not that of conviction under Section 302 of the IPC.

11 Even otherwise, co-accused have already been released on bail by suspending imprisonment and it is not pointed out that the State has challenged their release on bail by approaching the Honourable High Court. In the wake of this fact, the Applicant is also entitled for similar treatment as is given to co-accused. Therefore, the Order :

(i) The Application is allowed.

- (ii) The substantive sentence of imprisonment imposed on the Applicant is suspended and he is directed to be released on bail on his executing P.R. bond of Rs.15,000/- and on furnishing surety in like amount.
- (iii) As a condition of this order, the Applicant/Accused should not contact family members of the deceased Dadasaheb Shelar in any manner and he shall not extend any threat, promise or inducement to any of them.

(A.M.BADAR J.)