

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.388 OF 2017
IN**

**REVISION APPLICATION NO.414 OF 2017
WITH**

**CRIMINAL APPLICATION NO.389 OF 2017
IN**

REVISION APPLICATION NO.414 OF 2017

Hiten Haridas Raichura ... **Applicant**
V/s.

The State of Maharashtra & Anr. ... **Respondents**

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Mr.Shyam M.Kalyankar, Advocate for the Applicant.

Ms.P.N.Dabholkar, APP for the Respondent No.1/State.

Ms.C.Bocarro i/b.Vivek Sharma, Advocate for the Respondent
No.2/Original Complainant.

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CORAM : A.M.BADAR J.

DATED : 16th NOVEMBER 2017.

P.C. :

1 The applicant/accused was convicted of offences punishable under Sections 420, 465, 467, 471, 201 read with Section 34 and under Section 120-B of the Indian Penal Code (hereinafter referred to as 'IPC' for the sake of brevity) vide Judgment and Order dated 31/10/2013 by the learned Metropolitan Magistrate Magistrate, 16th Court, Ballard Pier,

Mumbai in Criminal Case No.279/PW/2006. For the offence punishable under Section 465 read with Section 34 of the IPC, he was sentenced to suffer simple imprisonment for one year apart from payment of fine of Rs.1,000/- and in default to pay fine to undergo simple imprisonment for two months. For the offence punishable under Section 467 read with Section 34 of the IPC, he was sentenced to suffer simple imprisonment for two years apart from payment of fine of Rs.3,000/- and in default to pay fine to undergo simple imprisonment for four months . For the offence punishable under Section 471 read with Section 34 of the IPC, he was sentenced to suffer simple imprisonment for six months apart from payment of fine of Rs.500/- and in default to pay fine to further undergo simple imprisonment for one month. For the offence punishable under Section 420 read with Section 34 of the IPC, he was sentenced to suffer simple imprisonment for one and half year apart from payment of fine of Rs.2,000/- and in default to pay fine to undergo simple imprisonment for two months. For the offence punishable under Section 120-B of the IPC, he was sentenced to suffer simple imprisonment for one year apart from payment of fine of Rs.1,000/- and in default to pay fine to undergo simple imprisonment for two months. The applicant/accused is original accused No.3 in the said Criminal Case No.279/PW/2006.

2 Feeling dissatisfied by the Judgment and Order of conviction, the applicant/accused No.3 challenged the said

Judgment and Order dated 31/10/2013 passed in Criminal Case No.279/PW/2016 by the learned Metropolitan Magistrate, 16th Court, Ballard Pier, Mumbai before the learned Additional Sessions Judge, Mumbai along with co-accused Dharmesh Jivanlal Solanki. Original complainant Nimish Shah on whose complaint Order under Section 156(3) of the Code of Criminal Procedure (hereinafter referred to as 'Code' for the sake of brevity) came to be passed resulting in the registration of the charge-sheet was filed, had also preferred an appeal challenging the Judgment of the trial Court vide Criminal Appeal No.465 of 2014. The State also challenged the Judgment and Order of conviction and sentence of accused persons for claiming enhancement in their sentence by filing Criminal Appeal No.855 of 2015. Co-accused Jayesh has challenged the Judgment and Order of the learned trial Court by filing Criminal Appeal No.134 of 2014. By common Judgment and Order dated 10/07/2017, the learned Additional Sessions Judge, Sessions Court, Mumbai was pleased to dismiss appeals filed by the accused persons challenging their conviction. However, Criminal Appeal bearing No.465 of 2014 filed by original complainant Nimish Ramdas Shah and State appeal bearing No.855 of 2015 came to be allowed. Substantive sentence imposed by the learned trial Court upon all accused persons came to be altered from simple imprisonment to rigorous imprisonment. Apart from that, the accused persons were directed to pay jointly or severally compensation of Rs.10,00,000/- each within three

months or to undergo further rigorous imprisonment for one year by the learned Appellate Court.

3 By a separate Order passed in the Revision Petition today itself, the applicant/revision petitioner is directed to join original complainant Nimish Shah as a party to the revision petition forthwith.

4 I heard the learned Advocate appearing for applicant/accused No.3 Hiten Raichura. The learned Advocate vehemently argued that the learned trial Court is enjoined with the duty to issue Conviction Warrant and the learned Appellate Court cannot take convicted accused in custody at the time of dismissal of his appeal for committing him to jail. The learned Advocate further argued that the Order directing the accused persons including the present applicant to pay compensation of Rs.10,00,000/- is *per se* illegal as by the impugned Judgment and Order, the Appellate Court has not set aside the Judgment and Order of the trial Court imposing fine on accused persons and compensation can always be the part of the fine amount. In the case in hand, the fine amount is much less and, therefore, the Order directing the applicant along with the co-accused to pay compensation is illegal. The learned Advocate further argued that short sentence which is maximum up to two years has been imposed and, therefore, the applicant, who was on bail throughout

the trial even thereafter during pendency of the present revision petition needs to be released on bail by granting exemption to him from surrendering.

5 I have also heard the learned Advocate appearing for the intervenor/original complainant, who is directed to be joined as respondent No.2. She opposed release of the applicant on bail by stating that after dismissal of the appeal, the only course of action available to the convict is to surrender himself and then to apply for bail.

6 The learned Additional Public Prosecutor also opposed the application.

7 In reply, the learned Advocate for the applicant/convicted accused No.3 submitted that it is settled position of law that while entertaining revision petition, there is no need to surrender and application for suspension of sentence can be entertained even without directing surrender of the accused.

8 I have carefully considered the rival submissions and also perused the impugned Judgment and Order.

9 As stated in the foregoing paragraphs, original complainant Nimish Shah filed a complaint alleging commission of

several offences by accused persons including present applicant/accused No.3 Hiten Raichura. The learned Metropolitan Magistrate by exercising his powers under Section 156(3) of the Code had referred that complaint for investigation to the police and that is how the charge-sheet leading to registration of Criminal Case No.269/PW/2016 came to be filed. The record shows that both Courts below concurrently held that the applicant along with two co-accused had committed offences punishable under Sections 420, 465, 467, 471, 201 read with Section 34 and under Section 120-B of the IPC. One of the accused is shown as absconding accused in the charge-sheet.

10 Case of the prosecution against accused persons was to the effect that under the conspiracy they sold fake and bogus shares to the complainant, who was a registered sub-broker running business under name and style 'Fair Deal Investment'. The cost incurred by the complainant for acquiring bogus shares from the accused was assessed at Rs.8,32,311.50 Ps. The Court below also found, on the basis of evidence of witnesses supported by the documentary evidence, that complainant Nimish Shah was required to repurchase and replace the forged and bogus shares by further incurring expenditure of Rs.11,22,829.30 Ps. It is seen that the learned Appellate Court awarded compensation for re-compensating the complainant, who was litigating in the matter of loss incurred by him because of sale of bogus share by accused

persons including the present applicant. It is seen that all Criminal Appeals were heard together and decided by common Judgment on 10/07/2017 by the learned trial Court. While confirming the conviction of accused persons and modifying the sentence from simple imprisonment to rigorous imprisonment and awarding compensation, the learned Appellate Court had directed cancellation of bail bonds of all accused persons including the present applicant/accused No.3, who was present before the said Court. This implies that the present applicant on cancellation of his bail bond was in custody of the Appellate Court.

11 What happened thereafter is very relevant for the purpose of deciding the instant application. As soon as the Judgment and Order maintaining conviction and altering sentence as well as awarding compensation is pronounced, the present applicant, as seen from the record of the Court below, had fled from the custody of the Appellate Court. Following are the observations of the learned Appellate Court in the impugned Judgment and Order in that regard :

“Later On,

It is reported that, after the pronouncement of the order, when Sheristedar was directed to ask police to take the appellants in custody, during the said period, immediately, appellant Hiten Haridas Raichura, under the pretext of talking with his Advocate left the court and till 4.10 p.m. did

not appear.

Ld. Trial Court to immediately issue conviction warrant and send to execute the sentence.”

12 The position which now stands is neither the applicant/convicted accused No.3 has deposited amount of compensation of Rs.10,00,000/- as directed by the appellate Court nor there is assurance that the applicant will be available for receiving the sentence, if any, ultimately imposed on him at the time of disposal of the instant revision petition. Availability of the accused for hearing of the case against him as well as for receiving the sentence, if any, ultimately imposed on him are essential criteria for suspension of sentence and releasing the accused on bail. Due to his non-surrender and because of his failure to deposit an amount of Rs.10 Lakhs towards compensation by the applicant/revision petitioner, as directed by the Appellate Court, at this stage, this Court is not assured that if released on bail by suspending the sentence, the revision petitioner will be available for receiving the sentence, if any, ultimately imposed on him.

13 The Appellate Court is invested with all powers to take the convicted accused in custody for committing him to the prison for undergoing the sentence. Other points raised by the learned Advocate deserves consideration at the time of the final hearing of the revision petition.

14 In the result, at this juncture, the following Order :

- (i) At present, both applications for suspension of sentence and releasing the applicant/accused No.3 on bail by exempting him from surrendering are rejected.
- (ii) Hearing of the revision petition is expedited.

(A.M.BADAR J.)