

dik

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

CRIMINAL BAIL APPLICATION NO. 1700 OF 2016

Arshad Ayub Shaikh

...Applicant

vs

The State of Maharashtra

...Respondent.

.....

Mr Subhash Jha a/w Ms Seema Singh i/b Mohd. Ibris Jayed for the
Applicant

Mr Arfan Sait, APP for the Respondent

Mr S.N.Metkari, PSI Khar Police Station.

.....

**CORAM : SMT SADHANA S. JADHAV, J.
17 JANUARY, 2017**

P.C. :

Heard. This is an application under Section 439 of the Code of Criminal Procedure, 1973. The Applicant herein is arrested by Khar Police Station on 29 September, 2015. The investigation is completed and charge-sheet is filed.

2 The information was received by Khar Police Station on 29 September, 2015 at about 1.00 p.m. that one person has been murdered. The offence was registered at about 4.00 p.m. The report was lodged by one Saif Arif Mirza, who happens to be the friend of deceased Rizwan Riaz Khan.

3 The informant had lodged a report alleging therein that on 28 September, 2015 at about 9.00 p.m. he had been along with his friend for drive. He has given names of his friends that is Rizwan, Adnan, Aftab, Hussain and Shehnaz. He had been to hotel “Chinese Grill”. After dinner they had been to Carter Road, Khar. They met Zoya who is known as the girlfriend of Rizwan. Zoya and Rizwan had been for stroll on the walking track. Rizwan had informed his friends that there were 5 to 6 boys on the track who had passed lewd comments against them. One of the boy from said group had defied and dared Rizwan. There were some verbal altercations between said boy and Rizwan. Thereafter, under the pretext of pacifying Rizwan the same boy left the company of the other boys and proceeded with Rizwan.

4 The first informant had further stated that since Rizwan did not return for quite some time, they decided to search for Rizwan. On the walking track they saw crowd and at that time they noticed that Rizwan was fallen on the ground in a pool of blood. He was taken to Mahavir Hospital. They referred Rizwan to Ramkrishna Mission Hospital. Doctor had examined Rizwan in the car and suggested that he be taken to Bhabha Hospital, where doctor had declared him dead.

5 The first informant had given description of the persons who had accompanied Rizwan to the walking track. The first informant had stated that the said person must have been 22 years of

old, 5'9" tall, fair, slim and was wearing a blue colour full T-shirt and blue colour jean pant and he was wearing a **silver chain in his neck**.

6 The applicant was arrested only in the morning of 29 September, 2015. At the time of arrest his blood stained clothes were seized. At the time of arrest he was wearing black colour jean pant. **He was also wearing silver colour chain in his neck** and was having a keys of Honda motorcycle. It was revealed that there were fresh injuries on the person of the applicant. There were scratch marks on his chest, back etc. The panchanama was conducted between 9.00 a.m. to 10.30 a.m.

7 On the same date, accused Danish Shaikh was arrested. During the personal search it was seen that there were scratch marks on the shoulder, stomach and there was swelling to his finger. Upon inquiry he had informed that he had sustained said injuries when he had fallen from the motorcycle.

8 In the course of investigation, the Investigation Officer had conducted test identification parade and the witnesses had identified all the accused persons. The girlfriend of Rizwan, Joya was also arrested. The Investigation Officer had recorded the statements of some witnesses who had stated that they had seen one boy and deceased on the walking track at Bandra.

9 Learned advocate for the applicant submits that the

Investigation Officer had recorded arrest panchanama of Danish Shaikh and he was questioned about the injuries, and therefore, had an opportunity to give explanation. It is also submitted that the age of the applicant does not tally with the arrest panchanama as the applicant was 19 years old at the time of arrest. It is also submitted that it is incumbent upon the prosecution to explain the injuries sustained by the accused. It is also submitted that since the applicant was not given any opportunity to explain the cause of injuries, the same cannot be relied for drawing an adverse inference against the applicant.

10 Learned APP submits that besides test identification parade, seizure of blood stained clothes, one other incriminating material against the Applicant is that the keys of Honda motorcycle was found with the accused at the time when he was arrested. Investigating Agency had recorded the statement of the owner of the said motorcycle. Parvez who happens to be the friend of the present applicant. He disclosed to the police that on 28 September, 2015 his friend Arshad, that is the present applicant, had approached him and asked for his motorcycle to go for a ride. He had obliged, since the applicant was known to the family. The applicant had not returned the motorcycle by night. They tried to contact him on his cellphone but his cellphone was switch off. On 29 September, 2015 in the morning his father had received phone call from Khar Police Station informing him that the motorcycle has been seized from the present applicant.

11 Learned APP submits that, this is the case of circumstantial evidence. All the material collected during the course of investigation would clearly indicate that the applicant is involved in the present case, and therefore, applicant does not deserve to be enlarged on bail.

12 Learned counsel for the applicant submits that the co-accused are enlarged on bail and hence doctrine of parity applies to the applicant and the applicant deserves to be enlarged on bail.

13 Learned APP, on instructions, and on the basis of the report submits that non-bailable warrant was issued against the accused who was enlarged on bail and he has been taken into custody.

14 Learned counsel for the applicant has placed his reliance on the judgment of Hon'ble Apex Court in the case of **Lakshmi Singh and Ors. Vs State of Bihar**¹. The Honourable Apex Court while considering the bail against conviction, at the time of appreciation of evidence it was noticed that the doctor who has examined one of the deceased had also examined the accused persons. It was also observed by the Honourable Supreme Court as follows;

“It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the

1 (1976) 4 Supreme Court Cases 394.

origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence.”

15 The present case rests upon circumstantial evidence. There is no direct evidence to show that there was altercation between the applicant and the deceased. In fact the applicant has denied his presence at the scene of offence and it is submitted that he has been falsely implicated.

16 Be that as it may, it would be a matter of evidence which ought to be adduced at the time of trial. It is incumbent upon the prosecution to explain the injuries on the person of the accused by adducing substantive, cogent and convincing evidence at the time of trial. As of today there are more than three circumstances which indicate the involvement of the applicant in the homicidal death of Rizwan. Firstly, the applicant was arrested in the early hours of 29 September, 2015 that is within few hours after registration of the offence. The first informant had specifically stated that the accused who had taken away Rizwan, was wearing a silver chain in his neck. At the time of arrest, the applicant was having a silver chain in his neck. There were bloodstained clothes on his person; Secondly, the applicant had fresh injuries on his person; Thirdly, the applicant was having keys of the Honda motorcycle which was lent to him by his friend.

17 As far as, an opportunity to explain the injuries is concerned, it appears that Danish and others had old healed injuries on their person, and therefore, they were questioned about the same. As far as the applicant was concerned, he had fresh injuries for which he had no explanation. Lastly, the applicant was identified by the witnesses and the person who had taken Rizwan. It is the case of the prosecution that the applicant along with Zoya and others had hatched the conspiracy to eliminate Rizwan. In these circumstances, the applicant does not deserve to be enlarged on bail. The application being, without merit, stands rejected. It is made clear that the observations are restricted to the application under Section 439 of the Code of Criminal Procedure, 1973 and shall not be taken into consideration at the time of trial.

(SMT SADHANA S. JADHAV, J.)