

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1282 OF 2016

IN

CRIMINAL APPEAL NO.70 OF 2016

**MOHD. AYUB ALIMUDDIN SHAIKH @)
AYUB CHIKNA)...APPLICANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.H.E.Mooman, Advocate for the Applicant.

Ms.V.S.Mhaispurkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 18th JANUARY 2017.

P.C. :

1 This is an application for suspension of sentence and releasing the applicant / accused on bail during pendency of appeal filed by him.

2 The applicant / accused along with co-accused came to be tried for offences punishable under Sections 395, 397, 342 read

with 34 of the IPC, under Sections 37(1) and 135 of Maharashtra Police Act, under Section 3 and 25 of the Indian Arms Act and under Section 3(1)(ii), 3(2), 3(4) of the Maharashtra Control of Organized Crimes Act, 1999, (MCOC Act). After due trial, the applicant / accused was held guilty of offences punishable under Section 392 read with 34 of the IPC and he is sentenced to suffer rigorous imprisonment for 9 years apart from payment of fine of Rs.20,000/-, in default, to undergo simple imprisonment for 1 year. He is also found to be guilty of the offence punishable under Section 342 read with 34 of the IPC and is sentenced to suffer rigorous imprisonment for 9 months and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for 1 month. He is acquitted of other offences alleged against him. The learned APP, on instructions, made a statement that acquittal of the applicant / accused from other offences is a subject matter of challenge before this court at the instance of the State.

3 Heard learned advocate appearing for the applicant / accused. He argued that the applicant / accused came to be

arrested initially on 26th December 2011 and subsequently in the instance crime on 27th December 2011. The learned advocate further argued that nothing was recovered at the instance of the present applicant / accused. Even chopper attributed to him was not recovered. In evidence of prosecution, there is no description of the chopper. The learned advocate further argued that the incident in question allegedly took place at about 9.15 p.m. of 19th December 2011. In the FIR or spot panchnama, there is no mention of availability of light on the spot and therefore this aspect raises a serious doubt in respect of evidence of eye witnesses regarding identification of the present applicant / accused.

4 The learned advocate further argued that Test Identification Parade (TIP) was conducted by the prosecution on 20th January 2012 and there is no explanation of this delay in the FIR. In all probability, photograph of the applicant / accused was shown to the identifying witnesses as seen from the evidence of the Officer conducting the TIP. The learned advocate further

argued that the TIP was conducted in disregard to the rules prescribed by this court as found in Criminal Manual. The evidence of the Officer conducting the TIP shows that he has not read the provisions of the Criminal Manual so also circulars in that regard. The learned advocate further argued that during TIP, no role was attributed to the present applicant / accused by the identifying witnesses. Supplementary statement of identifying witnesses are not recorded. The officer conducting the TIP has not ascertained the role attributed to the applicant / accused from the identifying witnesses.

5 The learned advocate for the applicant / accused drew my attention to the cross-examination of PW6 Kishansingh Tomar and PW8 Vijaykumar Garg regarding description of accused persons and contended that identification of accused persons by these witnesses is not proper. Reliance is placed on judgment in the matter of **Vilas Vasantrao Patil vs. The State of Maharashtra** reported in **1996 CRI.L.J. 1854**.

6 The learned advocate further argued that there is no possibility of hearing of the appeal in near future and considering the quantum of sentence imposed upon the applicant / accused, he deserves to be released on bail. For that purpose, reliance is placed on the judgments in the matter of **Smt.Akhtari Bi vs. State of Madhya Pradesh** reported in **2001 ALL MR (Cri) 743** and **Bhagwan Rama Shinde Gosai and Others vs. State of Gujarat** reported in **1999 CRI.L.J. 2568**.

7 The learned APP opposed the application by contending that evidence of PW6 Kishansingh Tomar and PW8 Vijaykumar Garg is clear and cogent. The same is corroborated by evidence of their employer PW10 Deepak Shah.

8 I have carefully considered the rival submissions and perused the impugned judgment and order apart from deposition of witnesses. According to the prosecution case, PW6 Kishansingh Tomar and PW8 Vijaykumar Garg are employees of Andhra Transplate Services providing courier service. On 19th December

2011, these two employees were carrying valuable articles costing about Rs.14,01,500/- for transporting them from Mumbai to Hyderabad. While they were approaching Chhatrapati Shivaji Terminus (CST) by a taxi, they were accosted by four accused persons who came on the spot by two motorcycles. The incident is stated to have taken place on Mahanagar Palika Marg near Metro Junction of CST. It is the case of prosecution that one of the accused whipped a firearm whereas the another threatened PW6 Kishansingh Tomar and PW8 Vijaykumar Garg by a chopper. The bag containing valuables was snatched from them by accused persons. The incident was reported to police which resulted in registration of Crime No.247 of 2011 for various offences and subsequently offences punishable under MCOC Act were added to the case diary of crime by taking out necessary formalities. After trial, the applicant / accused along with two co-accused were found guilty of the offences punishable under Sections 392 and 342 of the IPC.

9 PW6 Kishansingh Tomar and PW8 Vijaykumar Garg are eye witnesses to the crime in question. Their unanimous version is to the effect that on 19th December 2011 at about 9.15 p.m. while travelling in a taxi with valuables, they were accosted by four persons who were riding two motorcycles. Both of them have deposed that one of them was holding a firearm whereas the another was holding chopper and after threatening them, those accused persons robbed them of their valuables.

10 The incident took place near CST in Mumbai at about 9.15 p.m. of 19th December 2011. Both of these eye witnesses are claiming to have identified three of accused persons including the present applicant / accused in the TIP. There is nothing in cross-examination of both these witnesses to suggest that there was no availability of light on the spot of the incident in order to demonstrate that these two eye witnesses were not in a position to see accused persons during the course of commission of offence.

11 It is argued that TIP was not conducted as per guidelines of this court. It is true that this court has prescribed guidelines as found in Criminal Manual for the procedure to be followed in the TIP, but the TIP is primarily meant for aiding the investigation. Its is used for the aid of Investigator in order to ascertain whether the investigation is proceeding in the correct direction or not. Substantive evidence is always the evidence before the court. In the case in hand, both these eye witnesses have categorically identified the present applicant / accused as one of the robbers who had shown chopper to them during the course of offence. When there is substantive evidence of identification before the court then discrepancies, if any, in TIP cannot be gone into at this stage.

12 It is true that fix sentence is imposed upon the applicant / accused as well as the co-accused. Quantum of sentence and non-likelihood of hearing the appeal are relevant considerations for releasing the applicant / accused on bail by

suspending the sentence. At the same time, it needs to be mentioned that those are not only the relevant considerations while granting bail to a convicted accused. Nature of offence, circumstances in which it was committed are also relevant considerations. In the case in hand, allegations against the applicant / accused are serious in nature which are held to be proved in trial by the learned trial court. Considering the nature of offence alleged against the applicant / accused, I do not feel it proper to release him on bail during pendency of the appeal, particularly when even the State has chosen to challenge his acquittal in respect of other offences by filing proper proceedings before this court.

13 In this view of the matter, rulings so cited by the learned advocate for the applicant / accused, cannot be made use of in favour of the applicant.

14 For the foregoing reasons, the application is rejected.

15 Hearing of the appeal is expedited, as per its turn in
the category of jail appeals.

(A. M. BADAR, J.)