

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.971 OF 2018

IN

CRIMINAL APPEAL NO.731 OF 2016

Binny Alphonse Barnad.] ... Applicant

Versus

The State of Maharashtra.] ... Respondent

Mrs. Anjali Awasthi for Applicant.

Mr. Ajay Patil, APP for State.

**CORAM :- B. R. GAVAI &
SARANG V. KOTWAL, JJ.**

DATE :- 11 JULY, 2018

P. C. :-

1. This is an application for suspension of sentence and grant of bail during pendency of the present Appeal.

2. The Appellant, vide the impugned Judgment and Order dated 30/06/2016 passed by the learned District Judge - 3 & Additional Sessions Judge, Raigad - Alibaug, in Sessions Case No.83 of 2013, has been convicted for commission of offence punishable under

Section 302 of the IPC and was sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- and in default of payment of fine, to suffer further rigorous imprisonment for two months.

3. Heard Mrs. Anjali Awasthi, learned Counsel for the Applicant and Mr. Ajay Patil, learned APP for the State.

4. Learned APP vehemently opposed the application.

5. The present case rests on circumstantial evidence. The circumstances on which the prosecution relies are :

- (i) the last seen theory,
- (ii) extra-judicial confession,
- (iii) recovery of weapon used in the crime.

6. As held by the Hon'ble Apex Court in the case of *Niranjan Singh and another Vs Prabhakar Rajaram Kharote and others*¹, detailed elaboration of the evidence at this stage will have to be avoided.

¹ (1980) 2 SCC 559

7. Insofar as the last seen theory is concerned, the prosecution has relied on the evidence of PW 2 Tanabai Jadhav who is a fruit juice vendor and PW 5 Nagesh Kadam who works as an agent for hotel rooms. At a tourist spot like Matheran, the number of tourists on a Saturday would be huge. At least, *prima facie*, it does not appear to be probable that these two witnesses could recollect that they had seen the Appellant and the deceased together.

8. Insofar as the extra-judicial confession is concerned, the prosecution has relied on the evidence of PW 1 Shivaji Shinde who was the Corporator and who is said to have caught the Appellant red-handed. However, a perusal of his evidence would reveal that there are material improvements in his evidence. He is said to have been accompanied by PW 3 Vijay Chaudhari and PW 7 Maruti Kadam. The said witnesses do not corroborate his testimony. In any case, the extra-judicial confession is alleged to have been made on telephone to the mother of the Appellant.

9. Insofar as the third circumstance regarding recovery of the weapon used in the crime is concerned, it is alleged that the recovery

pursuant to the memorandum by the accused under Section 27 of the Evidence Act, was from a place just near the place where the deceased was found and from bushes. It could, thus, be seen that the recovery was from the place which is not exclusively and distinctly within the knowledge of the Appellant.

5. In that view of the matter, we are inclined to allow the Application. Hence, the following order :

ORDER

- (i) The Application is allowed.
- (ii) The order of sentence and conviction insofar as the present Applicant is concerned, is suspended.
- (iii) The Applicant is directed to be released on bail in the sum of Rs.15,000/- with one or more sureties in the like amount.
- (iv) The Applicant shall report to Wagle Estate Police Station on first Sunday of every month.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)