

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1554 OF 2016

IN

CRIMINAL APPEAL NO.512 of 2016

Javed Ahmed Shaikh

...Applicant

Versus

The State of Maharashtra

...Respondent

Mr. Sudeep Pasbola a/w Bhavesh Thakur i/b Rahul Arote for
the applicant.

Mr. V.V.Gangurde, APP for State.

CORAM: A.M. BADAR, J.

DATED: 8th JANUARY 2018

PC:-

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

2. Heard the learned advocate appearing for the applicant/accused. By drawing my attention to the evidence of PW-9 Naim Ibrahim Khan as well as that of the present applicant/accused, who had examined himself in defence the learned advocate for the applicant argued that the prosecution case itself was to the effect that deceased Naved was having illicit relations with co-accused Ruti-wife of the present applicant. The prosecution case reflects that upon seeing Naved (since deceased) and co-accused Ruti, the present applicant/accused assaulted deceased Naved causing his death. The learned advocate for the applicant argued that the case is therefore, not falling in part-I of Section 304 of the Indian Penal Code and at the most the applicant could have been guilty of the offence punishable under Section 304-II of the Indian Penal Code. In the alternative the learned advocate for the applicant argued that fixed sentence of imprisonment is imposed on the applicant/accused and out of 10 years imprisonment, till date the applicant had undergone imprisonment for more than 6 years. He is behind bars from

8.10.2011. The learned advocate for the applicant relied on judgment of Hon'ble Apex Court in the matter of **Bhagwan Rama Shinde Gosai and Ors. Vs.State of Gujrat reported in AIR 1999 SC 1859** as well as orders passed by the Division Bench of this Court in **Criminal Application No.555 of 2016 in Criminal Appeal No.303 of 2016** and in the matter of **Criminal Application No.1069 of 2010 in Criminal Application No.75 of 2016** on 3rd August 2016 and 17th September 2010 respectively. The learned APP opposed the application by contending that the learned Trial Court erred in coming to the conclusion that the assault was under grave and sudden provocation. According to the learned APP, offence punishable under Section 302 of the Indian Penal Code is made out by the prosecution.

3. I have carefully considered the rival submissions and also perused the impugned judgment and order as well as copies of deposition of prosecution witnesses. The applicant/accused was charged for the offence punishable

under Section 302 r/w 34 of the Indian Penal Code alongwith co-accused, but all accused were acquitted of that offence. The applicant/accused was found to be guilty of the offence punishable under Section 304-I of the Indian Penal Code and he is sentenced to suffer simple imprisonment for 10 years apart from directing him to pay fine of Rs.15,000/- and in default, further to undergo simple imprisonment for 6 months. Both the co-accused including wife of the present applicant namely, Ruti were acquitted .

4. The case of the prosecution unfolded by PW-9 Naim Khan is to the effect that his friend i.e. deceased Naved was having illicit relations with co-accused Ruti, who happens to be wife of the present applicant. This witness further testified that he got a call from Naved (since deceased) to the effect that he is being murderously assaulted by present applicant Javed and co-accused Ruti at the terrace of Riddhi Siddhi building. This witness accompanied by them went on the terrace of Riddhi Siddhi building and found Naved in the pool

of blood and co-accused Ruti in injured condition. He noticed presence of the present applicant on the terrace of that building, where mother of co-accused Ruti used to reside. The applicant entered in to defence and examined himself at Exh.135. To a large extent his version is in tune with the prosecution case. He stated that upon finding his wife i.e. co-accused Ruti in compromising position with Naved (since deceased), he assaulted them with a knife.

5. After considering the evidence of the prosecution as well as that of the defence, the learned trial Court came to the conclusion that the defence taken by the present applicant is probable and due to noticing the unfortunate incident of finding his wife Ruti in compromising position with Naved (since deceased), the applicant must have lost his control and the incident took place. With this conclusion, the learned Trial Court held that the offence punishable under Section 304-I of the Indian Penal Code is made out by the prosecution so far as the present applicant is concerned and he is directed to suffer

simple imprisonment for 10 years. The impugned judgment and order itself shows that the applicant is undergoing jail sentence right from 8.10.2011.

6. On these facts, it becomes clear that the applicant has undergone sentence of morethan 6 years. In the matter of **Bhagwan Rama Shinde Gosai and ors. (Supra)** in paragraph No.3, Hon'ble 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".

7. The Division Bench of this Court (**Coram: A.S. Oka and A.A. Sayed, JJ**) by order dated 3rd August 2016 in Criminal Application No.555 of 2016 in Criminal Appeal No.303 of 2016 **Hasib Zubeir Mulla Vs. The State of Maharashtra**, in para No.2 of the said order has held thus:-

"Out of substantive sentences of 10 years, it is not disputed by the Special P.P appearing for State Government that the applicant has already undergone 8 years. Considering the pendency of very old appeals in this Court, appeal of the year 2016 is not likely to be heard in near future and in any event within a period of two years. The proposal of the State Government to file an appeal against acquittal is not relevant for considering this application. Moreover, it is pointed out that there are no antecedents of the applicant except the case in hand. Therefore, in our view, a case is made out for grant of relief to the applicant."

The said case was of conviction for the offence punishable under Section 4(a) of Prevention of Terrorism Act

2002 as well as under Arms Act, 1959 and maximum substantive sentence was Rigorous Imprisonment for 10 years.

In Criminal Application No.1069 of 2010 in Criminal Appeal No.75 of 2006 of **Prakash Perumal Shetty Vs. State of Maharashtra** decided on 17th September 2010. Division Bench of this Court (**Coram: A.M. Khanwilkar and U.D. Salvi, JJ**) in para No.2 of the order has held thus:-

" Counsel for the Applicant has justly pressed into service decision of the Apex Court in **Kashmira Singh V/s. The State of Punjab reported in AIR 1977 Supreme Court 2147** to contend that presently the Appeals of convicts in jail which are being heard pertain to year 2002. It is, therefore, unlikely that the Applicant's Appeal will be heard in the near future or at least for another four years. By that period the Applicant would have virtually undergone the entire sentence period. In the circumstances, following the exposition of the Apex Court in the above said decision, we allow the Application and grant bail on the following terms".

8. In the case in hand also fixed sentence of 10 years is imposed on the applicant and applicant has undergone morethan half of the sentence imposed on him. This Court is

taking up final hearing of appeals filed even prior to year 2010, wherein the appellant/accused are undergoing jail sentence. In this view of the matter, the present appeal filed by the present applicant may not be heard within a period of four years.

9. In this view of the matter, considering the facts of the case in hand and in the light of observations of the Hon'ble Apex Court as well as Division Bench of this Court reproduced in foregoing paras and relied by the learned Advocate for the applicant, the applicant deserves to be released on bail. As such the following order:-

ORDER

- i) The application is allowed.
- ii) Substantive sentence of imprisonment imposed on the application is suspended and he is directed to be released on bail on executing his PR bond of Rs.15,000/- and on furnishing surety in the like amount.

iii) The applicant to report to the concerned police station once in 6 months i.e. on first Monday in between 11.00 a.m. to 1.00 p.m. and he should not leave State without informing the concerned Police Station.

iv) The applicant shall keep the police inform about his whereabouts from time to time .

v) The application is disposed of accordingly.

(A.M. BADAR, J)