

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

**CRIMINAL APPEAL NO.362 OF 2007
WITH
CRIMINAL APPLICATION NO.20 OF 2018
AND
CRIMINAL APPLICATION NO.398 OF 2018**

**Mohamed Aiyaaz Mohd. Shaikh : Appellant/Applicant
versus
The State of Maharashtra : Respondent.**

**ALONG WITH
CRIMINAL APPEAL NO.312 OF 2007**

**Mohamed Imtiyaz Mohd. Rafik & anr. : Appellants.
Versus
The State of Maharashtra : Respondent.**

**Mr. S V Marwadi for the Appellants/Applicants.
Mr. J P Yagnik APP for the Respondent/State.**

**CORAM : A.S.OKA &
A.S.GADKARI, JJ
DATE : 21st January 2019**

P.C.

1 The Appeals are called out for hearing. Both the Appeals are directed against the impugned judgment and order dated 23rd February 2007 passed by the learned Additional Sessions Judge, Greater Bombay by which the Appellants were convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code. Appeal No.312 of 2007 is filed by the Accused Nos.1 and 3 and Appeal No.362 of 2007 is filed by the Accused No.2.

2 The prosecution examined eight witnesses. The prosecution heavily relied upon the direct evidence of PW-1 Mrs. Halimabee Shaikh Mohd. Hanif. One of the submissions canvassed during the course of hearing of the Appeals is that the Accused No.2 (the Appellant in Appeal No.362 of 2007) was denied an opportunity to cross examine PW No.1. On this aspect, we were taken through the record of the case.

3 We have carefully perused the record of the case. The examination in chief of PW-1 was recorded on 03rd January 2005. The said witness was extensively cross examined by the advocate for the Accused Nos.1 and 3. The deposition of PW-1 recorded on 08th April 2005 records that after completion of the cross examination by the advocate for the Accused Nos.1 and 3, the advocate appearing for the Accused No.2 made a statement that he was engaged only in bail application and therefore, the said advocate does not desire to proceed with the cross examination. By recording that the cross examination by the Accused No.2 of the said witness was declined, the learned Judge closed the cross examination of PW-1. Perusal of the record further shows that even in the case of PW-2 and PW-5, the learned Additional Sessions Judge, recorded that as the Accused No.2 was not represented by any advocate, there is no cross examination by the Accused No.2..

4 The Record and Proceedings shows that on 28th February 2006

vakalatnama was filed on behalf of the Accused No.2 by the advocate who was already representing the Accused Nos.1 and 3. An application was made by the said advocate on behalf of the Accused No.2 being Misc. Application No.212 of 2006. By an order dated 12th July 2006, the learned Additional Sessions Judge recalled PW Nos.1, 2, 3 and 6 to enable the advocate for the Accused No.2 to cross examine the said witnesses on behalf of the said Accused.

5 Perusal of the record shows that on 3 occasions, the witness summons was issued to PW-1. The first witness summons was served to her but she did not appear. The second witness summons issued to her was returned unserved with the remark that the witness has undergone surgery and therefore, she was away. The third witness summons records that her whereabouts could not be located. No further efforts were made by the prosecution to procure the presence of PW-1 to enable the Advocate for the Accused No.2 to cross examine the witness. As a result, the Accused No.2 never got an opportunity to cross examine PW-1.

6 The learned APP did not dispute that the evidence of PW-1 is vitally important to the prosecution and that the prosecution cannot make a statement that it will not rely upon the testimony of PW-1. In fact in the impugned judgment, the learned Additional Sessions Judge has relied upon the

testimony of PW-1.

7 Thus, it is apparent that the Accused No.2 (the Appellant in Appeal No.362 of 2007) was not granted even a reasonable opportunity to cross examine PW-1. As the prosecution is relying upon the evidence of PW-1, prejudice has been caused to the Accused No.2 due to failure of the prosecution to produce PW-1 for cross examination by the Accused No.2.

8 Considering the fact that the Appeals are of the year 2007, no purpose is served by remanding the case to the Trial Court. We are of the view that while keeping the Appeals pending, by exercising powers under Subsection 1 of Section 391 of the Code of Criminal Procedure, the Trial Court will have to be directed to recall PW-1 to enable the advocate for the Accused No.2 to cross examine the said witness.

9 The Accused No.2 has taken out Criminal Application No.20 of 2018 for grant of bail till final disposal of his Appeal. It is pointed out that the Accused No.2 has undergone sentence for almost 17 years.

10 Now we have held that adequate opportunity to cross examine PW-1 who is a star prosecution witness was not granted to the Accused No.2. Moreover, the Accused No.2 has already undergone the sentence for 17 years

and more. Hence, a case is made out for enlarging the accused No.2 on bail pending final disposal of the Appeal subject to stringent terms and conditions.

11 Hence we pass the following order :-

- (i) We direct the learned Principal Judge, City Civil and Sessions Court, Mumbai to assign the Sessions Case No.275 of 2003 to any other Additional Sessions Judge for the purposes of recording cross examination of PW-1 – Mrs. Halimabee Shaikh Mohd. Hanif by the advocate for the Accused No.2;
- (ii) The Registry shall forthwith transmit the record and proceedings to the aforesaid court;
- (iii) The learned Additional Sessions Judge to whom the Sessions Case is assigned shall record the evidence of PW-1 only for a limited purpose to enable the Accused No.2 to cross examine the said witness;
- (iv) Recording of cross examination of the said witness shall be completed within a period of three months from the date on which the said Additional Sessions Judge is appointed by the

learned Principal Judge, City Civil and Sessions Court, Mumbai;

- (v) The further evidence of PW-1 recorded by the learned Additional Sessions Judge along with record of the case shall be forwarded by the learned Additional Sessions Judge to the Registrar (Judicial-1) of this Court on or before 31st May 2019;
- (vi) As soon as the record is received from the learned Additional Sessions Judge, both the Appeals shall be listed for further hearing before the appropriate Division Bench of this Court;
- (vii) The Criminal Application No.20 of 2018 is hereby allowed. The execution of substantive sentence imposed upon the Accused No.2 Mohamed Aiyaaz Mohd. Rafik shall stand suspended and he shall be released on bail in the sum of Rs.15,000/- with one or two local sureties in the like amount subject to condition that he shall remain present before the learned Sessions Judge, Mumbai on Monday, February 11, 2019 at 11.00 am. The bail is granted subject to further condition that he will remain present before the learned Additional Sessions Judge to whom the Sessions Case is transferred for recording of further evidence of PW-1 on all the dates without fail. Before he is released on bail, the Accused No.2

shall furnish his detailed address where he proposes to stay and his contact number to the concerned Jail Superintendent. Criminal Application No.20 of 2018 stands allowed on the above terms.

[A.S.GADKARI, J]

[A.S.OKA, J]