

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 493 OF 2019
IN
CRIMINAL APPEAL NO. 503 OF 2019

Mohammed Musbir Alam Shaikh. ..Applicant.

V/s.

The State of Maharashtra. ..Respondent.

Mr. Aamir Mushtak Shaikh, advocate for applicant.

Mr. Y.M. Nakhwa, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : APRIL 5, 2019.

P. C. :

1 Heard the learned Counsel for the applicant and the learned
APP for State.

2 This is an application under section 389 of the Code of
Criminal Procedure, 1908 seeking suspension of sentence. The applicant
herein is convicted for the offence punishable under section 304 Part I of
the Indian Penal Code and sentenced to suffer R.I. for 5 years and to pay
fine of Rs. 25,000/- I.d. to suffer further S.I. for six months by the
Additional Sessions Judge, Thane in Sessions Case No. 195 of 2016 vide
Judgment and Order dated 14/3/2019.

Talwalkar

3 It is the case of the prosecution that P.W. 10 had seen the deceased stealing a tyre from Activa Scooter. P.W. 10 had informed the present appellant that somebody was stealing the tyre from his activa scooter. It is alleged that the present applicant had assaulted the thief with stick and thereby causing 43 injuries on the person of the deceased. The appellant had then gone to his house and had brought a chain and tied his hands, dragged him to the main road, forced him to sit in an auto-rickshaw and had then taken him to the police station in the auto-rickshaw. The applicant had accompanied the injured to the police station. P.W. 1 has disclosed that upon enquiry, the applicant had disclosed that the deceased was assaulted by 3 to 4 person by fists and blows and after hearing the sound, he came down and had assaulted to him by means of fists blows and stick. He informed that deceased was in an intoxicated state of mind. The injured had also informed that he was trying to steal the tyre and people had assaulted him by wooden logs.

4 The police had enquired with the accused/applicant as to whether he desires to file FIR and he had disclosed that it is time for Namaj and he would file report subsequently. The police had then called for an ambulance and directed that the injured be taken to the hospital. P.W. 1 was busy in interrogating in another case. The injured was

brought to the police station at 5.30 a.m. and the ambulance had arrived at 9.30 a.m. and thereafter, he was taken to Shivaji Hospital, Kalwa, where he was declared dead before admission. It is further case of the prosecution that when the injured was attempting to steal the tyre, he was armed with an iron rod and spanner. It is surprising that he has not retaliated. P.W. 16 police naik had disclosed in his previous statement under section 161 of the Code of Criminal Procedure that the injured was lifted and put into ambulance.

5 It is further pertinent to note that a departmental enquiry in respect of the death of deceased while in police custody was initiated against the police personnel who were present in the police station at that time.

6 The learned Counsel for the applicant submits that the applicant has 52% disability. He limps and cannot walk normally. The learned Counsel for the applicant has placed on record the disability certificate of the applicant which shows that the applicant is suffering from 52 per cent disability. He is diagnosed as a case of physical impairment i.e. PPRP Right Lower Limb and the condition is permanent, non-progressive, not likely to improve. The learned Counsel submits that in view of the 52 percent disability, he is not able to persecute his daily

chores in the prison and therefore, he be enlarged on bail. Disability certificate is taken on record and marked "X" for the purpose of identification.

7 Needless to say that the police personnel have been exonerated in the departmental enquiry. It appears that there is suppression of the genesis of the incident.

8 Be that as it may, the learned Counsel for the applicant submits that the applicant has been sentenced to 5 years rigorous imprisonment and that he has undergone about 3 years and 6 months including remission.

9 This Court is hearing the appeals of the year 2013 and hence, the appeal may not come up for hearing in near future. Reliance can be placed upon the Judgment of the Apex Court in the case of **Kiran Kumar v/s. State of M.P. 2001 AIR SCW 5130** for seeking suspension of substantive sentence during the pendency of the appeal which cannot be heard at the earliest thereby causing the prayer to become infructuous.

10 In view of this, the applicant deserves to be enlarged on bail

Talwalkar

during the pendency of the appeal. Hence, following order is passed:

ORDER

- (i) The application is allowed.
- (ii) The substantive sentence imposed upon the applicant vide Judgment and Order dated 14/3/2019 passed by the Additional Sessions Judge, Thane in Sessions Case No. 195 of 2016 is hereby suspended. He be enlarged on bail on furnishing P.R. Bond in the sum of Rs. 35,000/- and one or more solvent sureties in like amount.
- (iii) The applicant be enlarged on bail subject to the condition that the fine amount is deposited in the court.
- (iv) Upon being enlarged on bail, the applicant shall furnish his contact number such as land line number cell phone numbers, his present address and his permanent address. The applicant shall furnish copy of Adhar Card.
- (v) The applicant shall attend the Sessions Court, Thane once in 6 months on the date assigned by the Sessions Court. Upon failure to attend any two consecutive dates, the Sessions Court shall report to the High Court and the prosecution is at liberty to move for cancellation of bail.

11 The application is disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]