

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

**INTERIM APPLICATION NO.1371 OF 2020
IN
CRIMINAL APPEAL NO.457 OF 2020**

Shankar Chandrakant Malusare .. Applicant/ Appellant

Versus

State of Maharashtra and Anr. .. Respondents

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Mr.N.N. Gawankar i/b. Mr.Abhaysingh A. Shinde, Advocate for the
Applicant/Appellant.

Mr.R.M. Pethe, APP for the Respondent – State.

Mrs.Shaifali Ashish Dharani, Respondent No.2, present in Court.

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CORAM : PRAKASH D. NAIK, J.

DATED : SEPTEMBER 3, 2021.

P.C. :

This is an application for suspension of sentence and grant of bail. Learned APP submitted that respondent no.2 is present in Court. She submitted that she has nothing to say in this application nor she intends to engage any advocate. She was also informed that she can be provided legal aid by appointing advocate. She stated that she do not want legal aid.

2 The applicant was prosecuted for the offence under Section 302 of IPC.

3 The incident in question had occurred on 28th August, 2017. The case of the prosecution is that the accused had purchased coconuts from the victim. Payment in that regard was done. Their dues to be cleared by him. The victim was insisting for payment of dues. There was a previous meeting before the incident dated 28th August, 2017. on the day of incident, there was verbal exchange of words between the victim and the applicant. At that point of time the applicant has allegedly waived the knife to scare the victim and others, and, thereafter, he assaulted the victim by giving blows of knife on chest and abdomen. The victim was taken to hospital. He succumbed to injuries on 30th August, 2017.

4 The applicant was tried before the Sessions Court. After recording the evidence, the trial Court vide judgment and order dated 29th August, 2020, convicted the applicant for an offence punishable under Section 304 (Part-I) of IPC and sentenced to suffer imprisonment for 10 years. The trial Court had also imposed fine of Rs.1,000/-, and directed the applicant to

pay compensation of Rs.2,00,000/-, to heirs/dependents of the deceased and in default to undergo simple imprisonment for six months. The applicant is acquitted under Section 302 of IPC.

5 The compensation amount of Rs.2,00,000/-, has been deposited by the applicant in the registry of the Court.

6 Learned Advocate Mr.Gawankar appearing for the applicant submitted that the applicant is in custody for a period of about four years. The appeal preferred by the appellant had been admitted by this Court. The compensation amount of Rs.2,00,000/-, has been deposited in this Court. The Appeal would not come up for hearing soon. The applicant has good case on merits. The judgment of conviction has been assailed on merits on several grounds. In the light of the reasoning assigned by the Court, while convicting the applicant for the offence under Section 304(Part-1) of IPC and in the light of the evidence in the matter, lead by the prosecution, the alternate argument of the applicant is that at the most the offence under Section 304 (Part-II) of IPC would be made out. The sentence which could be awarded is lesser than which was imposed by the trial Court. There are discrepancies in the evidence of witnesses which will be urged at the time of final hearing of the Appeal. The judgment

of the trial Court itself indicate that the applicant had knowledge that death would be the result of assault, which form the ingredient of Section 304 (Part-II) of IPC and not Section 304 (Part-I) of IPC, which warrants an intention. The applicant do not have criminal antecedents. He has deposited the compensation amount of Rs.2,00,000/-, in the Court.

7 Learned APP submitted that the prosecution has been able to prove its case. The evidence of witnesses inspire confidence. The trial court convicted the applicant under Section 304 (Part-I) of IPC. There is sufficient evidence to substantiate the evidence. The assault has resulted in the death of the victim. The applicant was armed with knife which shows his intention to commit the crime. Hence, the sentence of imprisonment may not be suspended.

8 The applicant/appellant was tried for an offence punishable under Section 302 of IPC. Learned Sessions Judge has convicted him for an offence under Section 304 (Part-I) of IPC. In paragraph 44 of the impugned judgment and order of conviction, the learned Judge, has referred to exception 4 of Section 300 of IPC. The learned Judge has also referred to Section 105 of the

Evidence Act relating to burden of proof which shifts upon the accused in the event of invocation of general exception. In paragraph 52, the learned Judge has observed that, the entire evidence on record clearly shows that, there was dispute with regards to certain amounts due or not due from accused. The business transaction was two years old. The talk between the parties over phone so also deceased visiting shop of accused indicate that the relationship between the parties was not so strained that it could lead to provide ground/motive for committing murder. Deceased had visited alone to the shop of accused on previous day of incident and returned unharmed. Both came together to APMC market to office of informant. Thus, it cannot be held that accused had any intention to commit murder of deceased over the issue of non payment of dues, though the said dispute did exist then. In paragraph 54 it is observed that from the evidence of eye witness, it is absolutely clear that the knife was removed after informant, PW 6, co-worker came to the spot. The intention of the accused initially appears to be keeping them at bay and hence, knife was waived to scare them. The facts clearly give serious blow to the theory of prosecution to premeditation. A premeditated person having thought of bringing knife with determination to kill someone would not wait, but,

would grab the first possible opportunity. Such conduct of any person waiting for arrival of others to create evidence against himself is unnatural and difficult to digest. In paragraph 57, however, it is observed that knowledge can be attributed to the accused that causing of such bodily injuries to deceased is likely to cause his death. Learned counsel for the applicant harped upon these observations, and, contended that if this findings is to be accepted, the case would fall under Section 304 (Part-II) of IPC. The Appeal is yet to be heard. This is not the stage to give any finding on the judgment passed by the trial Court. It is pertinent to note that acquittal under Section 302 of IPC or conviction for a lesser offence, is not under challenge, at the instance of the prosecution. There are no criminal antecedents against the applicant. The merits of the matter would be tested at the time of final hearing of the Appeal. The applicant has undergone custody for a period of about 4 years. Hence, case for suspension of sentence and grant of bail is made out with certain conditions.

:: ORDER ::

- (i) Interim Application No.1371 of 2020, is
allowed;

- (ii) During the pendency of Appeal No.457 of 2020, the sentence of imprisonment awarded vide judgment an order dated 29th August, 2020, passed by Principal District and Sessions Judge, Thane, in Sessions Case No.439 of 2017, convicting the applicant/appellant, is suspended, and, the applicant is directed to be released on bail on executing P.R. Bond in the sum of Rs.50,000/-, with one or more sureties in the like amount;
- (iii) Applicant is permitted to furnish provisional cash bail in the sum of Rs.50,000/-, for a period of eight weeks, in lieu of surety;
- (iv) The applicant shall deposit the fine amount of Rs.1,000/-, imposed by the trial Court while executing bail bond;
- (v) Applicant shall not enter into the jurisdiction of Ghatkopar Police Station, Mumbai, till the final disposal of the Appeal. He shall not approach the complainant or the other witnesses or relatives of the victim, in any manner;

- (vi) Applicant shall attend trial Court to mark his presence, once in six months;
- (vii) Interim Application No.1371 of 2020, stands disposed of accordingly.

(PRAKASH D. NAIK, J.)