

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 358 OF 2018
IN APEAL/323/2017 WITH APEAL/323/2017

SHAIKH AKBAR SHAIKH AKHTAR
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. Sk. Aktar
h/f. Mr. S.G. Ladda
APP for Respondent : Mr. S.J. Salgare

**CORAM : SMT. VIBHA KANKANWADI &
RAJESH S. PATIL, JJ.**

DATE : 19th September, 2022.

ORDER :-

1. Heard learned advocate for the applicant as well as learned APP.
2. Present application has been filed for suspension of substantive sentence imposed on the applicant. The applicant has been held guilty of committing an offence punishable under Sections 302 and 498-A of IPC, by the learned Additional Sessions Judge, Jalna, on 04.07.2017 in Sessions Case No. 101 of 2016. The appellant/applicant has been sentenced thus.
3. The learned Advocate for the applicant, in order to canvass the prayer for suspension of sentence has submitted that the learned Additional Sessions Judge, Jalna, failed to appreciate the evidence of eight witnesses examined by the prosecution in proper perspective. There was no independent witness who can be said to have been

examined to support the prosecution story. The deceased was wife of the appellant and it is stated that her death has been caused by throttling. PW-1 is the father of the deceased. PW-2 is brother of the deceased. PW-3,4,5,6 and 7 all are police witnesses. PW-8 is the Autopsy Surgeon. According to PW-1 and 2, when they received information that there is a quarrel going on in between the deceased and the appellant, they had come down to the house of the accused and from the slit of the door, they had seen accused pressing the neck of deceased. However, the conduct of PW-1 and 2 appears to be unnatural. Why they had not tried to break the door of the house of the deceased, has not been explained by them. So also, the Autopsy Surgeon says that he could notice finger marks 3 in number on left side of the neck at the level of thyroid cartilage and single bruise on the right side of the neck at the level of thyroid cartilage caused by thumb pressure, when the father and brother say that they had seen the accused pressing the neck of the deceased with both hands. Therefore, there are contradictions.

4. Learned advocate for the applicant further submits that the accused was an under-trial prisoner and since the date of his arrest, he is in jail. With such kind of evidence, he could not be asked to languish in jail as he has every hope of success in the appeal. Therefore, the sentence needs to be suspended.

5. Learned APP supports the reasons given by the learned Additional Sessions Judge, Jalna, and submits that since the appellant was an under-trial prisoner and was not released on bail throughout the trial, no sympathy can be shown to him.

6. At this stage, we are required to consider the *prima facie* evidence. The post-mortem report gives probable cause of death as “Asphyxia due to throttling”. Whether there was contradiction in the ocular evidence and the medical evidence can be considered at the stage of hearing and the conclusion of the appeal. But, what is to be considered is, that PW-1 father and PW-2 brother are the eye witnesses and they say that they had seen the entire episode from the slit of the door. They were available for cross examination and the reason as to why they had not tried to broke the door of the house of the accused, ought to have been asked. Further, PW-4 who is a Police Constable, he also says that after receiving the information when he went to the house of the accused, door of the house was closed from inside and accused was inside the house and from the slit of the door, he had also seen the same scene. All these witnesses have spoken in support of the prosecution story, so also, considering the fact that the appellant was not released on bail throughout the trial, this cannot be taken as a case, where the sentence should be suspended during the pendency of the appeal.

7. The application stands dismissed.

(RAJESH S. PATIL, J.)

(SMT. VIBHA KANKANWADI, J.)

grt/-