

a iv] Rest part of the impugned judgment regarding the set off given to the appellant/accused under Section 428 of the Code of Criminal Procedure is maintained.

v] Record and proceeding in the Special Case (PCSO) No.14/2014 be sent to the trial Court forthwith.

b **Result:-** Appeal partly allowed.

ABC 2019 (III) 49 BOM
ACQUITTAL & BAIL CASES
HIGH COURT OF BOMBAY

c (Dama Seshadri Naidu, J.)
Criminal Bail Application No.1958 of 2018 In Criminal Appeal No.708 of 2018
Decided on 6 June, 2019

d **SALIMA KHALIL SHAIKH** - Applicant(s).
Versus
STATE OF MAHARASHTRA - Respondent(s).

e **Law Covered:-** (A) Code of Criminal Procedure, 1973 – Section 389 – Indian Penal Code, 1860 – Sections 304(B) & 498A – Bail & Suspension of sentence pending trial – solitary accusation attributed exclusively to applicant – rest of the allegations encompass all the accused commonly – Conduct while on bail – No adverse allegations – no criminal antecedents – unlikely that the appeal will be taken immediately in near future – Sentence suspended. (Para 13)

f (B) Code of Criminal Procedure, 1973 – Sections 438, 439 & 389 – Anticipatory Bail, Regular Bail & suspension of sentence – Consideration of – The issues that weigh with the court – the chances of accusation being proved or not – the repeatability of the crime – the antecedents, age, health, occupation of the accused – the chances of the accused jumping or abusing the bail – the possibility of the evidence being tampered with – and the likely impact of bail on the security of the public – the nature and seriousness of the offence. (Para 11)

g (C) Criminal Jurisprudence – Criminal appeal – Duty of the prosecution – Held, in a criminal appeal weather against the judgement of conviction or acquittal – it is for the prosecution to establish that the judgement of the trial court was right or wrong as the case may be. (Para 12)

h (D) Criminal Jurisprudence – Presumption of innocence of the accused – is not strengthened by the acquittal nor weekend by a conviction in the trial court. (Para 12)

Facts:- It is a case of dowry death. A young bride found hanging in her matrimonial home in two months after her wedding. After a thorough trial, the trial Court convicted all the accused, among other things, for their failure to rebut the statutory presumption under Section 113 B of the Indian Evidence Act. The applicant was one of the four accused. Along with other accused, the applicant was charged with the offences u/s 304(B) and 498A IPC. The mother-in-law filed this application under Section 389, CrPC to have the sentence suspended and to get herself enlarged on bail. The application was allowed.

Law of relief:- Bail should not be refused for a punitive purpose.

Held:- On the applicant's part, are there any ameliorating circumstances for the Court to entertain her plea for suspension of sentence and bail? I shall see. Indeed, the power of an appellate court to grant bail stands well-crystallised through a series of judicial pronouncements. The issues that weigh with the court while its considering an application for bail are these: the chances of accusation being proved or not; the repeatability of the crime; the antecedents, age, health, occupation of the accused; the chances of the accused jumping or abusing the bail; the possibility of the evidence being tampered with; and the likely impact of bail on the security of the public; the nature and seriousness of the offence. At any rate, it should not be refused for a punitive purpose. (Para-11)

That said, I should also note that in a criminal appeal whether against the judgement of conviction or acquittal, it is for the prosecution to establish that the judgement of the trial court was right or wrong as the case may be. The presumption of innocence of the accused is not strengthened by the acquittal nor weakened by a conviction in the trial court. (Para-12)

On facts, Prima facie, the applicant does face a solitary accusation attributed exclusively to her. PW 1 deposed that the applicant returned the gold ring the bride's family presented presumably to the groom during the wedding. While returning, the applicant allegedly said that they were not beggars. The rest of the allegations encompass all the accused commonly. (Para-13)

Counsel:- For Applicant(s): Mr. Nitin Sejpal, Adv.
For Respondent(s): Mrs. J.S.Lohakare, Adv.

JUDGMENT

DAMA SESHADRI NAIDU, J.: - A married woman died in unnatural circumstances, within seven years of her marriage--in fact within two

a months after the marriage. In the crime registered on that count, the trial led to the conviction of her husband (A-1), father-in-law(A-2), mother-in-law(A-3), and a relative (A-4).

b 2. Now the mother-in-law filed this application under Section 389 of Criminal Procedure Code to have the sentence suspended and to get herself enlarged on bail. Earlier, it seems, all the accused filed a joint application for bail, but at the time of hearing, the counsel withdrew the plea of all others except the 4th accused. Then, the 4th accused alone got the bail. Now, the applicant, the mother-in-law, has come up with this technically "first application" for bail.

c 3. To provide the factual backdrop, I may note that the applicant is one of the four accused in S.C.No.757/2011. Along with other accused, the applicant was charged with the offences under Sections 304(B) and 498A IPC. All the four accused were tried and convicted by the Court of Asst. Sessions Judge, Pune, through its judgment, dated 17th May 2018.
d The trial Court sentenced them as follows:

e "1] The accused Nos. [1] Javed Khalil Shaikh, [2] Khalil Ahmad Shaikh, [3] Salima Khalil Shaikh and [4] Jahir Abdul Shakur Khan are hereby convicted under Section 235(2) of The Code of Criminal Procedure, for the offence punishable under Section 304-B read with Section 34 of the Indian Penal Code and they are sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.2,000/- each, in default to suffer simple imprisonment for two months.

f 2] The accused Nos. [1] Javed Khalil Shaikh, [2] Khalil Ahmad Shaikh, [3] Salima Khalil Shaikh and [4] Jahir Abdul Shakur Khan are convicted for the offence punishable under Section 498-A read with Section 34 of the Indian Penal Code and they are sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/-each, in default to suffer simple imprisonment for one month.

g 3] The substantive sentences of imprisonment shall run concurrently.

h 4] The pre-conviction detention undergone by the accused No.1 Javed Khalil Shaikh since the date of his arrest (11-07- 2011) till the date of his release on bail (05-01-2012), pre - conviction detention undergone by the accused No.2 Khalil Ahmad Shaikh since the date of his arrest (11-07-2011) till the date of his release on bail (10-09-2011), pre-conviction detention

undergone by accused No.3 Salima Khalil Shaikh since the date of her arrest (11-07-2011) till the date of her release on bail (08-10-2011) and pre-conviction detention undergone by accused No.4 Jahir Abdul Shakur Khan, since the date of his arrest (11-07-2011) till the date of his release on bail (08-10-2011) be set off against the substantive sentence of imprisonment, under Section 428 of the The Code of Criminal Procedure."

4. All the accused filed Criminal Appeal No.708/2018. In that appeal, the applicant filed Criminal Application No.1958/2018 for suspension of sentence and bail.

5. Shri Nitin Sejpal, the applicant's Counsel, has taken me through the deposition of PW1 and a few portions of the judgment, to hammer home his contention that the prosecution could make only broad, omnibus accusations against all the applicants. There are no specific overt acts, he stresses, attributed to the applicant. He has also submitted that PW1, the victim's sister, has in fact deposed that it is the mother-in-law, who informed the victim's relatives about the victim's illness. According to him, at no point of time did the victim tell PW1, her own sister, or any other relative about the alleged harassment the applicant had meted out to her.

6. In the end, Shri Nitin Sejpal has urged this Court to take note that the applicant was on bail during the trial, that the applicant has been in jail for more than a year by now, and that the applicant, a woman in her mid 50s, needs sympathetic consideration. To underline the justifiability of the bail application, the learned Counsel has also stressed that because of the docket pressure, this Court may not be in a position to hear the criminal appeal finally, soon. Thus, he urges this Court to suspend the sentence and enlarge the applicant on bail, pending the adjudication of the criminal appeal.

7. On the other hand, the learned Additional Government Pleader has vehemently opposed any bail to the applicant. According to her, the victim died well within two months after the marriage. From the stage of FIR through the trial, the prosecution has made specific allegations and sustained them against the applicant. It is she who has demanded dowry and, the learned App further stresses, continued to harass the victim to comply with the family's illegal, unreasonable demands for dowry.

8. The learned APP has nevertheless submitted that if the petitioner is desirous of having an early hearing, the State is ready

a and that it will seek no adjournment. Thus, the learned APP has urged this Court to dismiss the Criminal Application and to take up the Appeal itself for disposal at the earliest, of course, subject to the feasibility and the Court's convenience.

b 9. Heard Shri Nitin Sejpal, the learned Counsel for the applicant, and the learned Additional Public Prosecutor for the State.

c 10. It is a case of dowry death. A young bride found hanging in her matrimonial home in two months after her wedding. After a thorough trial, the trial Court convicted all the accused, among other things, for their failure to rebut the statutory presumption under Section 113 B of the Indian Evidence Act.

d 11. On the applicant's part, are there any ameliorating circumstances for the Court to entertain her plea for suspension of sentence and bail? I shall see. Indeed, the power of an appellate court to grant bail stands well- crystallised through a series of judicial pronouncements. The issues that weigh with the court while its considering an application for bail are these: the chances of accusation being proved or not; the repeatability of the crime; the antecedents, age, health, occupation of the accused; the chances of the accused jumping or abusing the bail; the possibility of the evidence being tampered with; and the likely impact of bail on the security of the public; the nature and seriousness of the offence. At any rate, it should not be refused for a punitive purpose.

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f 12. That said, I should also note that in a criminal appeal wether against the judgement of conviction or acquittal, it is for the prosecution to establish that the judgement of the trial court was right or wrong as the case may be. The presumption of innocence of the accused is not strengthened by the acquittal nor weekend by a conviction in the trial court.

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h 13. On facts, Prima facie, the applicant does face a solitary accusation attributed exclusively to her. PW 1 deposed that the applicant returned the gold ring the bride's family presented presumably to the groom during the wedding. While returning, the applicant allegedly said that they were not beggars. The rest of the allegations encompass all the accused commonly.

14. Indeed, the applicant remained on bail during the trial; I nevertheless hasten to add, that cannot be a decisive factor for this Court to consider this application under Section 389 of Cr.P.C. But the

applicant faced no adverse allegations about her conduct when she was out on bail. Nor has she any criminal antecedents.

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15. First, the applicant, too, is a woman in her mid-50s; and, second, after her conviction, the applicant has been in jail for more than one year by now. Finally, as the appeal pertains to 2018, given the docket pressure, it is unlikely for this Court to take up the appeal immediately--in near future.

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16. So balancing the competing interests, I reckon it is appropriate that the Court suspend the sentence and enlarge the applicant on bail.

ORDER

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(i) Application is allowed.

(ii) Substantive sentence imposed on the applicant/3rd accused is suspended and is directed to be released on bail on her executing P.R. Bond in the sum of Rs.30,000/- and on furnishing two sureties in the like amount by each.

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(iii) Pending the appeal, the applicant/accused No.3 should not contact the first informant, or any other witness, or any member of the deceased victim's family in any manner.

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(iv) The applicant's failure to abide by these conditions shall entail the prosecution to apply for cancellation of bail now granted to the applicant/3rd accused.

(v) Application is accordingly disposed of.

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Result:- Application allowed.

**ABC 2019 (III) 54 BOM
ACQUITTAL & BAIL CASES
HIGH COURT OF BOMBAY**

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(Dama Seshadri Naidu, J.)

Criminal Application No 1479 of 2018 In Criminal Appeal No.1031 of 2018

Decided on 10 June, 2019

SHABBIR RAFIK MULANI

- Applicant(s).

h

Versus

STATE OF MAHARASHTRA

- Respondent(s).

Law Covered:- (A)Protection of Children from Sexual Offences (POSCO) Act– Section 4 – Indian Penal Code, 1860 –

September 2019