
(2014) 10 BOM CK 0148

In the Bombay High Court

Case No : Criminal Bail Application Nos. 179, 236 and 850 of 2014

Abdul Salim Shaikh (Siddique) and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Constitution of India, 1950 — Article 12
Criminal Procedure Code, 1973 (CrPC) — Section 357A
Maharashtra Regional and Town Planning Act, 1966 — Section 52
Penal Code, 1860 (IPC) — Section 109, 119, 120(B), 299, 304
Prevention of Corruption Act, 1988 — Section 13(1)(d)

Citation : (2014) 10 BOM CK 0148

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Majeed Memon, Sr. Advocate and Shine i/b MZM Legal, Advocates for the Appellant; V.S. Mhaispurkar, APP and Shishir Hiray, Special P.P, Advocates for the Respondent

Judgement

A.M. Thipsay, J.—These three applications can be conveniently disposed of by this common order, as the applicants in all these applications are the accused in one and the same case i.e. Special Case No. 17 of 2013 arising out of C.R. No. I-63 of 2011 registered at Shil Daighar Police Station, Thane. There are totally 23 accused who have been arrested in the said case. The applicants-Abdul Salim Shaikh and Jamil Ahmed Jamahuddin Shaikh (in Bail Application No. 850/14) were arrested on 6th April 2013. The applicant-Hadisullah Raggibullah Chaudhary (in Bail Application No. 179/14) was arrested on 11th April 2013, and the applicant-Abdul Hakim Mohd. Naseer Chaudhari (in Bail Application No. 236/14) was arrested on 15th April 2013. The applicants are in custody since the dates of their respective arrest.

2. The case relates to the collapse of a building that was being constructed illegally without permission from the Municipal Corporation of Thane, and with the connivance of the officers from the Municipal Corporation. 74 persons died in

the mishap and 62 were injured.

3. The case of the prosecution is as follows:-

That the applicants were carrying on construction business in partnership. They had illegally procured some land belonging to the adivasis. They had constructed two buildings i.e. "Adarsh A" and "Adarsh B" on the plot of land described as "Lucky Compound". They had not obtained or secured any permission from the municipal corporation to carry out the said construction work. A number of complaints about the illegal construction that was going on were made by different persons to various authorities, but the concerned authorities, and the municipal officers deliberately ignored the complaints, and permitted the illegal work to be carried out, as they had been bribed by the said applicants and others. The construction work was hurriedly carried out, and it was sub-standard. The "A" building was completed in a haste. The "B" building was also being completed hurriedly and the construction of seven floors was completed in just about 4 months. In order to avoid any action from the municipal corporation, and to make the demolition of the illegal construction difficult, the applicants-on the advice of the municipal officers-had inducted some persons in the said building as tenants/gratuitous licencees, or temporary occupants. While the construction of the 8th floor was going on, the "Adarsh B" building collapsed on 4th April 2013, causing death of 74 persons and injuries to other 62. One of the occupants of the building-Sharfuddin Mukhtar Ali Mansoori who was having two tenements in the said building, and who himself was injured due to the collapse of the said building, lodged a report with the Shil Diaghar Police Station which was treated as the First Information Report, and a case in respect of offences punishable under sections 304 IPC, 336 IPC, 337 IPC, 338 IPC r/w section 34 of the IPC, was registered.

During the course of investigation, some more offences were added to the case, and the police report submitted after investigation alleges that the applicants (and the other accused) have committed the offences punishable under sections 304 IPC, 336 IPC, 337 IPC, 338 IPC, 308 IPC, 120(B) IPC, 109 IPC, 119 IPC, 420 IPC, 465 IPC, 467 IPC, 468 IPC, 471 IPC, 427 r/w section 34 of the IPC and u/s. 13(1)(d) of the Prevention of Corruption Act, 1988.

4. In the course of investigation, there have been shocking revelations. The investigation revealed the close and ugly nexus between the builders and municipal officers. It transpired that the builders were paying bribes to the Officers from the municipal corporation, and that therefore, in spite of repeated warnings and complaints from several persons, the municipal authorities did not take any action in the matter. They had allowed the building to be constructed upto 8 floors, and had connived at the illegal construction work which was being carried out openly, high handedly, and by flouting all the rules & regulations in that regard. Among the accused persons in this case, there are several officers from the Thane Municipal Corporation who are alleged to have received illegal gratification from the builders for not taking any action for the illegal

construction. One of the accused is a Municipal Councilor in the Thane Municipal Corporation.

5. The applicants-Abdul Salim Shaikh and Jamil Ahmed (in Bail Application No. 850 of 2014) are projected as the main accused. They are the builders, and the building in question was being built by them. The applicant Haddisullah Chaudhary (in Bail Application No. 179 of 2014) also said to be a builder, and the applicant Abdul Hakim (in Bail Application No. 236/14) stated to be a scrap dealer and estate dealer were allegedly having partnership with the main accused in the construction business.

6. Though the applications were separate, by consent, they were heard one by one, and the learned Special Public Prosecutor thereafter advanced his reply arguments one by one.

7. I have heard Mr. Majeed Memon, the learned Counsel for the applicant. I have heard Mr. Nitin Dalvi, learned counsel for the applicant in BA No. 179/14. I have heard Mr. Nitin Pradhan, learned Senior Advocate for the applicant in BA No. 236/14.

8. Mr. Memon contended that the charge of an offence of culpable homicide (not amounting to murder) punishable under section 304 of the IPC cannot be properly levelled against the applicants. He submitted that the applicants cannot be attributed with the knowledge that the building was likely to collapse, and further that due to the collapse of the building, deaths of human beings would be caused. He submitted that this was evident from the fact that in the mishap, six persons who were the relatives of one of the applicants (B.A. No. 850/14) died, and that this shows that the applicants were completely unaware about such a possibility i.e. that the building would collapse. He submitted that the collapse of the building was an unfortunate incident, and the applicants cannot be said to have committed culpable homicide of the 74 persons who died due to the collapse. He submitted that, at best, the offence allegedly committed by the applicants would be one punishable under section 304A of the IPC which is a bailable one. He also submitted that the investigation having been completed, the applicants be released on bail, particularly because they are already in custody for a period of more than one year, and because the trial is not likely to be over within a short time.

9. Mr. Nitin Dalvi, learned counsel for the applicant in BA No. 179/14 made an endeavour to show that the role attributed to the said applicant is not on par with that attributed to the applicants in Bail Application No. 850/14. He submitted that the applicant Haddisullah Raggibullah Chaudhary has been wrongly projected as a builder, and that actually he had only invested money in the construction project. He submitted that merely because the applicant had invested some money in the project which the applicants in BA No. 850/14 had undertaken, he cannot be held responsible for the poor quality of construction and the collapse of the building.

10. Mr. Nitin Pradhan, the learned counsel for the applicants in Bail Application No. 236/14 contended that the applicant was not at all concerned with the construction of the "Adarsh B" building, which collapsed. Mr. Pradhan submitted that whatever material has been collected by the Investigating Agency would only indicate the involvement of this applicant in the construction of the building "Adarsh A" which is in the same compound, but which has not collapsed. He submitted that since the alleged association of this applicant with the applicants Abdul Salim Shaikh and Jamil Ahmed Jamaluddin (BA 850/14), was only with respect to the construction work of the building "A", and since there is nothing to show that he had played any role in the construction of the building "B" which collapsed, the applicant deserves to be released on bail.

11. Mr. Hiray, the learned Special Public Prosecutor made an endeavour to show that apart from the applicants Abdul Salim and Jamil Ahmed, the applicants in other two applications were also very much involved in the construction of the said building. He submitted that all of them had conspired to commit the illegal act of carrying out illegal construction. He submitted that all were interested in the financial gains that would be made by such illegal construction, and that, as such, all the applicants are liable for the deaths that resulted from the collapse of the said building. He has meticulously drawn my attention to the various statements in the charge-sheet to highlight the individual roles played by applicants in this case.

12. The seriousness of the matter lies in the fact that 74 persons have died as a result of the collapse of the said building. The collapse of the building is attributed to the acts of the applicants. The vehement opposition to bail by advancing lengthy arguments spanning over a number of dates, is basically on the ground that the offences allegedly committed by the applicants are very grave and serious, and the magnitude of the offence is sought to be emphasized by pointing out that 74 persons died because of the collapse of the building. The case of the prosecution is that the applicants have committed the offence of culpable homicide of 74 persons punishable under section 304 of the IPC, and this is what makes the case serious. Though the applicants are alleged to have committed several other non-bailable offences also, considering that they are in custody for a period of more than 1 1/2 year by now, the question of grant of bail would not require any deeper or serious consideration had the matter been limited to the extent of those offences only. The decision regarding grant or refusal of bail, therefore, depends basically on whether a prima facie case of an offence punishable under section 304 of the IPC is disclosed against the applicants (or any of them) or whether the acts of the applicants, which allegedly, resulted in causing death of a number of persons amount only to an offence punishable under section 304A of the IPC, as contended by Mr. Majeed Memon, learned counsel for the applicants in Bail Application No. 850/14. This aspect assumes importance and significance as the approach of the Court in granting bail to the persons who are believed to be guilty of culpable homicide of several persons, and the approach of the Court in considering question of grant

of bail to persons who are believed to have caused death by rash or negligent act, would be entirely different.

13. The offence of culpable homicide is defined in section 299 of the IPC. Culpable homicide is causing death by doing:

(i) an act with the intention of causing death;

or

(ii) an act with the intention of causing such bodily injury as is likely to cause death;

or

(iii) or an act with the knowledge that it was likely to cause death.

14. Section 304A of the IPC, on the other hand, relates to causing death by rash or negligent act. The provisions of the said section apply to cases where there is no intention to cause death, and no knowledge (as against a mere awareness of a possibility) that the act done, would cause death.

15. As to how the deaths caused due to the collapse of the building would amount to an offence punishable under section 304 II of the IPC, and what is the precise allegation in respect of that offence can be best gathered from the reports made to the Court at different stages and from the "brief facts of the case", as mentioned in the printed prescribed pro forma of the charge-sheet. It is as follows:-

That knowing well that because of the inferior quality of the construction work hurriedly carried out, the building would collapse and people would die, persons were inducted and forced to stay in the said building as per the advice given by the officers of the Thane Municipal Corporation and other public servants. That the building collapsed on 4th April 2013 in which 74 persons died and 62 were injured.

16. Thus, the claim is that the applicants had knowledge that the building would collapse and would result in death of human beings, and that in spite of that, they constructed the building and inducted persons to stay therein. In fact, the claim is that the persons were forced to stay in the building by the applicants.

17. The prosecution has preferred to keep silent about whether the offence would fall under the first part of 304 IPC, or in the second part thereof. It, however, cannot be doubted that in the instant case, if the offence is punishable under section 304 of the IPC, it would fall only under Part II of section 304 of the IPC. The question of the same falling within Part-I thereof, would not arise as it is not the case of the prosecution that the applicants had done or performed the culpable acts with the intention of causing death of anyone, or with the intention of causing such bodily injury as was likely to cause death. The case of the prosecution itself is that the applicants and the other accused have done an act

with the knowledge that it was likely to cause death. Therefore, in spite of the silence maintained on this aspect, clearly, the prosecution case is that the offence allegedly committed by the applicants and other accused would be one punishable under section 304 part II of the IPC.

18. The learned Special Public Prosecutor has in his endeavour to support the claim that "the applicants did have the knowledge that their acts were likely to cause deaths" has pointed out the material from the charge-sheet which, according to him would make it clear that the applicants had the knowledge that the illegal construction which was undertaken by them, was likely to collapse.

19. Before proceeding further, the contentions advanced by Mr. Nitin Dalvi and Mr. Niteen Pradhan, the learned counsel for the applicant in Bail Application Nos. 179/14 and 236/14 respectively, may be briefly dealt with. In order to refute the contentions advanced to the effect that these applicants were not responsible for the illegal construction, the learned Special Public Prosecutor has drawn my attention to certain statements recorded during investigation, which according to him, indicate that these applicants were not mere financiers, but were themselves involved in the construction of the building which collapsed.

20. It is not possible to hold at this stage that the applicant Haddisulla Chaudhary (BA No. 179/14) was only a financier, and was not connected with the actual construction work. However, that the applicant Abdul Hakim Mohd. Naseer Chaudhari (BA No. 236/14) was involved in the construction of the said "B" building appears to be rather far fetched inference drawn on the basis of his involvement in the construction of building "A".

21. After having noted the contentions raised by and against the applicants in Bail Application No. 179/14 and Bail Application No. 216/14, it would be proper to come back to the real question on which the decision primarily depends:-viz.- whether there exists a prima facie case of having committed culpable homicide, against the applicants (or any of them). Though the correctness or otherwise of the facts alleged is not to be gone into meticulously at this stage, the need and necessity to decide, although prima facie, as to whether the facts alleged make out a case of an offence punishable under Section 304 of the IPC against the applicants cannot be doubted or disputed. Thus, what really needs to be considered is not "whether the applicants appear to have committed the acts attributed to them", but "whether the acts/omissions attributed to the applicants, in law amount to an offence of culpable homicide". The facts alleged against the applicants may, therefore, be examined in that context.

22. From the material in charge-sheet, indeed, it appears that the applicants- Abdul Salim Shaikh and Jamil Ahmed (BA 850/14) obtained the land in question, for construction, in violation of the legal provisions. Being a land owned by adivasis, there were statutory restrictions on acquiring of such land, but apparently, by creating some bogus documents, the possession of the said land was taken by these two applicants. It also appears that though there was no N.A.

permission in respect of the said land, these applicants, in collusion and conspiracy with the other accused, who are the officers of the Thane Municipal Corporation and other public servants, carried on construction activity on the said land without the requisite permissions. The construction contract was given to a person who was not qualified or competent. The person appointed as Architect-the accused no. 11 Farooque Abdul Latif Chhapra,-was not duly qualified. The material used for construction was sub-standard. The applicants paid huge bribes to the municipal officers and public servants from time to time so that no action of demolition, or of any other type, be taken by such officers and public servants. The building was constructed hurriedly. The object behind carrying out construction work in such a haste was to complete the building at the earliest so that it could be occupied by some persons, making the demolition thereof more difficult and complicated. (This is said to be-and clearly appears to be-the result of the advice and guidance given by municipal officers). It also appears that the applicants represented to some flat purchasers that the building had been constructed after obtaining all the requisite permissions. Indeed, these wrongs on the part of the applicants Abdul Salim Shaikh and Jamil Ahmed Shaikh are indeed made out from the material in the charge-sheet, but these wrongs do not establish the requisite mens rea in relation to the offence of culpable homicide.

23. Every offence consists of a particular act, and a particular intention with which that act is done. In view of this allegation against the applicants, the mens rea (guilty mind) attributed to them is the knowledge that the building would collapse and persons would die. The actus reus (forbidden act) is the construction of a building, and allowing/forcing persons to occupy it.

24. The high-handedness with which the construction work was being carried out, flouting all the rules, regulations and without bothering for the quality of the construction is indeed shocking. The nexus between the builders and the municipal officers is also shocking. The municipal officers whose duty was it to prevent such illegal constructions, in spite of a number of complaints received by them with respect to the illegal construction in question did not pay any heed to the complaints and kept quiet on obtaining illegal gratification from the applicants. However, the shock and the sorrow felt on account of the death of 74 persons and the disgust felt about the high-handed acts, showing total disregard for the Law, allegedly committed by the accused, should not result in affecting our thinking faculty and preventing us from rationally viewing whether the applicants appear to have committed culpable homicide of 74 persons.

25. Homicide is the killing of a human being by a human being. The Indian penal Code recognizes the following categories of unlawful homicide:-

- i) Culpable Homicide not amounting to murder.
- ii) Murder;
- iii) Homicide by rash or negligent act; and

iv) Suicide.

26. The IPC treats the unlawful homicides provided therein as of different degrees and provides different punishment therefor. Murder is most serious of them and culpable homicide not amounting to murder is the second of the unlawful homicides in seriousness. Homicide by rash or negligence act which has been made punishable by Section 304A of the IPC is undoubtedly a lesser offence. (The forth unlawful homicide namely suicide, cannot be punished as offender would not be available for trial and, therefore, only an attempt to commit suicide has been made punishable). In all the three types of homicides namely:-murder, culpable homicide not amounting to murder and causing death by rash and negligent act, "actus reus" is the same (causing of death of a human being) but "mens rea" is different. In the early days, killing of a human being was treated as a crime of the highest order with a liability of which no degrees were recognized. This was in the primitive society and gradually it came to be recognized that all the unlawful homicides cannot be treated with the same degree of severity as the state of mind of the offender would be different in the different categories of unlawful homicides.

27. Undoubtedly, the consequences of the acts attributed to the applicants are indeed too grave, but the degree of criminality, or the category of the unlawful homicide allegedly committed by the applicants and other accused, would not depend only on the consequences that have flown from the collapse of the building. It is known to criminal jurisprudence that much serious consequences might result from a comparatively minor offence, and no actual harm or injury would be caused to anyone even by commission of a serious offence. The parameters of criminal liability are well settled, and the law treats certain offences to be more serious than some others, not because the harm caused by those offences would be more than that would be caused by the offences which are treated as lesser, but because the state of mind of the wrongdoer in the former cases, is thought to be more culpable and more dangerous from the point of view of the society. For instance, in an attempt to commit murder, actually no hurt may be caused to anyone-say, where a bullet is fired from a fire-arm, which misses and does no damage. On the other hand, take a case of rash and negligent driving resulting into the death of a person. The former offence is treated by law as much more serious, though no harm would be caused to anyone, and the latter is considered as less serious, even though a human life has been lost by commission of that offence. Once it is accepted that, in law, the degree of criminality attached to a particular criminal behaviour does not necessarily depend on how much harm actually has been caused by that offence, the high number of persons who died in the incident-as was emphasized by the learned Special P. P.-would not be relevant in deciding whether the offence would fall within the penal provisions of section 304 of the IPC, or 304A of the IPC.

28. In this context, reference may be made to the judgment of the Supreme Court of India in Keshub Mahindra Vs. State of M.P., . A tragedy of

unprecedented nature occurred at Bhopal on the night intervening 2nd December 1984 and 3rd December 1984 when a highly dangerous and toxic gas called MIC escaped from the factory belonging to a Company known as Union Carbide India Ltd. As a result of the said leakage, about 3800 human beings lost their lives and about 19000 suffered severe injuries of a permanent nature. This is widely known as "Bhopal Gas Tragedy". Initially, a case was registered in respect of an offence punishable under section 304A of the IPC, and apart from the said Company, 11 more persons who were the Directors and Officers of the Company were indicted. After investigation, the Investigating Agency-the CBI-levelled the accusation of an offence punishable under section 304 II of the IPC, instead of an offence punishable under section 304A of the IPC against the accused persons. The learned Addl. Sessions Judge who was seized of the matter, framed charges in respect of an offence punishable under section 304 II of the IPC read with section 35 of the IPC against some of the accused persons, apart from other charges that were framed against some other accused in respect of other offences. The accused therein challenged the order framing charge as passed by the trial court, and approached the High Court of Madhya Pradesh by filing separate revision applications. The High Court dismissed the revision applications upholding the framing of charges. The accused had, under those circumstances, had approached the Supreme Court of India by filing a Special Leave Petition. It was inter alia, contended before the Supreme Court of India that no case of an offence punishable under section 304 II of the IPC, was made out. While considering whether a case for framing a charge of an offence punishable under section 304 II of the IPC, had been made out, Their Lordships observed that the accused could be charged for the offence of culpable homicide not amounting to murder, punishable under section 304 II, if allegedly the accused had done an act with the knowledge that it was likely to cause death. An endeavour was made to establish before the Supreme Court of India by showing material in the charge-sheet which indicated that the tragedy had occurred because of a number of acts of commission and omission by the accused persons. The material in the charge-sheet to show awareness on the part of the accused persons about the highly dangerous and toxic nature of the MIC, and their alleged failure to observe the safety norms and their running of the plant with full knowledge of the risk involved was pointed out. Their Lordships held that even after taking the entire material in the charge-sheet at its face value, and assuming it to be representing correct factual position in connection with the operation of the plant, still there was no prima facie case for framing a charge in respect of an offence punishable under section 304 II of the IPC. Their Lordships held that a prima facie case existed only in respect of an offence punishable under section 304A of the IPC, and not an offence punishable under section 304 II of the IPC. It is not necessary to make a detailed reference to the various observations made in the said reported judgment, but the fact remains that the position of law as explained by Their Lordships in the aforesaid judgment clearly points out that in the present case also, the proper allegation would be, prima facie, only in respect of an offence punishable under section 304A of the IPC, and not 304 II of the IPC.

29. The prosecution case itself, (as seen from the brief facts of the case mentioned in column no. 16 of the printed prescribed pro forma of the charge-sheet) is that the applicants in BA no. 850/14 had no permit or licence to carry on construction business. It is also claimed that they had no requisite knowledge necessary for carrying out profession of construction and that they had no experience in that profession. In my opinion, these allegations are not only not relevant in the context of the question of "knowledge" requisite for constituting an offence punishable under section 304 II of the IPC, but, in fact, are rather inconsistent-if not contradictory-with the claim of the applicants possessing the requisite mens rea. If the accused had no knowledge, or no experience with respect to the construction work, it was not likely that they would have knowledge that the construction work was of such a quality that the building would collapse. For perceiving or realising such a danger, some knowledge about the construction work would be necessary, and this can be better available to the persons who are engineers or construction contractors or construction workers. In fact, the degree of culpability on the part of the officers from the municipal corporation in the context of knowledge of the poor quality of the construction work would be more. It will not be out of place to mention here that all the municipal officers who, allegedly, in return for a bribe condoned the serious illegalities committed by the applicants and other accused, allowed the building to be constructed and allegedly advised to induct some persons in the building as a device to make an action of demolition of the illegal construction difficult, have been released on bail by this Court by various orders passed from time to time. (Coram: A.R. Joshi, J.)

30. When, on the one hand it is claimed that the applicants had no experience or no knowledge of construction work, it would not be possible to claim, on the other hand, that they knew that the building was going to collapse, because for acquiring such knowledge, knowledge about construction work-particularly what are the requirements of a reasonable quality of construction-would be necessary. A man who does not understand anything about the construction work would not be able to judge how poor the quality of the construction is, and therefore, would not be able to judge that a particular construction is likely to collapse. The applicants had engaged a contractor for doing the construction work (accused Laxman Rathod, who is absconding). The applicants had given the job of designing the construction work to the accused no. 11 Farooque Abdul Latif Chhapra, as an architect. Significantly, the Adarsh "A" building which was also equally illegally constructed, did not collapse. In the context of the allegation of culpable homicide, what is relevant is the quality of construction, and not the seriousness of the offences of acquiring the land illegally, by creating bogus documents, starting illegal construction without permission from the municipal officers, bribing them, etc. In other words, merely because the construction was carried out by doing illegal acts, the knowledge requisite for constituting the offence of culpable homicide, cannot be attributed to the applicants. It will be appropriate in this context to refer to illustration (c) to section 299 of the IPC.

"A" in that illustration, is clearly doing an unlawful act amounting to an offence, and while committing that offence, kills "B" whose presence behind the bush was not known to "A". The illustration says that though "A" was doing an unlawful act, he was not guilty of culpable homicide. Thus, the scheme of the provisions of the IPC leaves no manner of doubt that even when a person who is engaged in the commission of an offence causes death in the commission of that offence, he shall suffer only the punishment of his offence without any addition on account of such death.

31. The collapse of the building would be the effect of a number of factors relating to poor quality of the construction work such as lack of knowledge and expertise on the part of the persons actually doing the construction work, the errors or wrongs committed by them, the poor quality of the building material and the lack of knowledge as to the extent of the poor quality, etc. The combination of several such factors has led to the collapse of the building. When this is kept in mind, the claim that the applicants had knowledge that the construction undertaken by them would cause death, is difficult to accept. It is well settled that knowledge contemplated by section 299 of the IPC imports a certainty and not merely a probability.

32. Degree of knowledge which any particular person can be assumed to possess must vary. Ordinarily, intention and knowledge go together and, therefore, knowledge contemplated by Section 299 of the IPC is such as can be distinguished from a mere awareness of the risk involved in culpable act. Thus, the material from the charge-sheet that is pointed out by the Special Public Prosecutor, though indicates that the applicants were aware, or were made aware of the risk in constructing the building and that they still went ahead with such dangerous construction without any regard to the possible consequences, that would make them criminally liable in respect of the offence punishable under Section 304A of the Indian Penal Code and not in respect of an offence punishable under section 304 of the IPC.

33. In a primitive society, the parameters of criminal liability were depending only on the harm or damage caused by the wrongful act. In fact, in the early days of civilization, the distinction between civil liability and criminal liability was also not recognized. All the wrongful acts fell in the same category. Even when a distinction between criminal liability and civil liability was started to be recognized, the gravity or seriousness of the wrong would depend only on the result or consequences of the wrongful act. The seriousness or the degree of the wrong would be judged only on the basis of the harm or damage caused by it. Gradually, the concept that gravity of the offence depends not only on the result of the unlawful act, but also on the state of mind of the wrong doer, was developed. Today, the causing of death-of even several persons-by rash or negligent Act, is a lesser offence than the culpable homicide and/or murder, in terms of the punishment provided therefore, and the procedural aspects in dealing with the offender. To refute the theory of the applicants having the

requisite knowledge, a contention was advanced by Mr. Memon, the learned counsel for the applicants in Bail Application No. 850/14 that in the mishap, the applicants' relatives have died, but the learned Special Public Prosecutor countered the same by saying that the relatives were distant. By this, the learned Special P. P suggested that the applicants would not mind death of their distant relatives being caused. Be that as it may, what needs to be understood is that because of the collapse, the applicants have suffered financial loss. When the idea of the applicants was to construct a building-though illegally-and obtain profit from such activity, how could they knowingly permit the collapse of such a building? Collapse of the building, if could have been foreseen or reasonably contemplated by the applicants, would have been prevented by them, atleast till their entire money would be recovered with profit. Therefore, in such a case, it would be contrary to common sense to accept that the applicants had knowledge that death would be caused by their act of construction which would be necessary to bring the offence committed by them within the penal provisions of section 304 Part II of the IPC. The applicants had certainly taken great efforts in an attempt to construct a building, such as procuring land illegally, by investing monies for purchase of material, by engaging a contractor and an Architect, by bribing the municipal officers and obviously, these efforts would not have been undertaken by them, if they had not been hoping that the building would be successfully constructed and the flats/units would be sold, enabling them to recover the monies invested by them in the project, with satisfactory returns/profits. That the applicants continued the construction work despite possible obstacles though they had "knowledge" that the building would ultimately collapse before it could be sold out, (and their money would be recovered with profit) is a theory the absurdity of which is self evident.

34. The theory of the applicants having "knowledge" is pressed on the basis that the applicants were aware of the danger and the risk involved in the said construction work. This "awareness" ought not to be confused with "knowledge" as contemplated by section 299 IPC. It must be clearly understood that knowledge on the part of the offender about the possible danger or risk involved in his rash or negligent act, is implicit even in the penal liability u/s. 304A of the IPC. In fact, if there would be no such knowledge, there would be no criminal liability-even under section 304A IPC-at all. The "knowledge contemplated by section 299 is of a different nature and degree, and not of the type that is implicit in the concept of criminal rashness or criminal negligence, contemplated by section 304A of the IPC.

35. There has been some reference to the "sentiments of the community being aroused" due to the collapse of the building in the orders passed by the Sessions Court while refusing to release some of the accused-including the applicants-on bail. This is based on the contention taken by the prosecution in the reports filed by them before the Court. There is a reference to this aspect in the charge-sheet also. In this context, Mr. Memon, the learned counsel for the applicants has relied upon the decision of the Supreme Court of India in the case of Sanjay Chandra

Vs. CBI, . In the reported judgment, Their Lordships of the Supreme Court of India have taken a review of various decisions rendered by the Supreme Court in bail matters, including Babu Singh and Others Vs. State of U.P., , Moti Ram and Others Vs. State of Madhya Pradesh, and Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, . The observations made by Their Lordships leave no manner of doubt that there has been no change in the legal principles or legal position with respect to the grant of bail. There is no change in the basic principle that power to refuse bail is not to be exercised as and by way of inflicting punishment. What is important in the present context is that it has been observed, inter alia, by Their Lordships that "right to bail is not to be denied merely because of the sentiments of the community against the accused" (para 25 of the reported judgment).

36. Recognizing such "sentiments", (which are said to have aroused because 74 lives have been lost and the cause of their death being attributable to the wrongful acts of the accused), for twisting the law, and attempting to treat the deaths as homicide of a higher degree, would be highly improper. The attempt to bring the acts attributed to the applicants within the penal provisions of section 304 of the IPC on the basis that they had knowledge, is too artificial and prima facie unacceptable. The acts attributed to the applicants prima facie show reckless and high-handed conduct aimed at profit making. The applicants flouted all the laws for carrying out an illegal construction work with the object of making pecuniary gains. They did not take precautions to see that the construction work is of the requisite quality. They would, therefore, on these facts, be certainly liable in respect of an offence punishable under section 304A of the IPC. It seems difficult to stretch the accusation further, and claim that they have committed an offence punishable under section 304 II of the IPC.

37. Undoubtedly, the applicants appear to have committed some other non-bailable offences also. The question is whether for those offences, the applicants should be kept in custody. Interestingly, the most obvious and major offence committed by the applicants is the offence punishable under section 52 of the Maharashtra Regional and Town Planning Act, but the accusation of having committed that offences, has not been levelled at all against the applicants.

38. All said and done, the age-old principles that deprivation of liberty must be considered as a punishment and that power to refuse bail is not to be exercised as if punishment before the trial is being imposed, have not undergone any change. In fact, these principles were re-stated by the Supreme Court of India in the case of Sanjay Chandra (supra). The following observations made by Their Lordships are worth quoting:-

"..... one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson".

(paragraph 14 of the judgment)

In the same paragraph, Their Lordships have expressed that "the Courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and duly found guilty".

39. In the present case, once it is held that prima facie, the applicants cannot be said to have committed an offence of culpable homicide punishable under section 304 of the IPC, refusing to release them on bail in spite of their having spent 1 1/2 year in custody, and the trial not yet having commenced (and even if it commences, is not likely to be over within a reasonable time looking to the volume of the evidence that would be adduced during the trial), would only amount to "teaching them a lesson" for the wrongs committed by them. Since this would not be proper, there seems to be no reason to deny bail to them, particularly because all the municipal officers who are accused in this case have already been released on bail. It has already been observed that in the context of the collapse of the building, the degree of criminality attached to the said accused municipal officers cannot be said to be lesser-even if that it is higher may be a debatable issue.

40. The concern for the loss of 74 lives would be indeed genuine, but the remedy is not to detain the applicants without trial. If the concern for the loss of lives is genuine, the State or the Thane Municipal Corporation (which is also a State under article 12 of the Constitution of India) should consider whether it is possible to formulate a scheme and ensure that the dependents of the persons who died in the collapse, are suitably compensated in terms of money. Making effective use of the provisions of Section 357A which has been inserted in the Code of Criminal Procedure by Act 5 of 2009 for compensating the dependents of the deceased persons would be the real, effective and just remedy rather than authorizing pre-trial detention of the applicants for an indefinite period by making reference to the loss of lives of 74 persons.

41. After hearing the arguments, the orders were reserved, but when the matter was placed on board for pronouncement of the orders, in spite of the inclination to release the applicants on bail, which was disclosed, I have thought it proper to ascertain from the learned counsel for the applicants as to whether the applicants, as a good gesture, were willing to deposit some amount with the trial court so as to make the said amount available, to partly cover the amount of compensation in the event of the Court coming to the conclusion that the victims of the alleged offences should be suitably compensated. It was made clear to the learned counsel for the applicants that, that would not be a condition for the applicants' release on bail, but would, nevertheless, be in the interest of justice, as, prima facie, the applicants seem to be liable atleast to a certain extent and certain degree, for the loss of lives and the injuries caused to several persons. Indeed, at the end of the trial which the applicants are facing, the applicants might be required to compensate the victims suitably, if found guilty. It is not

that the applicants do not appear to have committed any offence. The suggestion "that the applicants might agree to deposit some reasonable amount without prejudice to their rights and contentions, so that, in the event of the applicants being found guilty at the conclusion of the trial, such amount would be available to the trial court to meet part of the amount of compensation as might be awarded to the victims", as given by the Court has been accepted by the learned counsel for the applicants. This would be helpful, as I am informed that in spite of enacting section 357A of the Code of Criminal Procedure, actually, no such fund has been created till date.

42. I have also asked the learned Special P. P as to why the accusation of an offence punishable under section 52 of the MRTTP Act, has not been levelled against the applicants in spite of that being the most obvious offences committed by the applicant. The learned Special P. P was not able to give any satisfactory reply to this. It appears from what he stated that such a complaint is required to be made by a specified authority and that the Thane Municipal Corporation, and the concerned authorities are not willing to lodge any such complaint/report. This is indeed surprising.

43. Before parting, it may be made clear that the observations about the nature of offence allegedly committed by the applicants as found in this order have been made in the context of the Bail Applications and shall not be taken as conclusive or binding, when the question of framing of charge would arise before the trial court. The trial court, in that regard, may come to its own conclusion, in accordance with law, after hearing the parties.

44. In the circumstances, I am inclined to release the applicants on bail, subject to certain conditions.

45. Applications are allowed.

OPERATIVE ORDER IN BA NO. 850 of 2014

The applicants are ordered to be released on bail in the sum of Rs. 2,00,000/- each, with one surety in like amount, or two sureties in the sum of Rs. 1,00,000/- each, on the following conditions:-

(i) The applicants shall not contact, meet or approach any of the witnesses in this case, in any manner, whatsoever.

(ii) The applicants shall deposit a sum of Rs. 7,50,000/- each, in the trial court within a period of 60 days from their actual release from custody which sum shall be in the custody of the trial court, and shall be subject to such orders as the trial court may pass at the conclusion of the trial.

OPERATIVE ORDER IN BA NO. 179 of 2014

The applicant is ordered to be released on bail in the sum of Rs. 2,00,000/- with one surety in like amount, or two sureties in the sum of Rs. 1,00,000/- each, on the following conditions:-

(i) The applicant shall not contact, meet or approach any of the witnesses in this case, in any manner, whatsoever.

(ii) The applicant shall deposit a sum of Rs. 7,50,000/- in the trial court within a period of 60 days from his actual release from custody, which sum shall be in the custody of the trial court, and shall be subject to such orders as the trial court may pass at the conclusion of the trial.

OPERATIVE ORDER IN BA NO. 236 of 2014

The applicant is ordered to be released on bail in the sum of Rs. 2,00,000/- with one surety in like amount, or two sureties in the sum of Rs. 1,00,000/- each, on the following conditions:-

(i) The applicant shall not contact, meet or approach any of the witnesses in this case, in any manner, whatsoever.

(ii) The applicant shall deposit a sum of Rs. 7,50,000/- in the trial court within a period of 60 days from his actual release from custody, which sum shall be in the custody of the trial court, and shall be subject to such orders as the trial court may pass at the conclusion of the trial.

46. At this stage, the learned Special Public Prosecutor prays that the operation of this order be stayed for a period of four weeks for enabling the State to approach the Hon'ble Supreme Court of India challenging this order. The bail order has been passed after considering, inter alia, the period already spent by the applicants in custody. The co-accused in this case who have been released on bail have already availed of the liberty granted.

47. Under the circumstances, prayer to stay the operation of the order is rejected.

48. However, it is directed that for a period of six weeks from today, the applicant shall report to the office of the Investigating Agency everyday between 3.00 p.m. to 5.00 p.m. within which time the State can certainly approach the Supreme Court of India and seek appropriate orders.

49. The trial court shall expedite the trial of the case, and endeavour to complete it as early as possible.