

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

**CRIMINAL APPLICATION NO. 7012 OF 2014
IN
CRIMINAL APPEAL NO. 792 OF 2014**

Hamid Bashumiya Shaikh

.. APPLICANT

VERSUS

The State of Maharashtra
& another

.. RESPONDENTS

Mr. S.S. Choudhary, advocate for applicant.
Mr. P.P. More, APP for the State.

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**CORAM : R.M. BORDE &
P.R. BORA, JJ.**

DATE : 26th FEBRUARY, 2015.

PER COURT :

1. The applicant is seeking his release on bail. Applicant has been convicted by the Special Judge and Additional Sessions Judge at Latur in Sessions Case No. 8/2014 for offence punishable under section 376 (2)(g) of the Indian Penal Code and has been sentenced to suffer life imprisonment and, fine of Rs. 30,000/- has also been imposed on him.

2. Mr. Choudhary, learned counsel for the applicant submitted that no evidence has come against the present applicant showing his involvement in the alleged offence. Learned counsel submitted that the prosecutrix herself has admitted that the tiffin was being served to the present applicant by his daughter who is residing in the nearby locality. Learned counsel further pointed out that it has also come on record that the grand-mother of the prosecutrix was unable to carry out any work and, in such circumstances, there is reasonable doubt as to whether she was infact able to cook food

and, therefore, further evidence also appears to be unacceptable that the tiffin was being provided from the grand-mother of the prosecutrix. Learned counsel further submitted that the evidence which has come on record also suggests that the prosecutrix was having some affair with accused no. 2 Hakim. Learned counsel further submitted that the applicant has been falsely implicated in the alleged crime only for the reason that accused no. 2 is the employee of his son.

3. Learned APP for the State has strongly opposed for granting bail to the present applicant. Learned APP brought to our notice that in the entire evidence nothing has come on record so as to take into account the defence of false implication. Learned APP also brought to our notice the evidence showing involvement of the present applicant in commission of the alleged crime. Learned APP submitted that though the medical evidence suggests that the present applicant was incapable to do sexual intercourse, from the other evidence his presence on the spot of occurrence is proved and, in such circumstances, he has been rightly convicted for the offence under section 376(2)(g) of the Indian Penal Code. He, therefore, prayed for rejecting the application.

4. We have carefully considered the submissions advanced on behalf of both the parties. We have also carefully perused the entire record of the case. So far as other accused in the present case is concerned, an overwhelming evidence has come on record showing that he had sexual intercourse with the prosecutrix. DNA test report which has been duly

proved by prosecution undoubtedly suggests that the other accused is the biological father of the child delivered by the prosecutrix. It has also been proved that the prosecutrix is aged about 12 years. Considering that the prosecutrix was minor at the relevant time, the defence of consent becomes irrelevant. In such circumstances, offence of rape seems to have been undoubtedly proved against the other accused.

5. However, so far as present applicant is concerned, prima facie, there appears no clinching evidence against him as has come on record against the other accused. Though the prosecutrix has testified that the present applicant committed rape on her, her said version has not been corroborated by the medical evidence. As has been submitted by the learned counsel for the applicant, the medical evidence which has come on record suggests that the present applicant was incapable of performing sexual intercourse. Similarly, evidence as regards providing of lunch tiffin to the present applicant is concerned, the same also prima facie does not inspire confidence. It is therefore evident that evidence on the the above aspects needs to be re-considered. The present applicant is admittedly aged about 73 years and there is further no dispute that during pendency of the trial the applicant was on bail. Nothing has been brought on record by the prosecution to show that there are criminal antecedents against the present applicant.

6. In such circumstances and for the reasons stated above, we are inclined to allow the present application. Hence the following order :

- (1) Application is allowed.
- (2) Applicant be released on furnishing PR bond in the amount of Rs. 25,000/- and on furnishing solvent surety/sureties in the like amount.
- (3) Bail before the trial Court.

(P. R. BORA)
JUDGE

(R. M. BORDE)
JUDGE

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