

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.771 OF 2016

IN

CRIMINAL APPEAL NO.483 OF 2016

Dhondu Maruti Zapade .. Applicant
Versus
The State of Maharashtra .. Respondent

Ms.Nagma Tandon, Advocate for the applicant.

Mr.S.V.Gavand, APP for the Respondent State.

CORAM : PN. DESHMUKH, J

DATED : 7th SEPTEMBER, 2016

P.C. :

1 This application is filed for suspension of substantive sentence imposed upon applicant and for grant of bail.

2 Applicant is found to be convicted for the offences punishable under section 376, 506 IPC and is sentenced to suffer RI for 10 years and to pay fine of Rs.5,000/- in default to suffer RI for 1 year for offence u/s.376 IPC, and is directed to suffer RI for 2 years and pay fine of Rs.1,000/- in default to suffer SI for 3 months for an offence punishable u/s.506 IPC. Both the substantive sentences are directed to run concurrently.

3 Learned counsel for the applicant had submitted that from the evidence of prosecutrix, by no stretch of imagination, it

can be said that she was forcibly subjected to sexual inter-course, and by referring to her evidence, it is submitted that applicant was always a consensual party to the acts of sexual inter-course. However, it is only in one of the weddings as her relative found her to have gained weight, her father got her medically examined when prosecutrix was found carrying pregnancy. It is thus, contended that case of prosecution does not establish involvement of applicant as an accused to have committed rape on prosecutrix against her wish, as there is nothing even to establish that prosecutrix at the time of incident was minor. Nothing is placed on record with regards to her date of birth.

4 It is further contended that according to DNA test, accused is not certified to be biological father of a child born to prosecutrix. In these facts, it is contended that application be allowed, pending trial, by suspending substantive sentence imposed upon the applicant and by releasing him on bail.

5 Learned APP has opposed the application on the ground that prosecutrix is minor, and as such, a case put forth on behalf of applicant does not stand for own reason. It is further contended that application be, therefore, rejected.

6 Perused the record. From the evidence of prosecutrix as well as her report, it reveals that she knows applicant as he hails from her village and about six months prior to her lodging report one day when she was in her field at about 8.00 a.m, applicant arrived and forcibly caught hold of her, and by threatening her not to raise shouts, dragged her below one tree

where he committed sexual inter-course with her against her wish. She has further stated that 4 – 5 days thereafter, in the noon hours when she was again present in the field, applicant arrived and dragged her, took her below the same tree and committed sexual inter-course with her. She has further stated that two days thereafter, while she was again present in the field, applicant arrived in the field in the morning and by taking her below the same tree, committed sexual inter-course against her wish. However, due to threats extended to her by applicant she had not disclosed about the incidents to anyone.

7 In view of contents of report as well as evidence of prosecutrix, as above, a specific query was put to learned counsel for the applicant to place on record copy of spot panchnama. Said document is accordingly tendered at the bar, which panchnama is marked as Exhibit-44. Said document was necessary to ascertain distance between the field of prosecutrix where she was present as alleged by her on all the three occasions before she was dragged below the tree where she was subjected to sexual assault. However, on perusal of the document, there is no reference to any such tree in the spot panchnama, which fact is also pointed out by learned APP as well as learned counsel for the applicant.

8 Thus, it is found that there is nothing on record to establish the distance between the spot where prosecutrix was present in the field and the tree below which she was alleged to be dragged by accused for committing sexual inter-course. Such contents in spot panchnama were material as it could have thrown

light on conduct of prosecutrix, if she while being forcibly taken in the field below the tree had, on any occasion, raised shouts or had resisted applicant to accompany him. However, in the absence of any such contents in the spot panchnama, nothing can be said to be established, of which benefit has to be given in favour of applicant.

9 Even otherwise it is no case of prosecution that immediately after the alleged first incident of sexual inter-course, complaint was made by prosecutrix to anyone, as the report is dated 9th April 2014 wherein reference is made to three incidents of alleged rape out of which first incident has occurred about six months before lodging report.

10 Similarly, it is material to note that it is only on 2nd April 2013 when prosecutrix happened to be present in some marriage and was found to have gained weight, was inquired by one of her relative who is sister of her father, about her gaining weight, and was therefore, medically examined in the hospital of Dr.Joshi on the following day where she was stated to be pregnant of 6 months. It is five days thereafter present report came to be lodged.

11 Admittedly, there is nothing on record to establish age of prosecutrix to be minor. According to the ossification test report, the age is stated to be between 14 – 16 years, while according to the Investigating Officer, prosecutrix had never stated him of accused threatening her to not to disclose about the incidents to anybody in her family, her parents, else he would kill

her.

12 In view of evidence as aforesaid, prosecutrix appears to have materially improved her version, whereas in her report as well as her evidence, she has stated that due to threats, as aforesaid, she did not disclose the incident to anyone and had submitted to applicant.

13 Even otherwise, according to DNA test report, applicant is excluded to be biological father of baby of prosecutrix. In view of this report, when further evidence of prosecutrix is perused together with the probable case put forth on behalf of applicant, it is found that prosecutrix apart from one Bhima Mali also knows Dharma Kathe and Kalu Mali. It is further suggested to prosecutrix that it is only because Ranjana Thogire – sister of applicant had seen her in a compromising position with Kalu Mali on two occasions, false report came to be lodged against the applicant. Above suggestion though is denied by prosecutrix finds much substance, particularly in view of DNA test reports, according to which applicant is not found to be biological father of the child born to prosecutrix.

14 Having considering evidence, as aforesaid, together with fact of prosecutrix not narrating about the incident to anyone for more than six months. Case of prosecution appears to be full of doubts and as such, inspite of applicant having been convicted for the offence punishable u/s.376 IPC, and is sentenced to suffer Rigorous imprisonment for 10 years, his substantive sentence is liable to be suspended, pending Appeal, and is found entitled to be

released on bail on imposing conditions as per order below. Even otherwise, the appeal preferred by applicant may not be listed for final hearing in near future, due to pendency of other old Criminal Appeals.

ORDER

Applicant shall be released on bail on his furnishing P.R. Bond in the sum of Rs.30,000/- with one or two sureties in the like amount.

While on bail, applicant shall mark his presence with Otur Police Station once in three months on first day of such month, pending Appeal.

Applicant shall furnish proof of his residence with Investigating Officer and in the event of change of residence, shall update the same.

(PN. DESHMUKH, J)