

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

**918 CRIMINAL APPLICATION NO. 1796 OF 2017
IN
CRIMINAL APPEAL NO. 134 OF 2017**

Bapurao @ Sakharam s/o
Munjaji Wangkar

..... APPLICANT

V E R S U S

The State of Maharashtra

..... RESPONDENT

.....

Mr. Vijay Sharma, advocate for Applicant.

Mr. S.Y.Mahajan, A.P.P. for Resp. – State.

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CORAM : V.L.ACHLIYA, J.

DATE : 15th JUNE, 2017

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ORDER :

1. The applicant/appellant who has been held guilty of the offence punishable u/s 376 and 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs. 1,000/- has moved this application seeking suspension of

sentence and release on bail during pendency of Appeal for the reasons set out in the application.

2. Heard the learned counsel for the applicant and A.P.P. for the respondent – State. Perused the Judgment and Order as well as copies of the depositions including the report of medical examination of the victim girl and accused.

3. Mr. Sharma, learned counsel for the applicant strenuously contended that the Judgment and Order passed by the trial Court is perverse and not sustainable in law. He submits that there is no cogent and convincing evidence to sustain the charge u/s 376 and 506 of the Indian Penal Code. There is delay of more than two days in lodging the F.I.R. No satisfactory explanation has been put-forth as to the delay caused in lodging the F.I.R. He submits that in the light of the delay, the possibility of accused being framed in the false case and complaint lodged after due deliberation, can not be ruled out. He submits that except the testimony of the prosecutrix who claims to be mentally retarded and deaf and dumb girl, there is no evidence sufficient to prove the charge u/s 376 of the Indian Penal Code. He submits that the sole

testimony of the prosecutrix is not sufficient to base the conviction. By referring the report of medical examination, learned counsel submits that the report rules out the possibility of forcible sexual intercourse. He submits that old healed tears of hymen noted in report at the most suggest that the victim has earlier undergone sexual intercourse. He further submits that in medical examination, no injuries noticed to Labia majora as well as Labia manora as well as the private part of the prosecutrix so also no signs of physical violence noticed during the medical examination of the prosecutrix. So also, the medical examination of the accused reflects no marks of injury found to penis. The report of Chemical Analyser reflects that no spermatozoa was detected in vaginal swab during medical examination of the prosecutrix. He, therefore, submits that except the words of the prosecutrix, which is in the form of gestures, there is nothing to prove the commission of sexual intercourse by the applicant/accused with the prosecutrix.

4. He further submits that it has been brought on record that the place of incident was surrounded by number of houses which includes the house of uncle of the prosecutrix, which makes it difficult to believe that the

incident was occurred in a manner stated by prosecutrix.

5. It is contended that considering the overall evidence, the conviction is not sustainable and the applicant has good case to succeed in Appeal. During the pendency of Appeal, the applicant was on bail. He further submits that the age of the applicant is 84 years. In the light of submissions advanced, learned counsel urged to release the applicant on bail during the pendency of Appeal. In support of the submissions advanced, learned counsel for the applicant referred and relied upon the decision of the Apex Court in the case of **State of Rajasthan Vs. Darshan Singh @ Darshan Lal reported in AIR 2012 Supreme Court 1973** and **Anil Ari Vs. State of West Bengal reported in (2009) 11 Supreme Court Cases 363.**

6. On the other hand, learned A.P.P. opposed the application with the contention that there is sufficient evidence to sustain the conviction. He submits that the applicant has committed serious offence of rape on a deaf and dumb girl by taking advantage that she was alone in the house and mentally retarded. He further submits that the victim has fully supported the prosecution case.

Learned A.P.P. submits that the delay caused in lodging F.I.R. has been properly explained. It is pointed out that the mother of the prosecutrix has deposed that due to the threats given by the accused, the report could not be lodged immediately after the incident. He further submits that the age of the applicant/accused is shown in the report of medical examination as 55 years. Learned A.P.P. submits that in the charge sheet also his age is shown as 55 years. He submits that at the time of delivering the Judgment, the age of the applicant is shown as 60 years. He further submits that nothing is placed on record to accept the contention that the applicant is old aged and infirm person.

7. In order to appreciate the submissions advanced, I have perused the impugned Judgment and order, depositions of the witnesses, report of medical examination and other documents placed on record for consideration. The applicant was charged for committing the offence of rape on a girl, who was not only mentally retarded but deaf and dumb. In order to prove its case, the prosecution has examined the mother of the victim girl, who lodged the complaint. She has fully supported the case of prosecution. She has offered explanation as to

the delay caused in lodging F.I.R. The fact deposed by her as to the delay caused in lodging F.I.R. appears to be not challenged in the cross examination. The evidence of the prosecutrix was recorded with the help of interpreter and psychologist. By making gestures, the prosecutrix has explained the acts committed by the applicant/accused. The report of medical examination reveals that the victim girl had undergone sexual intercourse. Vaginal examination reveals admission of two fingers with pain which is suggestive of the fact that the victim girl was not habituated to sexual intercourse. The hymen was found to be torn with old healed tears. No doubt the prosecution has not examined Medical Officer who has examined the prosecutrix and issued medical certificate. However, non examination of Medical Officer is not sufficient to infer that the prosecution has failed to prove charge u/s 376 of the Indian Penal Code. The effect of non examination of the medical officer and prejudice caused to accused can certainly be taken into account at the time of deciding the Appeal. It is quite settled position of law that the testimony of the prosecutrix is solely sufficient to base the conviction if her testimony inspires full confidence. At the stage of deciding the bail application, such close scrutiny of testimony of prosecution witnesses is not expected to

be made. The reasons and findings recorded by the trial Court, *prima facie* found to be consistent with the evidence adduced by prosecution. Although the accused has taken a defence that he has been falsely implicated in the case on account of rivalry in the village and group politics, there is no evidence as such to accept the contention that the possibility of false implication can not be ruled out. The suggestion given to the witnesses as to existence of two groups in the village and they belong to particular group, has been denied by the witnesses. Thus, considering the overall facts of the case, I am of the *prima facie* view that there is sufficient evidence to base the conviction.

8. Learned counsel for the applicant has contended that the applicant is more than 84 years of age. In support of this contention, learned counsel has relied upon the age noted in the photo Identity Card issued in favour of the applicant by the Election Commission. He submits that as per the Identity Card, on 01/01/1994 the age of the applicant noted as 61 years. He, therefore, submits that inference can be drawn that now the age of the applicant may be around 84 years. He submits that there are no criminal antecedents of applicant. In my

view, the contention of the applicant that he is 84 years of age, runs contrary to the record and proceedings. At the time of filing of the charge sheet, the age of the applicant/accused shown as 55 years. In the medical examination, the age of the applicant is noted as 55 years. In the Judgment, the age of the applicant is mentioned as 60 years. Therefore, the age recorded in the photo Identity Card issued by the Election Commission itself not sufficient to infer that the applicant is old aged person and at present he is 84 years of age. Apart from this, the age of the person itself not sufficient to released on bail. The age of the person may be accepted as one of the criteria to be taken into consideration while considering such person to be released on bail. In the case of **Anil Ari** [supra], Hon'ble Apex Court has directed that old age of person can alone be criteria to release on bail. In fact, in the Judgment, it has been observed that the release of the person on bail required to be considered by taking into consideration various factors such as nature of accusations made against the accused, the manner in which the crime has been committed, gravity of offence and desirability of release of accused on bail after convicted for committing the serious offence.

9. Having regard to the overall facts of the case, the nature of offence, sentence awarded and the evidence adduced by prosecution and reasons and findings recorded by trial Court, I am of the view that no case is made out to entertain the application and to release the applicant on bail.

10. It is clarified that the observations as made above are made for the limited purpose to decide the application seeking suspension of sentence and release of applicant on bail during the pendency of Appeal. The observations so made shall not be treated as the observations made as to the merits of the case or expression of the view of this Court as to merit of the case.

11. In the result, I am inclined to reject the application and pass the following order.

ORDER

[1] Criminal Application is rejected.

[2] Looking to the fact that the applicant is claimed to be old aged person and conviction awarded is of seven years, I am inclined to expedite the hearing of the Appeal. Trial Court is directed to expedite the preparation of paper book and submit record and proceedings with paper book within eight weeks from the date of receipt of this order.

[3] On receipt of record and proceedings with paper book, list the Appeal for final hearing.

[V.L.ACHLIYA, J.]