

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.46 OF 2016
IN
CRIMINAL APPEAL NO.715 OF 2015**

PRAMOD LAXMIKANT UPADHYA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Apeksha Vora, Advocate for the Applicant.

Mr.A.R.Kapadnis, APP for the Respondent – State.

Mr.V.G.Bagade, Spl.PP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 6th MARCH 2017.

ORAL ORDER :

1 This is an application for suspension of sentence and release of applicant / accused on bail during pendency of the appeal filed by him. The applicant / accused has been convicted

of offences punishable under Sections 376 and 392 of the IPC. He has been sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.10,000/- for the offence punishable under Section 376 of the IPC. For the offence punishable under Section 392 of the IPC, he has been sentenced to suffer rigorous imprisonment for 7 years apart from payment of fine of Rs.5,000/-.

2 Heard the learned advocate appearing for the applicant / accused. She argued that medical evidence adduced by the prosecution is not consistent with the version of the prosecution. She argued that evidence of PW14 Dr.Hemlata Pandey shows that the applicant / accused is a probable biter. She had examined the prosecutrix on 24th January 2014. However, her evidence shows that the size of injury on the victim is more than the size noted by PW19 Dr.Chitwan Dubey. The learned advocate further argued that the fact that the brassiere of the prosecutrix was seized from her falsifies the story of bite marks on breast area of the prosecutrix. While the prosecutrix was wearing the

brassiere, no injuries of bite marks can be there. There were no injury on the private part of the prosecutrix and this evidence shows that witnesses are lying. The learned advocate further argued that PW19 Dr.Chitwan Dubey has incorrectly stated the time of examination as well as facts regarding examination of the prosecutrix. Evidence of the victim (PW1) in paragraph 15 to the effect that she was taken to KEM Hospital negates the theory of PW14 Dr.Hemlata Pandey. Evidence of PW14 Dr.Hemlata Pandey shows that she had been to Seven Hills Hospital for examination of the victim. It is further argued that the CCTV footage as seen from the evidence of the Investigating Officer, is not the original footage. The original CCTV footage was in the hard disk which was not produced before the court, and therefore, evidence regarding CCTV footage is totally inadmissible. The learned advocate argued that the prosecutrix was left on the spot by a person named Hemant Gupta. However, this material witness is not examined by the prosecution. Though spot of incident is stated to have been shown by the brother of the victim, he is also not examined by the prosecution. With this, according to the

learned advocate for the applicant / accused, there is no evidence to connect the applicant / accused with the crime in question, and therefore, he is entitled to be released on bail during pendency of the appeal filed by him.

3 The learned APP opposed the application by contending that there is evidence in the nature of extra judicial confession by the applicant / accused before PW13 Dr.Sachin Patil. The learned APP further argued that CCTV footage collected by the prosecution and proved before the trial court shows that watchman of the society i.e. the applicant / accused was in company of the victim and as he was posted to guard the residence of the society, it was not his business to be near the prosecutrix. It is argued that clothes of the applicant / accused were recovered at his instance from the meter room of the society and the cell phone of the victim was recovered at his instance from the Paradise society. Clothes of the victim were recovered from the nearby area. The forensic evidence is pointing out the guilt of the applicant / accused in as much as the soil found on

clothes and belt of the applicant / accused is matching with the soil found on clothes of the victim of the offence. My attention is drawn to the evidence of PW21 Shashank Mishra to point out that during the relevant period, the applicant / accused was not within the premises of the building.

4 I have carefully considered the rival submissions and also perused the copies of deposition of witnesses examined by the prosecution.

5 It is the case of the prosecution that in night hours of 23rd January 2014, the prosecutrix, who was resident of Raheja Vihar Apartments, had been to dance class and then along with her friends she had gone to Hary's Restaurant for dinner. As seen from the prosecution case, there the prosecutrix and her friends consumed liquor and in the night intervening 23rd January 2014 and 24th January 2014, she returned to her apartments along with her friends. As she saw a resident of apartment, the prosecutrix had chosen not to enter in the apartment. The auto rickshaw was

then taken at some distance. Thereafter, the friend of the prosecutrix left in the auto rickshaw. It is case of the prosecution that then, the applicant / accused committed rape on her while she was under the influence of the liquor.

6 Evidence of the prosecutrix reveals that she is not recollecting the incident having lost her senses soon before the incident. She regained her consciousness while admitted in the hospital. As such, case of the prosecution is based on circumstantial evidence.

7 First circumstance which can be noted from the evidence of the prosecution is disappearance of the applicant / accused from place of duty at the time of the incident. According to the prosecution case, the incident of rape on the prosecutrix was committed in the parking area of the nearby building. Evidence of PW21 Shashank Mishra shows that the applicant / accused was aware about the arrival of the prosecutrix in the late night hours as he had opened the door when the auto rickshaw

came there. Evidence of PW21 Shashank Mishra shows that then the auto rickshaw took “U” turn and the prosecutrix and the friend accompanying her went back in the said auto rickshaw. Evidence of this witness shows utterance of the applicant that the victim is vomiting and he needs to go there to see her. On this pretext, the applicant / accused, as stated by PW21 Shashank Mishra, has left the society. The applicant / accused was missing from his duty area for a period of about 30 to 40 minutes i.e. the time when the incident allegedly took place. Evidence of this witness further shows that at about 3.45 a.m. the prosecutrix came inside the gate of the apartment under influence of the liquor. Thereafter, on being informed by another lady, he came to know that the victim was lying in the lobby of “A” wing of the building.

8 The next piece of evidence relied by the prosecution is extra judicial confession made by the applicant / accused before PW13 Dr.Sachin Patil. The applicant / accused while appearing before this Medical Officer gave the history of indulging in fingering in the genitals of 28 years old female at about 2.30 a.m.

of 24th January 2014 apart from sucking, kissing and fondling that female.

9 Apart from this, on the basis of confessional statement of the applicant / accused, there is recovery of a cell phone from the nearby building. The prosecutrix has duly identified that cell phone which was recovered at the instance of the applicant / accused. This fact becomes relevant under Section 27 of the Evidence Act.

10 It is seen from the evidence of the prosecution that the prosecutrix was found in semi-nude condition and there were no clothes on the lower portion of her body. During the course of investigation, under panchnama Exhibit 29, in presence of PW6 Namdev Waghmare, a panch witness, clothes of the prosecutrix including her high heel boots were seized. Clothes of the applicant / accused were also seized. Report of the Chemical Analysis of these seized articles shows that soil found thereon is matching. It is, thus, seen from this evidence that clothes of the applicant /

accused were stained with some type of soil which was found on clothes of the prosecutrix.

11 Evidence of PW14 Dr.Hemlata Pandey and PW19 Dr.Chitwan Dubey shows that the prosecutrix was sexually molested.

12 The evidence pointed out in foregoing paragraphs prima facie indicates that it was the applicant / accused who is the perpetrator of the crime in question. As such, it cannot be said that there is no evidence against the applicant / accused to implicate him in the crime in question.

13 Considering the nature and the quality of evidence adduced by the prosecution and the nature of crime, it is not possible to conclude that this is a fit case wherein bail can be granted to the applicant / watchman accused of raping the resident of a building under his guard, and a such, the following order :

- i) The application is rejected.
- ii) The hearing of the appeal is expedited as the applicant / accused is undergoing sentence.

(A. M. BADAR, J.)