

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.159 OF 2017

IN

CRIMINAL APPEAL NO.84 OF 2017

Nitin Deoram Kadali ... **Applicant**
V/s.
The State of Maharashtra ... **Respondent**

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Smt.Aisha Ansari, Advocate for the Applicant.
Mr.A.R.Kapadnis, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 20th MARCH 2017.

P.C. :

1 This is an application for suspension of sentence and release of the applicant on bail during pendency of his appeal, which is already admitted by this Court. The applicant/accused has been convicted of the offence punishable under Sections 376, 504, 506 and 341 of the Indian Penal Code (For short, "the IPC") by the learned trial Court. He has been sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.1,000/-, in default to further undergo simple imprisonment for one month for the offence punishable under Section 376 of the IPC. He is further acquitted of offences punishable under Sections

4 and 16 of the Protection of Children from Sexual Offences Act (For short, “the POCSO Act”). For other Sections of the IPC, lessor sentence is imposed on him and all substantive sentences are directed to run concurrently. Therefore, it is not necessary to mention other sentences imposed on the applicant/accused, which are lessor than the sentence imposed for the offence punishable under Section 376 of the IPC.

2 Heard the learned Advocate appearing for the applicant/accused. By taking me through the entire evidence adduced by the prosecution, the learned Advocate argued that there are several contradictions and omissions in evidence of P.W.No.1 the prosecutrix, her sister P.W.No.2 Gangubai and P.W.No.4 Pandurang her brother. Those contradictions as well as omissions are proved through the Investigating Officer. It is further argued that medical evidence coming on record from P.W.No.9 Dr.Manisha is not supporting the prosecution and the C.A. report supports the case of the present applicant. Panch witnesses have turned hostile and seizure of the sickle is also not proved. It is further argued that evidence of defence witnesses and other evidence suggest that there was a love affair between the prosecutrix and applicant/accused and as the applicant had refused to marry the prosecutrix, he is falsely implicated in the crime in question.

3 The learned Additional Public Prosecutor opposed the application by contending that the crime in question is serious.

4 Law in the matter of sexual offences is set at the rest by catena of Judgments of the Honourable Apex Court. In the matter of *Bharwada Bhoginbhai Hirjibahai v. State of Gujarat* reported in AIR 1983 SC 753, it is held that in the Indian setting, refusal to act on testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to the injury suffered by her. In the matter of *Radhu v. State of M.P.* reported in 2007 Cr.L.J. 4704, the Honourable Apex Court held that finding of guilt in a case of rape can be based on uncorroborated testimony of prosecutrix and the Court should not sway away on the basis of minor discrepancies and contradictions in the evidence of the prosecution.

5 In the case in hand, P.W.No.1 prosecutrix has categorically deposed that her date of birth is 17/09/1997. P.W.No.6 Sahebrao Shinde Headmaster of Janta Vidyalay Dhondegaon has deposed that date of birth of prosecutrix recorded in the school record is 17/09/1997. On the basis of this evidence, the learned trial Court in paragraph 18 of its Judgment came to the conclusion that the prosecutrix was below 18 years of age at the time of commission of alleged offence of rape. However, as it is seen subsequently in paragraph 38, the learned

trial Court held that prosecution failed to prove that the prosecutrix was below 18 years of age and, therefore, the applicant/accused came to be acquitted of the offences punishable under the POCSO Act. Be that as it may, after assessing the evidence adduced by the prosecution, in paragraph 18 of its Judgment, the learned trial Court came to the conclusion that at the time of alleged incident, the prosecutrix was below 18 years of age.

6 The evidence of the prosecutrix shows that on 01/09/2015 when she was going towards her agricultural land by walking, accused persons dragged her and put her inside the house where the applicant had committed rape on her. Soon after the incident, P.W.No.2 Gangubai and P.W.No.4 Pandurang had seen the prosecutrix inside that house while weeping. This conduct of the prosecutrix is material to infer the guilt of the applicant and her evidence also stands corroborated by these witnesses.

8 P.W.No.9 Dr.Manisha, who examined the prosecutrix after about six days came to the conclusion that her hymen was torn and had opined that in past sexual intercourse had happened with the prosecutrix. Merely because there can also be some other reasons for hymenal tear, one cannot come to the conclusion that what is stated by the prosecutrix for causing rupture of her hymen,

is false and that too at this stage. In the wake of this positive evidence, evidence of defence witnesses will have to be appreciated. D.W.No.1 Keru deposed what the Advocate for the defence had tutored to him. D.W.No.2 Dhavalabai is sister-in-law of accused No.2 Kantilal. The defence witnesses attempted to show that there was love affair between the applicant and prosecutrix. If that is so, then also the applicant cannot violate person of the prosecutrix against her will and without her consent.

9 In this view of the matter, no case for bail is made out. The application is rejected.

10 Filing of private paper book is allowed.

(A.M.BADAR J.)