

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.405 OF 2017

IN

CRIMINAL APPEAL NO.229 OF 2017

MAHESH RAMCHANDRA MARAGAJE)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Pracheta Rathod a/w. Mr.Arun Rajput i/b. Ms.Anjali Patil,
Advocate for the Applicant.

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

CORAM : A. M. BADAR, J.

DATE : 27th SEPTEMBER 2017

P.C. :

1 This is an application for suspension of sentence and releasing the applicant / accused on bail during pendency of the appeal filed by him. The applicant / accused has been convicted of offences punishable under Sections 376(D) read with 120B, 377 read with 120B, 366 read with 120B, 354 read with 120B, 341, 342 read with 120B, 323 read with 120B, 506(II) read with

120B as well as under 120B of the Indian Penal Code (IPC). As all sentences imposed on the applicant / accused are directed to run concurrently, it is not necessary to put on record all sentences imposed on each and every count on the applicant / accused. Suffice to mention that highest sentence of imprisonment imposed on the applicant / accused is for 20 years for the offence punishable under Section 376(D) read with 120B of the IPC with a further direction to him to pay fine of Rs.25,000/-, and in default, to undergo rigorous imprisonment for 1 year.

2 Case of the prosecution in brief is thus :

(a) The victim of the crime in question i.e. PW1 is a rag picker, who used to come to Mumbai occasionally for earning her livelihood. She is permanent resident of Nanded. According to the prosecution case, about three months prior to the incident, she came to Mumbai for earning her livelihood, as her elder son Honaji, aged about 20 years, started assaulting her at her native place. At Mumbai, she used to stay in a tempo parked in front of Hill Residency at Amar Nagar. The incident allegedly took place

in the night intervening 20th September 2013 and 21st September 2013. The prosecutrix lodged report thereof on 21st September 2013. She alleged that at about 3.00 a.m. of that night, she woke up when a vehicle carrying milk came. At about that time, 5 to 6 boys peeped inside the tempo. She named those persons as Vishal, Ajay, Kalu, Wasim and Dastagir, by stating that she came to know names of some other boys as they were calling each other by names. She claimed that she was knowing Vishal since prior to this incident. According to the prosecution, then, these accused persons dragged the prosecutrix out of the tempo, took her in the vicinity and committed rape as well as carnal intercourse against the order of nature with her.

(b) The prosecution further alleged that then Vishal and Kalu by a motorcycle took her to the forest area in the vicinity. At that place, two other boys came. All accused persons then committed rape on her, so also carnal intercourse, against the order of nature. The prosecutrix added name of one more person "Veeru" at this stage.

(c) After lodging the FIR by the prosecutrix, within two days her statement under Section 164 of the Cr.P.C. came to be recorded by the learned Metropolitan Magistrate on the request of the police. The prosecutrix maintained her version before the learned Metropolitan Magistrate, so far as the first part of the incident is concerned. However, so far as second part of taking her to the forest area is concerned, she remained silent so far as making a phone call and calling two persons by accused Vishal.

3 Heard the learned advocate appearing for the applicant / accused. She admitted that the entire evidence against the present applicant came on record by way of omission. The prosecutrix had never named the applicant as perpetrator of the crime. The learned advocate further argued that forensic evidence is also not supporting the case of the prosecution, so far as the present applicant / accused is concerned. The learned advocate drew my attention to several omissions brought on record from the version of the prosecutrix and proved through evidence of PW41 A.P.I. Sarita Bhosale. She drew my attention to evidence of

sister of the applicant / accused examined by the prosecution who deposed that in the night when the incident allegedly took place, the applicant / accused was present in the house itself. Evidence of hostile witnesses namely PW7 Sanker Survade and PW9 Devishankar Shukla is also pointed out.

4 I have heard the learned APP appearing for the State. He vehemently argued that there is no reason for the prosecutrix to falsely implicate the applicant / accused in the crime in question. The learned APP submitted that evidence of Test Identification Parade goes to show that the applicant / accused was also a member of the gang which committed rape and unnatural offence against the prosecutrix. The learned APP further pointed out forensic evidence against other accused persons as well as evidence of PW13 Dr.Sadanand Bhise and submitted that injuries on person of victim vouches about her truthfulness.

5 I have carefully considered the rival submissions and also perused material on record. It is well settled that in case of serious offences great care and caution is required to be taken and the learned trial court is expected to consider the evidence meticulously and strictly. The court is not expected to get itself swayed by enormity of the offence. This observation is made in light of the observations of the learned trial court found in paragraph 71 of its judgment concerning the present applicant / accused. The learned trial court inferred his guilt in the crime in question by observing that he was arrested on 21st September 2013 itself and the fact that he was arrested on the very next day of the offence shows that he is involved in commission of that crime. Obviously, such an observation is totally absurd. If it is taken to the logical end, then the police can arrest anybody on the day following the commission of crime and the court would be constrained to convict him merely because of his arrest on the very next day of the offence. The learned trial court also appears to have swayed with illogical reasoning that if the applicant / accused was innocent, then he would have made hue and cry and

would have lodged grievance to higher Police Officers. Such reasoning cannot stand the scrutiny of law.

6 Be that as it may, let us see what the prosecutrix has deposed in order to prima facie infer involvement of the applicant / accused in the commission of serious crime alleged by the prosecution. So far as first part of the incident is concerned i.e. taking the prosecutrix out of the tempo and committing rape on her, the prosecutrix has deposed that accused named Ajay, Vishal, Dastagir and Wasim were involved in that incident. So far as second part of the incident, which allegedly took place at Rahul Nagar Forest area is concerned, the prosecutrix deposed that accused Vishal made a phone call to somebody and immediately Mannu, Hamal and Mahesh came. Mannu, Hamal and Mahesh then committed forcible sexual intercourse with her. This evidence, in the light of paragraph 41 of evidence of the prosecutrix vis-a-vis material elicited from paragraphs 29 and 30 of evidence of Investigating Officer PW41 A.PI. Sarita Bhosale, is seen to have surfaced on record by way of omission. If all this

took place, it is not clarified by the prosecution as to why name of the present applicant / accused was not spelt out at the first available opportunity. It is neither found in the FIR nor in the statement of the prosecutrix under Section 164 of the Cr.P.C. by the Metropolitan Magistrate. This fact, coupled with the fact that forensic evidence is in no manner implicating the applicant / accused as one of the culprits, requires me to hold that the applicant / accused deserves liberty, considering the nature of evidence against him. In case of more than one accused person, tendency of putting embellishment and roping in as many as persons as it can be, is generally found. Therefore the order :

ORDER

- i) The application is allowed.
- ii) Substantive sentence imposed on the applicant / accused is suspended and he is directed to be released on bail, on his executing P.R.Bond in the sum of Rs.30,000/- with one or two surety in like amount.
- iii) As a condition of this order, the applicant / accused should report the concerned Police Station on every first

Monday of each calendar month, in between 11.00 a.m. to 1.00 p.m.

iv) The applicant / accused should not commit any crime during pendency of the appeal filed by him.

(A. M. BADAR, J.)