

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.440 OF 2017

AND

CRIMINAL APPLICATION NO.441 OF 2017

IN

CRIMINAL APPEAL NO.253 OF 2017

KALIM AMIN KHAN

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.K.H.Kamble, Advocate for the Applicant.

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

CORAM : A. M. BADAR, J.

DATE : 29th MARCH 2017.

P.C. :

1 These are applications 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 Section 363, 366 and 376 of the IPC by the learned trial court. For the offence punishable under Section 376 of the IPC, he has been sentenced to suffer rigorous

imprisonment for seven years apart from directing him to pay fine of Rs.1,000/- and in default, to undergo further simple imprisonment for six months. On other counts lesser sentence has been imposed on the applicant/ accused and as all sentences are made concurrent, there is no need to point out other sentences imposed on other counts.

2 Heard the learned advocate appearing for the applicant/ accused. He argued that there is no substantial evidence regarding commission of rape by the applicant/ accused on the informant PW2. The learned APP opposed the application by contending that the offence is held to be proved by atleast one court and considering nature of evidence, the applicant/ accused cannot be released on bail during pendency of the appeal.

3 I have carefully considered the rival submissions and also perused the record made available including deposition of witnesses.

4 It is case of prosecution that the applicant/ accused had kidnapped the minor female victim PW2 from her lawful guardian with an intention that she may be forced or seduced to have sexual intercourse with him and accordingly he committed rape on her.

5 Perusal of evidence of PW2 - the prosecutrix shows that she joined company of the applicant/ accused on 27th November 2011. She was knowing the applicant/ accused. Along with him she had been to Mumbai, Jaipur and then came back to Mumbai. As per her evidence, on 12th December 2011, she returned back to join company of her parents after coming to know that the applicant/ accused is a married person having two issues. She lodged FIR on 13th December 2011. Perusal of the FIR lodged by the prosecutrix goes to show that she had made categorical statement therein that she had no physical relation with the applicant/ accused during her stay with him from 27th November 2011 to 12th December 2011. In her chief-examination the prosecutrix has deposed that after lodging the FIR, she was

again called by the police on the next day. As per her version, on the next day in her supplementary statement she informed the police that she has been raped. When she was again called at the police station, she then informed to police that she had been raped at the hotel.

6 The question which will have to be adjudicated is whether information given to police can be a substantive evidence before the court. In the case in hand, the prosecutrix is not telling before the court that she had been raped by the applicant/accused. What she is stating before the court is that she had informed the police that she has been raped by the applicant / accused in the hotel.

7 Be that as it may, it is seen that the prosecutrix at the relevant time was more than 16 years of age. There is no evidence on record to show that the applicant/accused has applied any force to her while taking her away. On the contrary, the prosecutrix has stated that she had joined the company of the

applicant / accused. So far as the offence punishable under Section 376 of the IPC is concerned, the prosecutrix has not stated before the court that she had been raped by the applicant/ accused. Her FIR shows that there were no physical relations between her and the applicant/ accused. Medical evidence shows that the prosecutrix was habitual to sexual intercourse. Her evidence does not reflect that there was violence on the part of the applicant/ accused. *Prima facie*, therefore, it appears that the case is falling within the guidelines given in paragraph 12 in the matter of **Sunil Mahadev Patil vs. State of Maharashtra**¹ which read as follows :

“12 When a boy and a minor girl are in love with each other and chose to live together without consent

of their parents, then the following factors are to be considered:

(i) What is the age of the prosecutrix, who is minor.

(ii) Whether the act is violent or not.

¹ 2016 ALL MR (Cri) 1710

(iii) Whether there are antecedents or not.

(iv) Whether the offender is capable of repeating the Act or not.

(v) Whether there is likelihood of threats or intimidation, if at all the boy is released.

(vi) Whether any chance of tampering with the material witnesses when their statements are recorded.

(vii) It is also to be taken into account in such cases that a boy in his early 20's deserves to get employment and to plan, stabilize and secure his future.

”

8 In this view of the matter, the applicant/ accused deserves liberty and therefore, the order :

- i) The application is allowed.
- ii) Substantive sentence of imprisonment imposed upon the applicant/ accused is suspended and the applicant/ accused is directed to be released on bail on

his executing P.R. Bond in the sum of Rs.15,000/- and on furnishing surety in like amount.

iii) As a condition of this order, the applicant/ accused should not contact the prosecutrix in any manner and he should not extend any threat, promise or inducement to her as well as her family members.

(A. M. BADAR, J.)