

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1135 OF 2015

IN

CRIMINAL APPEAL NO.137 OF 2016

MANGESH SUKHDEO KHAIRE

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Tushar L. Pimple, Advocate for the Applicant.

Ms.A.A.Takalkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 13th JANUARY 2017.

P.C. :

1 This is an application by convicted accused for suspension of sentence and releasing him on bail during pendency of the instant appeal. The applicant / accused is convicted of the offences punishable under Sections 376 and 366A of the IPC and under Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act). He is sentenced to suffer rigorous

imprisonment for 7 years and 2 years respectively, for the offence punishable under Section 376 and 366A of the IPC. Apart from this, despite of provisions of Section 42 of the POCSO Act, the applicant / accused is sentenced to suffer rigorous imprisonment for 7 years for the offence punishable under Section 4 of the POCSO Act. Some fine is also imposed on the applicant / accused.

2 Heard the learned counsel appearing for the applicant / accused. He argued that the alleged sexual intercourse, even according to evidence of the prosecution, was consensual and it is seen that the applicant / accused and the prosecutrix were deeply in love. Therefore, considering the age of parties at the relevant period as well as the circumstances in which the incident in question took place and conduct of the prosecutrix, liberty of the applicant / accused needs to be restored to him till disposal of his appeal.

3 The learned APP opposed the application by contending that evidence on record shows that the prosecutrix

was not of consenting age and the offence alleged against the applicant / accused is serious.

4 I have carefully considered the rival submissions and also perused the impugned judgment and order as well as deposition of witnesses. According to the prosecution case, the applicant / accused had kidnapped the prosecutrix in order to force or seduce herself to illicit intercourse with him and had committed rape on her.

5 Prima facie, it is seen that the prosecutrix was not of a consenting age at the time of commission of the alleged offence. However, it is seen that she was about 16 years of age and was studying in 12th Standard in Karmaveer Bhaurao Patil College at the time of incident. This aspect needs consideration, apart from the fact that the applicant / accused is also a young person.

6 Evidence of the prosecutrix shows that she was in deep love with the applicant / accused though she denied this fact.

Shops of the present applicant / accused and that of brother of the prosecutrix were adjacent to each other and the prosecutrix was visiting the shop of her brother. Though she stated that the applicant / accused used to threaten her by contacting her telephonically, to have physical relations with her, this evidence has come on record by way of omission. The prosecutrix has not stated in her evidence as to when and where and how the applicant / accused had committed rape on her. Without disclosing these facts, she straightaway deposed that because of sexual intercourse committed by the applicant / accused on various occasions, she became pregnant. What happened thereafter, is also relevant.

7 Evidence of PW6 Ashutosh – brother of the prosecutrix shows that on 15th November 2012, the prosecutrix left her house without disclosing this fact to anybody. On this backdrop, it is in evidence of prosecutrix that she accompanied the applicant / accused to Shirdi and thereafter stayed with the applicant / accused for a period of about one month. During this period, she

gave birth to a child. The couple, along with newly born child, then returned to their native place Islampur. But instead of going to parental house, they preferred to stay in a lodge.

8 Evidence of PW7 Dr.Anjali and PW8 Dr.Mrunal goes to show that in papers of medical treatment as well as medical papers, prepared at the time of delivery of prosecutrix, name of the applicant / accused is shown as her husband. During all this long time of stay with the applicant / accused, the prosecutrix never complained against the applicant / accused. She accepted the fact that when the applicant / accused used to go out of the house for earning livelihood, she used to stay at the home itself. If all this was going on without her wish or will, nothing prevented her from lodging report or escaping from the alleged custody of the applicant / accused.

9 Be that as it may, in the matter of Sunil Patil vs. State of Maharashtra, Criminal Bail Application No.1036 of 2015, decided on 3rd August 2015, this court has considered the aspect

as to when bail in such matter can be granted. Paragraph 12 of that order is relevant and it reads thus :

“12. The overall considerations while deciding such applications can be summed up as -

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.

(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.

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10 It is, thus, seen that when a boy and a minor girl are in love with each other and chose to live together without consent of their parents, then looking to the fact that there was no force or violent threats or intimidation to the prosecutrix, liberty can be granted to the accused in such case.

11 In the case in hand, appeal filed against the impugned judgment and order of conviction is already admitted. The applicant / accused is also a young boy and considering the circumstances in which the crime in question allegedly took place and the fact that the appeal will take its own time for disposal, the application deserves to be allowed and therefore the order :

- i) The application is allowed.
- ii) The substantive sentence of imprisonment imposed

upon the applicant / accused is suspended and he is directed to be released on bail on executing P.R.Bond in the sum of Rs.15,000/- and on furnishing surety in like amount.

iii)The applicant / accused should not extend any threats to the prosecutrix or her parents and he should not contact the prosecutrix and her relatives in any manner.

(A. M. BADAR, J.)