

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1605 OF 2017

IN

CRIMINAL APPEAL NO.975 OF 2017

AKSHAY HARISHCHANDRA NARVEKAR)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Rahul Arote, Advocate for the Applicant.

Mr.Y.M.Nakhwa, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 18th DECEMBER 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. This court, vide order dated 5th December 2017, has already admitted the appeal filed by the applicant/accused for final hearing. The applicant/accused is convicted of

offences punishable under Sections 363, 366, 376(2)(i) of the Indian Penal Code (IPC) and he is sentenced accordingly for those offences.

2 Heard the learned advocate appearing for the applicant/accused. He argued that there is no conclusive proof of age of the alleged victim of the crime in question. The oral evidence in respect of her age given by the alleged victim of the crime in question is of no assistance to the prosecution. The learned advocate further argued that the prosecution has not examined the Medical Officer who has conducted the Ossification Test, and therefore, evidence of some other Medical Officer, who had deposed that the prosecutrix was between 14 to 16 years of age, is not acceptable. The learned advocate further argued that Prosecution Witness No.8 Sanchita Khedekar, Head Mistress, has admitted in her cross examination that she does not know on the basis of which document, the age of the alleged victim of the crime in question, is recorded in the record of the school. Therefore, according to the learned advocate for the

applicant/accused, in the light of judgment of the Hon'ble Apex Court in the matter of Alamelu and Another vs. State, Represented by Inspector of Police with connected Appeals¹, there is no evidence on record to show that the prosecutrix was not of a consenting age. Her evidence reveals that she was in deeply love with the applicant/accused, and therefore, the applicant/accused who was on bail during pendency of the trial, needs to be released on bail.

3 The learning Additional Public Prosecutor opposed the application by contending that prosecutrix had candidly stated that she was kidnapped by the present applicant/accused and then she was raped by the applicant/accused by taking her to Kolhapur. The learned Additional Public Prosecutor drew my attention to evidence of Prosecution Witness No.7 Dr.Sachin Rajput as well as to the evidence of Prosecution Witness No.8 Sanchita Khedekar and submitted that the applicant/accused is not entitled for bail.

1 (2011) 1 Supreme Court Cases (Cri) 688

4 I have carefully considered the rival submissions and also perused the impugned judgment and order as well as copies of deposition. Prosecution Witness No.1 is the alleged victim of the crime in question. She has stated that her date of birth is 1st June 1998. On 8th January 2014 the applicant/accused forcibly took her when she went to bring milk. By taking her to Kolhapur, the applicant/accused committed sexual intercourse with her on two to three occasions. Cross-examination of Prosecution Witness No.1/prosecutrix reveals that she was in love with the applicant/accused, who at the relevant time, appears to be 22 years of age. In paragraph 8 of her cross-examination, the Prosecution Witness No.1/prosecutrix has admitted the suggestion given by the defence that as she was liking the present applicant/accused, she had been to Gateway of India with the applicant/accused as well as her relatives. Cross-examination of Prosecution Witness No.1/prosecutrix further shows that she used to write letters to the applicant/accused. It is seen from her cross-examination that Prosecution Witness No.1/prosecutrix was roaming with the applicant/accused at various places and had

even stayed with him as well as with her relatives at a lodge at Kalamb by hiring rooms. The defence has got proved photographs of the Prosecution Witness No.1/prosecutrix with the present applicant/ accused during the course of her cross-examination.

5 So far as age of the Prosecution Witness No.1/prosecutrix is concerned, the prosecution has examined Head Mistress of the school where Prosecution Witness No.1/prosecutrix was taking school education. She is Prosecution Witness No.8 Sanchita Khedekar. She deposed that as per certificates given by the school, date of birth of the Prosecution Witness No.1/prosecutrix is 1st June 1998. In cross-examination, this witness has admitted that she is not aware as to, on the basis of which document, entry in respect of date of birth of Prosecution Witness No.1/prosecutrix was taken in the school record. At that time, she was not working in the school. This witness has admitted that the documents in respect of date of birth of Prosecution Witness No.1/prosecutrix were issued prior to her joining as Head Mistress. In the matter of Alamelu and Another

(supra) in paragraph 40, the Honorable Apex court has held thus :

“Undoubtedly, the transfer certificate, Ex.P-16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.”

It is, thus, clear from this verdict of the Honorable Apex Court that the date of birth mentioned in the Transfer Certificate has no evidentiary value unless the person, who made the entry or who gave the date of birth to the authorities of the school, is examined.

6 It is seen that Prosecution Witness No.1/prosecutrix was subjected to Ossification Test. The doctor who conducted the test in respect of bony age of Prosecution Witness No.1 is not examined by the prosecution. Prosecution Witness No.7 Dr.Sachin Rajput has stated that he knows the signature of Dr.Vyavahare who had conducted the Ossification Test. On the basis of report of Dr.Vyavahare, Prosecution Witness No.7 Dr.Sachin Rajput has stated that radiological age of Prosecution Witness No.1/prosecutrix is 14 to 16 years. In the matter of Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir and Others², the Honorable Apex Court has held that there is error of 2 years on both sides in the radiological age of a person.

7 Thus, in the case in hand, the prosecutrix appears to be deeply in love with the applicant/accused, who at the relevant time was a young boy aged about 22 years. Evidence recording the age of the prosecutrix is prima facie discrepant. The applicant/accused was on bail during pendency of the trial.

2 AIR 1982 Supreme Court 1297

8 In the matter of **Satyam Ramchandra Fulore vs. The State of Maharashtra**³ (Coram : **Sadhana S. Jadhav, J.**), the alleged victim of the crime was 16 years old female child who was intending to marry the applicant/accused therein. With a reason that the girl was in love with the applicant/accused therein, this court, vide order dated 30th September 2014, was pleased to release the applicant/accused therein, on bail. In the matter of **Sunil Patil vs. State of Maharashtra**⁴ in paragraph 12, this court has given guidelines while considering the case of a boy and a minor girl in love. Considering the fact no force or violence was applied to the alleged victim of the crime in question and the present applicant/accused as well as the victim of the crime in question were deeply in love with each other, I do not see any reason to deny bail to the present applicant/accused.

9 In this view of the matter, I am of the opinion that the applicant/accused is entitled to be released on bail during pendency of the appeal filed by him, and therefore the order :

3 Criminal Bail Application No.1953 of 2014

4 2016 ALL MR (Cri) 1710

ORDER

- i) The application is allowed.

- ii) Substantive sentence of imprisonment imposed on 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 the like amount.

- iii) As a condition of this order, the applicant/accused should not contact the prosecutrix/Prosecution Witness No.1 as well as her relatives in any manner during the pendency of the appeal, failing which, the prosecution is entitled to get this order cancelled by moving appropriate application.

(A. M. BADAR, J.)