

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1567 OF 2016

IN

CRIMINAL APPEAL NO.827 OF 2016

HARISH SAMAD ALI SHAIKH

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Naina Rao h/f. Mr.Umesh Iyer, Advocate for the Applicant.

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

CORAM : A. M. BADAR, J.

DATE : 7th MARCH 2017.

P.C. :

1 This is an application for suspension of sentence and release of applicant / accused on bail during pendency of the appeal filed by him. The applicant / accused has been convicted of the offence punishable under Section 376 of the IPC and he has been sentenced to suffer rigorous imprisonment for 7 years apart from payment of fine of Rs.10,000/-.

2 Heard the learned advocate appearing for the applicant / accused. She argued that the FIR of the incident in question came to be lodged after eight months from the incident and that too when the prosecutrix was running pregnancy of seven months. This, according to the learned advocate appearing for the applicant / accused, shows that whatever had happened, had happened with consent of the prosecutrix. The learned advocate argued that the prosecutrix is a matured lady having a daughter and she was residing with her sister and still the incident was not disclosed to anybody.

3 As against this, according to the learned APP, the initial act was against her will and without the consent of the prosecutrix. The learned APP further argued that considering the strata of people from which the prosecutrix belongs, the delay in lodging FIR is of no consequence. The incident is not disputed and the applicant / accused had fathered a child out of the incident.

4 I have carefully considered the rival submissions and also perused copies of deposition of prosecution witnesses as well as documentary evidence.

5 PW1 is the prosecutrix. Her evidence shows that she was about 27 years of age at the time of the incident. She was on visiting terms with the applicant / accused, his daughter Salina being friend of the prosecutrix. Evidence of the prosecutrix, so also the FIR lodged by her shows that she was knowing the applicant / accused very well.

6 So far as the alleged incident is concerned, the prosecutrix has stated that eight months prior to lodging the FIR dated 24th March 2015 by her, Salina – her friend and daughter of the applicant / accused requested her to sleep with her. The reason disclosed is fear of the applicant / accused in the mind of his daughter Salina. This Salina is not examined by the prosecutrix.

7 According to the prosecutrix, she acceded to the request of Salina and slept in the house of the applicant / accused. In the morning, when at about 5.00 a.m. when Salina left the house, the applicant / accused committed forcible sexual intercourse with her. The prosecutrix has further stated that thereafter the applicant / accused told her not to disclose the incident to anybody and that he will marry her. The applicant / accused is also stated to have assured her that he will provide a house to her.

8 Evidence of the prosecutrix does not show that she was under the spell of terror or threat of the applicant / accused after the incident. She was very well acquainted with the applicant / accused. The FIR lodged by the prosecutrix, so also her evidence, shows that the prosecutrix is a divorced lady having a daughter aged about 9 years. She was residing with her sister. In other words, the prosecutrix is a fully grown up lady knowing what was right for her and what was wrong for her. She had attained the consenting age. However, still she had not reported the incident, if it was against her will and without her consent.

9 Evidence of PW4 Samsoor Shaikh – sister of the prosecutrix, is totally inconsistent with the version of the prosecutrix. PW4 Samsoor Shaikh has stated that it was on 24th March 2015 that the incident of alleged forcible sexual intercourse with her sister i.e. PW1 took place. It is worthwhile to note that according to the prosecution case, as reflected from the FIR, so also the evidence of PW1 – the prosecutrix, the incident in question took place eight months prior to 24th March 2015. Evidence of PW4 Samsoor Shaikh also shows that the prosecutrix did not disclose the incident to her, despite running pregnancy of six months duration.

10 Consent is an act of reason. Mind weighing has in balance what is good for oneself and what is bad for oneself. In the wake of this evidence of the prosecutrix and her sister at the time of final hearing of the matter, one will have to examine whether the act was with or without consent.

11 Suffice to state that considering this nature of evidence against the applicant / accused, pending the appeal filed by him, he 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 should extend any threat to her.

(A. M. BADAR, J.)