

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.257 OF 2018

IN

CRIMINAL APPEAL NO.109 OF 2018

Hemraj Mohanji Nakum ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

Ms.Pracheta Rathod for the applicant.

Ms.V.S. Mhaispurkar, APP for the respondent/State.

CORAM : A.M.BADAR J.

DATED : 14th JUNE 2018.

P.C. :

1. This is an application for suspension of sentence and for releasing the applicant/accused on bail during the pendency of the appeal filed by them. Though the applicant/accused is acquitted of offence punishable under Sections 4 and 6 of the Protection of Child from Sexual Offences Act, 2012, the learned Trial Court convicted the applicant of offence punishable under Section 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment of seven years apart from fine of Rs.2,000/- and default sentence of one month.

2. Heard the learned Advocate appearing for the applicant/accused no.1. She took me through the statement dated 13th March, 2015, 14th March, 2015, 19th March, 2015 and 30th April, 2015 of the alleged victim of the crime and contended that first two statements of the victim/female prosecutrix is in no way implicated the applicant in crime in question. The learned Advocate further argued that cross-examination of the investigator shows neither the prosecutrix, nor her father was willing to lodge the FIR, but it was the investigator who was insisting the victim/prosecutrix to lodge the FIR by giving name of the offender. The learned Advocate further argued that in 4th statement, the victim/prosecutrix has even implicated wife of the present applicant.

3. The learned APP opposed the application by contending that the statement of the victim/prosecutrix i.e. PW1 is stating about the incident which had happened prior to seven months of lodging the FIR whereas her two statements were in respects of incident which allegedly took place prior to one and half months.

4. I have carefully considered rival submissions and also perused the impugned judgment as well as copies of deposition of prosecution witnesses. Undisputedly, the applicant is behind bar for a period of

three years and two months excluding remission and the sentence imposed upon him is only of seven years.

5. The case of the prosecution reflects that the prosecutrix/PW1 was knowing the present applicant as well as the co-accused who is the wife of the present applicant. The prosecutrix was taken to the Somaiya Hospital for medical termination of her pregnancy by her father. They both, as seen from the evidence of PW5 Satish Baburao Ghare, Investigating Officer, were not desirous of lodging the FIR but police were called at instance of medical officer PW4 Dr.Kamlesh Choudhari. These facts are also clear from PW4 Dr.Kamlesh Choudhari.

6. First version of the prosecutrix/PW1 was then recorded by the investigator on 13th March, 2015. Though acquainted with the present applicant and also his family members, the prosecutrix / PW1 has attributed the cause of her pregnancy to one unknown person who met her in the garden prior to one or one and half moth. Then immediately on the next date 14th March, 2015 again second statement of the prosecutrix /PW1 came to be recorded by the Investigator. Again this time, the prosecutrix referred and attributed her pregnancy to act done by one unknown person in the garden. This statement of 14th March, 2015 was considered as FIR lodged by the prosecutrix and it was

registered against an unknown person. Then again on 19th March, 2015, 3rd statement of the prosecutrix came to be recorded wherein she alleged sexual intercourse by the present applicant with her on three occasions and that too prior to seven months. No overt act was attributed to wife of the present applicant i.e. accused no.2 in the said statement. Then on 30th April, 2015 against statement of prosecutrix came to be recorded by the Investigator wherein she has attributed overt act to wife of the present applicant who then came to be arraigned as accused no.2 in the crime in question.

7. In paragraph 51 of the impugned judgment and order, the learned Trial Court has categorically recorded the finding that the prosecution has failed to prove that the fact, that the prosecutrix is a child below 18 years of age. This resulted in acquittal of the present applicant for offences punishable under Sections 4 and 6 of the Protection of Child from Sexual Offences Act, 2012.

8. The chronologically of all events stated in the foregoing paragraphs unerringly points out that the prosecutrix was unwilling to disclose the incident to the police and that, at the instance of the PW4 Dr. Kamlesh Choudhari she has modulated her version from time to time to stand her convenience and convenience of the Investigating

officer. Her evidence even if accepted as it is, then also it is a case of consensual sex and this fact assumes important because the prosecution has failed to prove the fact that the prosecutrix was not of an consenting age.

9. Be that as it may, including the period of remission, the applicant must have undergone more than half of the substantive sentence imposed on him. The appeal filed by him is of this year and considering huge the pendency of the appeal before this Court, the same is not likely to be heard in near future. Therefore, considering the evidence against the present applicant and the sentence already undergone by him, the following order;

:: ORDER ::

- (i) The application is allowed.
- (ii) Substantive sentence of imprisonment 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.15,000/- and on his furnishing one or more surety in the like amount.
- (iii) As a condition of this order, the applicant should not contact the victim/prosecutrix or her family members in any manner.

(A.M.BADAR J.)