

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1708 OF 2017

IN

CRIMINAL APPEAL NO.1037 OF 2017

Suresh Shamu Prajapati ...Appellant

Versus

The State of Maharashtra ...Respondent

WITH

CRIMINAL APPLICATION NO.1709 OF 2017

IN

CRIMINAL APPEAL NO.1038 OF 2017

Manoj Chhotelal Mali ...Appellant

Versus

The State of Maharashtra ...Respondent

Mr. Priyatosh R.Tiwari i/b A.M. Saraogi for the applicant.

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

CORAM: A.M. BADAR, J.

DATED: 8th JANUARY 2018

PC:-

1. Applicants Suresh Prajapati and Manoj Mali who are convicted and accordingly sentenced by the learned Additional Sessions Judge, Thane in Sessions Case No.235 of 2012 by these applications are seeking suspension of sentence and releasing them on bail during pendency of the trial. Applicant Suresh Prajapati is convicted of offence punishable under Section 363, 366-A, 376 of the Indian Penal Code. For offences punishable under Sections 376 and 366-A of the Indian Penal Code, he is sentenced to suffer Rigorous Imprisonment for seven years on each count. No separate sentence is imposed on him for the offence punishable under Section 363 of the Indian Penal Code. Applicant Manoj Mali is convicted of the offence punishable under Section 366-A of the Indian Penal Code and he is sentenced to suffer Rigorous Imprisonment for five years.

2. Heard the learned advocate appearing for the applicants/accused. By taking me through the deposition of

witnesses, the learned advocate argued that in fact there is no legally admissible evidence against the present applicants in order to convict them on alleged offences. The learned advocate argued that because of death of the alleged victim of the crime in question, there is no substantive evidence against the present applicants and even if, it is assumed that there is some forensic evidence is available with the prosecution the same is not sufficient to convict the present applicants of the alleged offences as blood found on the clothes of the alleged victim of the crime in question or semen found on the leggings of the alleged victim forms corroborative piece of the evidence. The learned advocate further argued that in absence of any evidence to point out that the blood and semen found on the clothes belongs to applicant Suresh Prajapati, the learned Trial Court ought not to have convicted applicant Suresh Prajapati. It is further argued that both the applicants were on bail during the pendency of the trial and they did not misuse their liberty.

3. The learned APP opposed the application by contending that former statements by the alleged victim of the crime in question were proved by the prosecution through the evidence of father and brother of the deceased and those statements are admissible under Section 157 of the Evidence Act to infer guilt of the applicants/accused in the crime in question.

4. I have carefully considered the rival submissions and also perused the copies of depositions as well as the impugned judgment and order of conviction. The incident in question allegedly took place on 28.9.2011. According to the prosecution case, victim female child who at the relevant time was aged about 14 years and taking education in 9th Standard, was kidnapped by applicant Suresh Prajapati and in the night intervening 28.9.2011 and 29.9.2011 she was raped by him. Allegations against applicant Manoj Mali are to the effect that he provided his room and actively aided co-accused Suresh Prajapati in commission of crime.

5. Undisputedly, after few months from the alleged incident, the alleged minor victim of the crime in question died by suicidal death. There is no iota of evidence to connect the suicidal death of the minor female child with the incident in question. Therefore, statements, if any, made by the alleged minor female victim of the crime in question to the investigator cannot be used in evidence in pursuant to the provisions of Section 32 of the Evidence Act. Similarly, former statement by a witness can be used after its due proof for corroborating the version of such witness. In the case in hand, the alleged minor female child of the crime in question died during pendency of the trial prior to recording of her evidence and as such her evidence is not available. Therefore, version of her father Baban Ghadge and Brother Mayur Ghadge regarding her disclosure to them is prima facie of no assistance to the prosecution.

6. It is revealed from the impugned judgment and order

that statement of the alleged minor female victim recorded by the police under Section 161 of the Code of Criminal Procedure were used as substantive evidence by the learned trial Judge and that is how both applicants were convicted and sentenced.

7. Even if, substantive evidence of father Baban Ghadge and brother Mayur Ghadge is scrutinised then it is also seen that the same is at variance with the report lodged by PW-6 Baban Ghadge as well as former statement of PW-1 Mayur Ghadge. This is the position of evidence available against applicants/accused.

8. Both the applicants were on bail during pendency of the trial and they had not misused their liberty. Fixed sentence which runs maximum for 7 years so far as the applicant Suresh is concerned and that of 5 years so far applicant Manoj is concerned, is imposed on them. Considering the pendency of the appeals before this Court and nature of

evidence available against both the applicants, I see no reason to refuse bail to both the applicants. Therefore, the following order:-

ORDER

- i) Both the applications are allowed.
- ii) Substantive sentence of imprisonment imposed on both the applicants is suspended and they are directed to be released on bail on executing their P.R. Bond of Rs.15,000/- each and on furnishing sureties in the like amount by each of them.

(A.M. BADAR, J)