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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO. 1939 OF 2018
IN
CRIMINAL APPEAL NO. 1181 OF 2018**

Kalpesh Rahul Mohite

....Applicant

Vs.

The State of Maharashtra

....Respondent

Mr. Prashant Ganeshnarayan Pandey Advocate for the applicant
Mr. S. H. Yadav APP for the State.
Mr. Anil Desai, PI Mahim Police Station

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : 11th DECEMBER, 2018.

P.C.

Heard. This is an application under section 389 of Code of Criminal Procedure, 1973. Applicant herein is convicted for offence punishable under section 376 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 10 years and fine of Rs. 1000/- in default to suffer simple imprisonment for 15 days. He is

also convicted for offence punishable under section 354 r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and fine of Rs. 500/- I/d to suffer simple imprisonment for 7 days. He is also convicted for offence punishable under section 366 r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and fine of Rs. 500/- I/d to suffer simple imprisonment for 7 days. He is also convicted for offence punishable under section 4 r/w section 17 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 10 years. He is also convicted for offence punishable under section 8 r/w section 17 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 3 years with fine of Rs. 1000/- I/d to suffer simple imprisonment for 15 days. He is also convicted for offence punishable under section 12 r/w section 17 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for one year with fine of Rs. 500/- I/d to suffer simple imprisonment for 15 days. All substantive sentences to run concurrently by Special Judge (POCSO) Greater Mumbai vide

Judgment and Order dated 21/08/2018 in Special (POCSO) Case no. 804 of 2013.

2 The learned counsel for the applicant submits that co-accused Mohd. Salim Mohd. Shamim Khan has been enlarged on bail by the Co-ordinate Bench [Coram: A. M. Badar, J.] vide order dated 09/10/2018. It is submitted that the allegations levelled against both the accused are same in nature.

3 Perused the evidence adduced by the prosecution at the trial. The substantive evidence of the victim is recorded in camera. She has deposed before the Court that she was in 8th standard and that she was in love with one boy namely Deepak Shamim. Her parents and family members had objected to the said love relation and warned her not to meet her friend. According to her, family members were not talking with her on that count and hence, she had decided to leave the house. On 28/05/2013, she left the house. According to her, her neighbour i.e. Mohd. Saleem had outraged her modesty. He had ravished her. Initially she had gone to her house, however, on the

second thought, she decided to leave the house and commit suicide. At about 3.00 a.m., when she was passing through the highway, a white colour car had approached her. There were 5 boys in the car. They had requested a hand for friendship to which she consented. She boarded the car and thereafter, she was ravished by the present applicant. He had driven the car towards Kherwadi. His other friends had boarded the car. They had also outraged her modesty. When she was not co-operating, she was abandoned by the boys on the road. From there she has taken auto. The driver of the auto had extended compassion to her and therefore, she stayed with auto driver. On the next day morning, he has dropped her at Borivali station, from there she reached Virar. Her grandmother was not present at home and therefore she went to the house of her paternal uncle. From there she went to her own house and narrated the traumatic incidence which she had gone through. Her parents had taken her to the police station to lodge report.

4 According to her, she had stayed in the police station for two days and there her statements were recorded.

5 It is pertinent to note that she had not named the applicant in the F.I.R. She had neither given his description. She had not mentioned the make of the car or the registration number of the car. All the accused were arrested on 30/05/2013. Accused were shown to the victim in the police station. Thereafter, the photographs of the accused were shown to the other witnesses as well as the victim. Prima facie, the test identification parade conducted by the Investigating Agency in the course of investigation was of no significance as the accused were shown to the victim and other witnesses. There are inherent inconsistencies in the substantive evidence of the victim. At the belated stage, in the cross-examination, she has specifically stated that her statement was recorded on 29/05/2013. For 2-3 days, police were inquiring with her. That the accused were not produced before her at the police station but their photographs were shown and she had identified the accused persons from the photographs. Subsequently, she was taken to jail premises for the purpose of conducting test identification parade. The car that is seized is in fact a silver colour car. She has admitted that she has

not stated the registration number of the said vehicle. She has also admitted that on 27th midnight, she had left the house for committing suicide as her parents were not allowing her to meet Deepak. The Court had asked a question as to why she had taken Rs. 500/- from her mother's purse, if she had left the house for committing suicide and at that stage, the victim had maintained silence. She has reiterated before the Court that she was made to sit in the police station for 2-3 days.

6 The learned counsel for the applicant submits that in fact the whole case rests on test identification parade. In fact, accused Salim was her neighbour. She was acquainted with him. Salim was the first person who had ravished her on that day. The learned counsel submits that the accused Salim has been enlarged on bail by this Court (Coram: A.M. Badar, J.), despite the fact that there are serious allegations against him. It is also submitted that the present applicant was stranger to her.

7 The learned APP submits that the car was owned by the company and was returned to the company and that the father of the

applicant was working as driver on the said car. There is no substantive evidence to that effect. The applicant was 23 years old at the time of incident.

8 According to the learned counsel for the applicant, applicant was enlarged on bail under section 167 (2) of Code of Criminal Procedure, 1973, however, the same is disputed by the APP on the basis of instructions of Investigating Officer and it is submitted that the applicant was enlarged on bail after filing of the charge-sheet.

9 Be that as it may, in view of the above discussion, applicant deserves to be enlarged on bail upon imposing certain stringent conditions.

ORDER

(I) Application is allowed.

(II) Applicant be enlarged on bail on furnishing P. R. bond in the sum of Rs. 50,000/- and one or more solvent sureties in the like amount. Applicant be enlarged on provisional cash bail for a period of

6 weeks within which period he shall furnish P.R. bond and solvent sureties.

(III) Applicant shall report to the Court of Sessions (POCSO) Greater Mumbai once in three months on the date assigned by the learned Sessions Judge.

(IV) Upon failure to attend any two consecutive dates, the Special Court shall make a report to the High Court and the Prosecution would be at liberty to file application seeking cancellation of bail.

(V) Applicant shall not reside in Mumbai for two years during the pendency of the Appeal.

10 Application stands disposed of.

[SMT. SADHANA S. JADHAV, J.]