

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.163 OF 2019

IN

CRIMINAL APPEAL NO.164 OF 2019

Salim Wasim Shaikh ... **Applicant**

V/s.

The State of Maharashtra & Anr. ... **Respondents**

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Ms.Nazima Y. Malik, Advocate for the Applicant.

Ms.P.N.Dabholkar, APP for the Respondent No.1/State.

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CORAM : A.M.BADAR J.

DATED : 20th FEBRUARY 2019.

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. The applicant/accused is convicted for the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.25,000/- and in default to further undergo simple imprisonment for three months.

2 Heard the learned Counsel for the applicant/accused. She argued that though points for determination framed by the learned trial Court was covering the year 2014, there is no iota of evidence to show that the applicant/accused has committed rape on the prosecutrix in the year 2014. It is further argued that no specific instances are proved as seen from paragraph 34 of the impugned Judgment and Order. The same is also reflecting the fact that the victim was accompanying the applicant/accused of her own. It is further argued that as per prosecution case, the applicant/accused was engaged to one Kishor and promised to marry her did not survive. The sample of handwriting of the applicant/accused was not taken nor any report was placed on record. The spot panch is stating that the spot of the incident was 10 x 16 feet room where said incident is not possible. The learned Counsel further submitted that evidence of the prosecution is inconsistent. The prosecutrix is not accepting the fact that she was roaming with one Kishor on motorcycle whereas her mother P.W.No.1 has spoken about it while in the witness box. With this, the learned Counsel for the applicant/accused submitted that the applicant/accused is entitled for bail.

3 The learned Additional Public Prosecutor opposed the application by contending that the sexual intercourse by the applicant/accused with the prosecutrix was against her will. Her evidence is corroborated by evidence of P.W.No.4 Dr.Swati. It is

further argued that the prosecutrix was not major at the time of the incident.

4 I have considered the submissions so advanced and perused the material placed on record.

5 Birth Certificate (Exhibit 27) of the prosecutrix was placed on record by the prosecution which is showing her date of birth as 12/04/1999. From cross-examination of the prosecutrix also her date of birth is brought on record as 12/04/1999. Her mother P.W.No.1 has also spoken about the same date of birth. Thus, birth date of the prosecutrix is not in dispute. On this backdrop, it is in evidence of P.W.No.4 Dr.Swati that the prosecutrix accompanied by the present applicant/accused had been to her clinic on 21/07/2015 and at that time she was running pregnancy of six weeks duration. This implies that the prosecutrix had sexual intercourse when she was below 18 years of age and, as such, was a child as defined under Section 2(d) of the Protection of Children from Sexual Offences Act, 2012. The prosecutrix, at the relevant time, was not of consenting age and as such her consent and will, if any, pales into insignificance.

6 The prosecutrix has deposed that she had sexual intercourse with the applicant/accused from the year 2015 at her house as well as in the Hotel. She deposed that the

applicant/accused had taken her initially to Bhatiya Hospital and then to the Clinic of P.W.No.4 Dr.Swati for aborting foetus. This evidence is gaining corroboration from evidence of P.W.No.4 Dr.Swati.

7 In criminal case proof of mathematical precision is not required, but what is required is that proof beyond all reasonable doubts. Evidence of the victim of the sexual intercourse is not required to be corroborated if the same is found to be trustworthy and acceptable. As the prosecutrix had not even attained the consenting age in the year 2015 absence of evidence regarding sexual intercourse in the year 2014 is of no consequence.

8 Considering the nature of crime, no case for grant of bail is made out. The application for bail is rejected.

(A.M.BADAR J.)