

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 842 OF 2019

IN

CRIMINAL APPEAL NO. 770 OF 2019

Farhaj Alisab Nadkar

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

...

Mr. Ganesh K. Gole a/w Mr. Attet Shirodkar for the Applicant.

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

CORAM: P N. DESHMUKH, J.

DATED : 26th SEPTEMBER, 2019.

P.C:-

1. Original accused No. 2 Farhaj Alisab Nadkar is convicted for the offences punishable under Sections 376(2)(i), 376(2)(j) of the Indian Penal Code and is sentenced to suffer RI for ten years and to pay fine of Rs. 25,000/-, in default to suffer RI for one year on above counts who is also convicted for the offences punishable under Sections 366, 324 and 506 of Indian Penal Code has filed this application for suspension of sentence and for bail.

2. It is the case of the prosecution that on 7th April 2015, the minor prosecutrix lodged report that in the night of 3rd April 2015 original Accused No. 1 (acquitted) who is also known as Guddu called her on her mobile requesting her to meet him near the river saying that he loved her. However, she did not listen to his request. On 6th April 2015, at 11.00 a.m. said accused again phoned her directing to meet him on that night. When she went at the river, there accused no. 1 was present. She further stated that at that time he assaulted prosecutrix by his kick and fist blows, and on making her lie down on floor, on removing her clothes, forcibly committed sexual intercourse. Accordingly report came to be lodged on 7th April 2015 upon which offence came to be registered.

3. Learned Counsel for the applicant submitted that evidence of prosecutrix, who though is found to be minor, is not at all convincing as she had not come out with true facts and her evidence is contrary to her statements, which are as many as four in numbers. Learned Counsel by referring to the evidence of the prosecutrix, has pointed out material contradictions and omissions from her evidence which are found duly proved through Investigating Officer and relevant portions of her statements are proved and marked as Exhibit 17, supplementary statement dated 7th April 2015 at Exhibit 20, portion Exhibit 19 in

statement dated 10th April 2015, Exhibit 18 from additional statement dated 10th April 2015 and Exhibit 21 from additional statement dated 13th April 2015. Referring the nature of evidence as aforesaid, it is submitted that prosecutrix at one time had involved applicant in her FIR and in her additional statements dated 7th April 2015 and 10th April 2015 involved both the accused. It is contended that in fact involvement of acquitted accused No.1 is further substantiated from the CA report, as semen of group "B" of said accused no.1 is found on the pyjama of prosecutrix. Thus, referring to above evidence on record, and contending that though according to the case of the prosecutrix, she was taken out by the appellant in the presence of her sister Muskan, said Muskan is not examined. It is therefore prayed that as appellant was on bail pending the trial, and there is no sufficient evidence, he be released on bail by imposing suitable conditions.

4. Learned APP opposed the application contending that there is direct evidence involving the applicant in present crime. However to a specific question put to the effect that on what way learned trial Judge acquitted original no.1, nothing material can be pointed out.

5. In the background of above said submissions and facts, there appears substance in the submissions advanced for the appellant

as in the FIR Exhibit 17, there is no whisper against applicant in the present crime. In Exhibit 20, additional statement of prosecutrix dated 7th April 2015, acquitted accused no. 1 alone is involved. It is found that when her second additional statement is recorded on 10th April 2015 of which material portion is marked as Exhibit 19 and her fourth additional statement dated 13th April 2015 of which material portion is marked as Exhibit 21, since proved by Investigating Officer, applicant's involvement is seen wherein it is alleged that in the night of 6th April 2015 accused no. 2 committed sexual assault on her at the river side. Contrary to above evidence, from the third additional statement on record dated 10th April 2015, prosecutrix has again come out with a story of her being assaulted by both the accused which portion is marked as Exhibit 18. Having considered the nature of evidence on record, evidence of prosecutrix does not inspire confidence to establish involvement of applicant.

6. It is material to note that even fact of recording of additional statements of prosecutrix is doubtful as at one place she states that her statement was recorded by lady Police Officer when she was admitted in hospital and has admitted that after her discharge from the hospital, her statement was recorded at Roha Police Station. Though without going into this aspect at this stage, it is further material to note

that according to CA report, the blood group of acquitted accused no. 1 is group "B" while that of appellant who is original accused no. 2 is group "O". On the seized muddemal article i.e. pyjama of prosecutrix, semen of group "B" i.e. of acquitted accused is detected. Having considered the nature of evidence as above and since applicant was on bail during the trial, application is allowed as per order below.

ORDER

1. Applicant shall be released on bail on his executing P. R. Bond in the sum of Rs. 25,000/- with one surety in the like amount.
2. While on bail the Applicant shall mark his presence with Roha Police Station between 10.00 a.m. to 1.00 p.m. on the first day of each month initially for the period of 6 months and thereafter quarterly on the first day of each such month.
3. Amount of fine if not already paid, shall be paid within two weeks from today before the trial Court.
4. Application is disposed off as allowed in above terms.

(P. N. DESHMUKH, J.)