

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.973 OF 2018

IN

CRIMINAL APPEAL NO.1187 OF 2018

MANPRITSINGH KASHMIRSING GILL)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Pracheta Rathod, Advocate for the Applicant.

Mr.Amit Palkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 30th SEPTEMBER 2019

P.C. :

1 This is an application for suspension of sentence and releasing the applicant/convicted accused on bail during pendency of the appeal filed by him. The applicant/convicted accused has been convicted of offences punishable under Sections 376(D) read with 120B, 377 read with 120B, 366 read with 120B, 354 read with 120B, 341, 342 read with 120B, 323 read with 120B, 506(II) read with 120B as well as under 120B of the Indian Penal Code

(IPC). As all sentences imposed on the applicant / accused are directed to run concurrently, it is not necessary to put on record all sentences imposed on each and every count on the applicant / accused. Suffice to mention that highest sentence of imprisonment imposed on the applicant / accused is for 20 years for the offence punishable under Section 376(D) read with 120B of the IPC with a further direction to him to pay fine of Rs.25,000/-, and in default, to undergo rigorous imprisonment for 1 year.

2 Case of the prosecution in brief is thus :

- (a) The victim of the crime in question i.e. PW1 is a rag picker, who used to come to Mumbai occasionally for earning her livelihood. She is permanent resident of Nanded. According to the prosecution case, about three months prior to the incident, she came to Mumbai for earning her livelihood, as her elder son Honaji, aged about 20 years, started assaulting her at her native place. At Mumbai, she used to stay in a tempo parked in front of Hill Residency at

Amar Nagar. The incident allegedly took place in the night intervening 20th September 2013 and 21st September 2013. The prosecutrix/PW1 lodged report thereof on 21st September 2013. She alleged that at about 3.00 a.m. of that night, she woke up when a vehicle carrying milk came. At about that time, 5 to 6 boys peeped inside the tempo. She named those persons as Vishal, Ajay, Kalu, Wasim and Dastagir, by stating that she came to know names of some other boys as they were calling each other by names. She claimed that she was knowing Vishal since prior to this incident. According to the prosecution, then, these accused persons dragged the prosecutrix/PW1 out of the tempo, took her in the vicinity and committed rape as well as carnal intercourse against the order of nature with her.

- (b) The prosecution/PW1 further alleged that then Vishal and Kalu by a motorcycle took her to the forest area in the vicinity. At that place, two other boys came. All accused persons then committed rape on her, so also carnal

intercourse, against the order of nature. The prosecutrix/PW1 added name of one more person "Veeru" at this stage.

- (c) After lodging the First Information Report (FIR) by the prosecutrix/PW1, within two days her statement under Section 164 of the Cr.P.C. came to be recorded by the learned Metropolitan Magistrate on the request of the police. The prosecutrix/PW1 maintained her version before the learned Metropolitan Magistrate, so far as the first part of the incident is concerned. However, so far as second part of taking her to the forest area is concerned, she remained silent so far as making a phone call and calling two persons by accused Vishal.

3 Heard the learned counsel appearing for the applicant/convicted accused. She submitted that neither in the FIR nor in her statement under Section 164 of the Code of Criminal Procedure, the prosecutrix/PW1 has referred name of the

applicant/convicted accused. She has not attributed any role to the applicant/convicted accused in the crime in question. It is further argued that, however, for the first time, the prosecutrix/PW1 while in the witness box had deposed that after commission of gang rape on her by other accused including main accused Vishal, a phone call was made by main accused Vishal to somebody and then immediately the applicant/convicted accused, one Hamal and co-accused Mahesh came and they also committed rape on her. Thereafter, she was taken to some jungle area. In her cross-examination at paragraphs 41 and 43, these omissions were specifically put to her. The prosecutrixPW1 was unable to explain as to why these facts were not disclosed by her either to the Investigator or to the learned Magistrate, who had recorded her statement under Section 164 of the Code of Criminal Procedure.

4 PW41 is Investigating Officer Mrs.Sarita Bhosale, Assistant Police Inspector, attached to Police Station Matunga. She had recorded the FIR lodged by the prosecutrix/PW1. During cross-examination at paragraph 30, PW41 Mrs.Sarita Bhosale,

Assistant Police Inspector, has categorically accepted the fact that the prosecutrix/PW1 had not stated that the present applicant/convicted accused had committed rape on her.

5 According to case of prosecution, gang rape on the prosecutrix/PW1 commenced from 3.00 a.m. and after commission of rape on her by Ajay, Kalu, Wasim and Dastagir, Vishal had made a telephonic call to somebody. In the witness box, by way of omission, the prosecutrix/PW1 has named the applicant/convicted accused as one of the persons, who came in response to that call. Telephonic calls exchanged between the accused persons was the reason for conviction of the applicant/convicted accused and the resultant sentence. For proving exchange of phone calls between accused persons, the prosecution has examined Yogesh Rajapurkar, Nodal Officer with Bharti Airtel Limited. Cell phone number of the applicant/convicted accused is reported to be 8454952301. Evidence of PW37 Yogesh Rajapurkar, Nodal Officer, does not show that main accused Vishal had made a telephonic call on this

cell phone number belonging to the applicant/convicted accused either at 3.00 a.m. or prior to that. Similarly, evidence of this Nodal Officer does not show that even after 3.00 a.m. of the day of the incident, there was telephonic call from main accused Vishal to the present applicant/convicted accused.

6 Convicted co-accused Mahesh Maragaje, against whom evidence of gang rape has come, by way of omission, is already directed to be released on bail vide order dated 27th September 2017 passed in Criminal Application No.405 of 2017, by noting that in case of more than one accused persons, there is tendency of putting embellishment and roping in as many as persons as it can be.

7 Considering the foregoing reasons, applicant/convicted accused Manpritsingh Gill is also entitled for same treatment. As such, the order :

ORDER

i) The application is allowed.

- ii) Substantive sentence 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.30,000/- with one or two surety in like amount.
- iii) As a condition of this order, the applicant/accused should report the concerned Police Station on every first Monday of each calendar month, in between 11.00 a.m. to 1.00 p.m.
- iv) The applicant / accused should not commit any crime during pendency of the appeal filed by him.
- v) The application is, accordingly, disposed off.

(A. M. BADAR, J.)