

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL APPLICATION NO.387 OF 2020
IN
CRIMINAL APPEAL NO.106 OF 2020

Dashrath s/o Gangaram Koli

Age: 38 years, Occu.: Truck Driver,

R/o. Indira Nagar, Lasur,

Tq. Chopda, Dist. Jalgaon

... Applicant

Versus

1. The State of Maharashtra

2. XYZ

... Respondents

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Mr. R. M. Deshmukh, Advocate for applicant.

Mr. S. W. Munde, APP for respondent No.1 – State.

Mr. A. R. Hange, Advocate for respondent No.2 (appointed)

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 30-09-2020

PRONOUNCED ON : 14-10-2020

ORDER :

. Present application has been filed for suspension of sentence. The applicant has been convicted in Sessions Case No.11 of 2016 by learned Additional Sessions Judge, Amalner on 20-01-2020. He has been convicted for the offence punishable under Section 376(2)(j) of the Indian Penal Code and thereby sentenced to

suffer rigorous imprisonment for ten years and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default, to suffer rigorous imprisonment for one year. Further, he has been convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default, to suffer rigorous imprisonment for one year. Further, he has been convicted for the offence punishable under Section 354-B of Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/- (Rupees Two Thousand only), in default, to suffer rigorous imprisonment for six months. Further, he has been convicted for the offence punishable under Section 452 of the Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.3,000/-(Rupees Three Thousand only) in default, to suffer rigorous imprisonment for six months.

2. Heard learned Advocate Mr. R. M. Deshmukh for applicant, learned APP Mr. S. W. Munde for respondent No.1 – State and learned Advocate Mr. A. R. Hange for respondent No.2 – victim.

3. It has been vehemently submitted on behalf of the applicant/appellant that the learned trial Judge has not appreciated the evidence properly. He failed to consider that the victim is mentally challenged and though she has been examined, she has made material improvements. She has clearly stated that she was taught by police. Informant is her mother, however, her testimony would be hearsay taking into

consideration the fact that she was not present in the house. Her testimony has been tried to be connected to the offence on the basis of circumstance told by her that when she was going towards her work for cutting onion crops from the field of one Girdhar Conductor, she met accused near temple of Mariaai. She had a dialogue with accused which indicated that the daughter of the informant is alone in her house. In fact, the house of the informant is situated in a thickly populated area. Nobody else has been examined to prove that they had seen the accused going in the house of informant. Nobody had heard shouts of the victim. Though it is contended that the rape was forceful, yet, the medical evidence would show that there was no physical external injury to the private part of the victim. He also submitted that the examination-in-chief of most of the witnesses have been recorded as per Section 309 of the Code of Criminal Procedure. Though an opportunity has been given to cross examine all the witnesses later on by the learned Judge, yet, a complete fair trial appears to have not been given to the accused. Therefore, for all these points, the appellant has good case in appeal when the appeal is admitted and it is not likely to be taken for final hearing in near future. The applicant who was on bail almost throughout the trial, except from 27-01-2016 to 01-03-2016 and 27-11-2018 to 18-03-2019, he deserves to be released on bail by suspending the sentence.

4. It will not be out of place to mention here that learned Advocate appearing for the applicant has taken this Court through the entire evidence of which the compilation has been provided by him.

5. Learned APP as well as learned Advocate appointed to represent the cause of respondent No.2 – victim have strongly opposed the application. They are supporting the reasons given by the learned Judge while convicting the accused. They both have stated that though the victim is mentally challenged, yet, she had that much understandable capacity and had given rational answers. There is no legal hindrance in accepting her testimony. She has clearly identified the accused and told by words as well as gestures that the accused has committed rape on her. Testimony of the informant would show that the accused had the knowledge about the fact that the mentally challenged daughter of the informant is alone in the house. He went there after the request was made by the informant to take the T-poy to the house of her another daughter at Shirpur. In fact, her statement was that she wanted to send that wooden T-poy to Shirpur and accused accepted that he would transport it to Shirpur, but then she had stated that she has specifically told the accused not to go to her house, at that time, as the victim was alone and she promised that she would give that T-poy to the accused after her return from the field. In spite of these specific directions, the accused went to the house of the informant and has committed the heinous crime. He deserves no sympathy.

6. At the outset, it can be said that for some period the applicant was in jail and, therefore, he cannot claim that throughout the trial he was on bail. The prosecution case rests mainly on the testimony of the victim, who is stated to be mentally challenged. Dr. Subhash Badgujar, who had examined her medically, has been examined as PW.9. He had certified that the victim is 55% mentally disabled. He

has certified that the said state of the victim regarding mental condition is moderate grade. It also appears from the cross examination of the said witness by accused that the accused is denying the fact that the victim is mentally retarded and, therefore, a suggestion has been given that the victim is of sound mind. Question, therefore, would arise in such a case of defence, whether accused can get any benefit regarding the state of fact about the mental illness of the victim. The fact remains that the evidence has been produced to show that the victim is 55% mentally challenged. It appears that the medical evidence is supporting the prosecution in respect of commission of rape. Therefore, there is *prima facie* evidence against the accused. The said evidence has been scanned by the learned trial Judge and he has come to the conclusion that the offence has been committed. Under such circumstance, this cannot be the fit case where the applicant should be released on bail by suspending his sentence.

7. The learned Advocate appearing for the applicant has submitted that the sentence that has been imposed on the accused is small sentence and he has not misused the liberty that was granted. These are the additional grounds on which the applicant is seeking suspension of sentence. In ***Kiran Kumar Vs. State of M. P [(2001) 9 SCC 211]***, the Hon'ble Supreme Court has observed that "if it is not possible to take up the matter immediately for final hearing and if the sentence imposed is short sentence, then the Court may think about releasing the appellant on bail by suspending the sentence."

8. Here, in this case, as regards the final hearing of the matter is concerned, it can be heard as special bench has been created to hear the appeals finally and the

physical working of the Court to that extent is going on. In *Kiran Kumar (Supra)*, the Hon'ble Supreme court has given discretion to the Court and if the circumstances stated therein exist, then only the sentence can be suspended on the basis of those grounds. As aforesaid, by expediting the appeal, it can be heard finally and when there appears to be *prima facie* evidence against the accused, it will not be proper to release the applicant on bail, though the sentence may appear small. Taking into consideration the nature of the offence, the circumstance under which it has been committed, the victim being mentally challenged and the nature of the evidence that has been brought on record, are the points on which the discretion cannot be used in favour of the accused. Hence, the following order :-

ORDER

- . Application stands rejected.
2. Appeal is expedited.

[SMT. VIBHA KANKANWADI, J.]

SCM