

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

**CRIMINAL APPLICATION NO. 374 OF 2019
IN
APPEAL NO. 404 OF 2019**

Varsha Dhanraj Gaikwad ..Applicant

v/s.

The State of Maharashtra ..Respondent/s

Mr. Ritesh Thobde a/w. Sagar Tambe for the Applicant .
Mr. P.H.Gaikwad, APP for the Respondent-State.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 26th AUGUST, 2021.**

P.C.

1. Learned Counsel for the Applicant, at the outset states that today's date of hearing has been notified to the Respondent No.2. He has placed on record affidavit of service.

2. This is an Application under Section 389 of the Code of Criminal Procedure for suspension of substantive sentence imposed by judgment dated 10/01/2019, passed by the learned Addl. Sessions Judge, Pune in Special Case No.299 of 2016.

3. The Applicant and the other co-accused have been convicted for

offences punishable under Section 376 r/w. 107 of Indian Penal Code (IPC) & 376 (D) and 506(ii) r/w. 34 of IPC and Section 12 of Protection of Children from Sexual Offences (POCSO) Act, 2012, and sentenced as under:

- (I) for the offence punishable under Section 376 r/w. 107 IPC to suffer rigorous imprisonment for seven years and to pay fine of Rs.1000/- in default to undergo simple imprisonment for one month;
- (ii) for offence under Section 376(2)(f) r/w. 107 IPC to suffer rigorous imprisonment for ten years and to pay fine Rs.1000/- in default to undergo simple imprisonment for one month;
- (iii) for offence under Section 376(D) r/w. 107 IPC to suffer rigorous imprisonment for twenty years and to pay fine Rs.2000/- in default to undergo simple imprisonment for two month;
- (iv) for offence under Section 506 (II) r/w. 34 of IPC to suffer rigorous imprisonment for one year and to pay fine Rs.500/- in default to undergo simple imprisonment for fifteen days;
- (v) for offence punishable under Section 11(i) and Section 12 of POCSO Act, 2012 to suffer rigorous imprisonment for two years and to pay fine of Rs.500/- in default to undergo simple

imprisonment for fifteen days;

(vi) All the aforesaid substantive sentences were directed to run concurrently.

4. Learned Counsel for the Applicant states that the main accused who had allegedly committed rape has already been released on bail by order dated 13/07/2021 in Interim Application No. 1335 of 2019 in Criminal Appeal No.310 of 2019. He further submits that two other co-accused have also been released on bail by order dated 04.12.2020 in Criminal Application No. 441 of 2019 in Criminal Appeal 545 of 2019, and by order dated 08/04/2021 in Criminal Application No. 470 of 2019 in Criminal Appeal No.579 of 2019. He therefore submits that the present Applicant is entitled for bail on the principle of parity.

5. Learned APP submits that the Applicant is related to the victim. He further submits that she was the main conspirator who was involved in taking the victim to the room. He submits that the gravity of the offence and the nature of the evidence would not justify grant of bail.

6. I have perused the record and considered the submissions advanced by the learned Counsel for the Applicant and the learned APP for the State.

7. The crime against the Applicant was registered pursuant to the FIR lodged by the mother of the victim. It is alleged that the victim had been to the house of her grand parents at Mundwa, Pune on 13.04.2016. She returned to Buldhana, her parental home on 26.05.2016. She narrated to her mother that she had seen the Applicant, who is her maternal aunt, having physical relationship with the co-accused. She alleged that the Applicant had threatened and forced her in keeping physical relationship with the accused no.1. Based on this narration the mother of the victim lodged the FIR against the Applicant and the other co-accused.

8. It is to be noted that the first information report does not make any reference to the incident of rape. The victim whose statement was subsequently recorded on 01.06.2016 has also not alleged that she was raped by the Accused No.1. The allegations for rape were made for the first time in the supplementary statement recorded on 09.06.2016, though it is on record that the victim and her mother

were in constant touch with the police till 04.06.2016. In the supplementary statement it is alleged that on 14.05.2016, the Applicant herein had taken the victim to the flat of her grand father. She had pushed her on the floor and the Accused No.4 had caught her legs, and the Accused no.3 had caught her hands, while the main accused i.e. the accused no.1 had sexual intercourse with the victim against her wish.

9. It is to be noted that the main accused who had allegedly committed rape, has been released on bail by this Court by order dated 13.07.2021 in Interim Application No.1335 of 2019 in Criminal Appeal No.310 of 2019. The other two co-accused who had allegedly held hands and legs of the victim while the main accused committed rape, have also been released on bail by order dated 04.12.2020 (Coram Prakash D. Naik, J) in Criminal Application No. 441 of 2019 in Criminal Appeal No.545 of 2019 and by order dated 08.04.2021 (Coram Revati Mohite Dere, J.) in Criminal Application No.470 of 2019 in Criminal Appeal No.579 of 2019. While enlarging the co-accused on bail, this Court has in detail considered the evidence of the prosecutrix, as well as the evidence of the Complainant and has discussed the infirmities in their evidence.

10. It is also on record that the Applicant was married to the brother of the first informant. The matrimonial dispute between the Applicant and the brother of the first informant has led to filing of criminal proceedings under Section 498A and the same are pending before the Court. Considering these facts and having regard to the nature of accusations and the material omissions, contradictions and discrepancies in the evidence, in my considered view, this is a fit case for suspension of sentence pending hearing of the appeal.

11. Hence the Application is allowed on the following terms and conditions:-

- (a) Substantive sentence imposed against the Applicant by judgment dated 10.01.2019 in Special Case No.299 of 2016 is suspended pending hearing of the appeal;
- (b) The Applicant is ordered to be released on bail on furnishing bail bond of Rs.25,000/- (Rupees Twentyfive Thousand Only) with one or two solvent sureties in the like amount to the satisfaction of the Trial Court;
- (c) The Applicant shall report to the Trial Court, once in two months on the day/date specified by the Trial Court, till the

Appeal is finally disposed of;

(c) The Applicant shall not contact and or interfere with the victim and her family members;

(d) The Applicant shall keep the Trial Court informed of her current address and mobile contact numbers, and/or change of residence or mobile details, if any, from time to time;

(e) If there are two consecutive defaults in appearing before the Trial Court, the learned Judge shall make a report to the High Court and the prosecution would be at liberty to file an application seeking cancellation of bail.

12. Application stands disposed of accordingly.

PRASANNA P
SALGAONKAR
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signed by
PRASANNA P
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Date:
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(ANUJA PRABHUDESSAI, J.)