

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

926 CRIMINAL APPLICATION NO.2758 OF 2022
IN
CRIMINAL APPEAL NO.608 OF 2022

GANPAT DUNDA DHINDALE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Appellant : Mr. Bhide Vinod Y.
APP for Respondent 1 : Mr. P G Borade
Advocate for Respondent 2 : Mr. Mayur Subhedar h/f
Kakde Vishal Sanjay

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CORAM : SHRIKANT D. KULKARNI, J.
Dated : September 28, 2022

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PER COURT :-

1. It is an application for suspension of sentence and bail moved by the applicant/appellant (original accused).

2. Heard Mr. Bhide, learned counsel for the applicant/appellant, Mr. Mayur Subhedar h/f Mr. Kakde, learned counsel for respondent no.2 and Mr. Borade, learned APP for the State/respondent no.1.

3. Mr. Bhide, learned counsel for the applicant/appellant (original accused) submitted that,

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the prosecution agency has examined in all 16 witnesses in order to prove the charges levelled against the appellant/original accused. He points out that PW-1 victim, PW-2 mother of the victim have turned hostile. He further points out that the learned Additional Sessions Judge, Sangamner was pleased to convict the present appellant/accused mainly relying upon the evidence of PW-13 PHC Kailas Nehe, who has recorded the FIR as per narration of the victim girl and accepting the DNA report. Mr. Bhide, learned counsel also invited my attention to the relevant paragraphs of the impugned judgment and order of conviction rendered by the Additional Sessions Judge, Sangamner. He also invited my attention to the copy of the depositions of the victim girl, copy of the deposition of mother of the victim, copy of deposition of the Investigating Officer, copy of deposition of two Doctors as well as the Investigating Officer. He also invited my attention to the statement of the accused recorded under section 313 of the Cr.P.C.

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4. Mr. Bhide, learned counsel for the appellant pointed out that when the victim girl has turned hostile and not supported to her FIR, it was erroneous on the part of the learned Additional Sessions Judge in accepting the contents of the FIR simply on the testimony of police station officer. He submitted that the FIR is not substantive piece of evidence. He further pointed out that though statement of the victim girl is recorded by the JMFC, Akole u/s 164 of the Cr.P.C. that was not signed by the victim girl. It was not exhibited. The learned Judge has also accepted the same and proceeded to convict the appellant/accused also by taking help of DNA report.

5. Mr. Bhide, learned counsel for the appellant invited my attention to the deposition of relevant witnesses and pointed out that the procedure for collecting DNA sample till sending it to the Forensic Laboratory are given ceremonial go-bye. He submitted that there is no dispute about proposition of law that if all protocol right from collecting the sample for DNA till

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sending it to the Forensic Science Laboratory are followed, in that context, the DNA report would be certainly relied upon. He pointed out that in this case there are so many lapses while collecting DNA sample. He also invited my attention to the deposition of relevant police officer as well as the deposition of relevant Medical Officer. He pointed out that there is ambiguity in the evidence as to who has actually send the kit for collecting the DNA sample. He further pointed out that carrier of the sample is also not examined by the prosecution. He further pointed out that the expert, who has conducted DNA test and submitted the report is not examined by the prosecution in order to rely upon such DNA report when it is surrounded by shadow of doubt.

6. Mr. Bhide, further points out that though the present appellant is stated to be the father of the victim and alleged to have committed rape on his own daughter; factual reality is otherwise. Daughter of the appellant had love affair with one Pandurang Gambhire,

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with whom she intends to marry. The appellant opposed for the same; which disliked the victim girl and her mother had prompted in lodging such false FIR. That kind of defence has been raised by the appellant while recording his statement under section 313 of the Cr.P.C. Victim girl has confessed this while facing the cross examination. These facts need to be considered while deciding this application for suspension of sentence.

7. Mr. Bhide, learned counsel for the appellant further points out that the appellant is behind bar since the date of arrest i.e. 15.2.2018. He has completed four years and seven months approximately and had undergone practically half of the sentence. This is one more ground to consider the application for suspension of sentence and release him on bail. He submitted that in view of the above factual scenario and evidence on record, there is no need to keep the appellant behind bar. He can be released on bail by suspending the sentence.

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8. Mr. Bhide, learned counsel has relied upon following stock of citations in support of his submissions :-

- i. **Dnyanoba s/o Annasaheb Kale Vs. State of Maharashtra, reported in 2006 ALL MR (Cri) 1070.**
- ii. **Audumbar Digambar Jagdane and another Vs. The State of Maharashtra reported in 1998 ALL MR (Cri) 1363.**
- iii. **Annasaheb s/o Vishwanath Chavan and anr. Vs. State of Maharashtra reported in 2006 ALL MR (Cri) 3098.**
- iv. **Tanhaji Raghunath Barde Vs. The State of Maharashtra reported in [2021 BHCCO 1992] (Aurangabad Bench)**
- v. **Prince Vs. State of Haryana CRM 31613/2014 Pun & Har.**
- vi. **Modi and anr. Vs. State of Haryana CRM No.27601/2016.**

9. By taking help of above said citations, Mr. Bhide, learned counsel submitted that the findings recorded by the learned Additional Sessions Judge on the basis of the FIR, her statement recorded under section 164 of the Cr.P.C., the evidence of station officer and DNA report are erroneous in the eye of law in view of above cited stock of citations.

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10. Mr. Mayur Subhedar h/f Mr. Kakde learned counsel for respondent no.2 submitted that the victim girl had affair with one Pandurang Gambhire. She wanted to marry Pandurang Gambhire. The appellant/father opposed to marry with Pandurang. As such, victim and her mother prompted to lodge the FIR. Victim girl has admitted such fact while facing the cross-examination. He submitted that victim girl is now married with Pandurang and residing with her husband.

11. Mr. Borade, learned APP for the State/respondent no.1 strongly opposed to release the appellant on bail by suspending the sentence. He vehemently submitted that the appellant alleged to have committed heinous offence of rape and that too on his own daughter. The trial court has considered all these aspects and pleased to pass various terms of sentence with fine amount. maximum sentence awarded against the appellant/accused is of Ten years. He also invited my attention to the paragraph nos.34 and 35 of the

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impugned judgment and order of conviction rendered by the Additional Sessions Judge, Sangamner and submitted that it is not a fit case to release the appellant/accused on bail in the above factual scenario. It is a stigma on the society when the appellant/father commits such offence.

12. I have considered the submissions of both sides and the learned APP for the State.

13. At the outset, let me make it clear that it may not be proper to touch the merits of the matter by making in detail scrutiny of the evidence of the witnesses. It is to be seen whether it is a fit case to release the appellant on bail by suspending the sentence.

14. First point is about the period which the appellant/accused has undergone in the prison. It is pointed out by Mr. Bhide, learned counsel for the appellant that the appellant is behind bars since the date of his arrest i.e. 15.2.2018. He has completed four years and seven months approximately out of Ten years

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sentence. This point needs to be considered coupled with other points.

15. On going through the evidence of victim and mother of the victim girl, it is evident that both of them have turned hostile and not supported to the prosecution case. Victim girl has gone to the extent by admitting the entire defence put forth by the appellant/accused.

16. On going through the observations and findings recorded by the learned Additional Sessions Judge, Sangamner ; it would reveal that the learned Judge has accepted the contents of the FIR as substantive piece of evidence which is contrary to the ratio as laid down in the case of **Dnyanoba s/o Annasaheb Kale Vs State of Maharashtra** reported in 2006 ALL MR (Cri) 1070 (supra). This Court has held that FIR is not a substantive piece of evidence. It can be used only to a limited purpose for contradicting or corroborating or corroborating the maker thereof. Therefore, the averments made in the FIR alone cannot take place of
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proof only by exhibiting the said document unless all the contents thereof are proved by the complainant. As pointed out earlier in the present case, the victim girl has turned hostile and not supported to the prosecution case. She did not stick up to the contents of the FIR. The FIR is exhibited at the instance of PW-13 police station officer Kailas Nehe. He is scribe of the FIR. When author of the FIR is turned hostile and not supported to the contents of the FIR, certainly that FIR cannot be termed as substantive piece of evidence.

17. So far as the statement of victim girl recorded by the JMFC, Akole u/s 164 of the Cr.P.C is concerned, it is pointed out by Mr. Bhide, learned counsel that such statement is even not signed by the victim girl and it was pointed out to the learned Judge about same when that statement was referred in the witness box. He submitted that on that count statement recorded u/s 164 of the Cr.P.C. cannot be relied upon. I find force in this submission. It is held by the Division Bench of this Court in the case of **Audumbar Digambar Jagdane and**

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Anr. Vs. The State of Maharashtra reported in 1998

ALL MR (Cri) 1363 (Bombay) that the statement made by the witness u/s 164 of Cr.PC, if he turned hostile, the statement even if proved cannot be accepted as substantive piece of evidence. In this case, victim girl even has not supported to her statement recorded by the learned Judicial Magistrate First Class u/s 164 of the Cr.P.C. As such, that statement u/s 164 of Cr.P.C cannot be accepted as a substantive evidence.

18. Another important aspect of which the learned Judge has convicted the appellant is DNA report. There cannot be legal debate that DNA report issued by the concerned Forensic Laboratory can be accepted and relied upon in view of section 293 of CrPC subject to compliance of mandatory requirement and procedural aspect. Learned counsel Mr. Bhide has pointed out the decision of the Division Bench of this Court to which I was the Party in the case of **Tanhaji Raghunath Barde Vs. The State of Maharashtra** reported in 2021 BHCCO 1992 (Aurangabad Bench), wherein the Division

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Bench has held that if DNA report relied upon by the prosecution is not safe in view of the serious lapses in collection, preservation and sending the samples to the forensic expert for analysis. There are missing links in the chain of circumstances which are relied by the prosecution. Certainly, that DNA report cannot be relied upon.

19. In the present case, it is pointed out by Mr. Bhide learned counsel for the appellant that right from collection of sample for DNA, there are lapses. There is question mark as to where-from DNA kit was made available; secondly, who carried the sample of DNA to the forensic laboratory. That carrier is not examined. What was the condition of that sample till its collection and it reaches to the Laboratory on record. The witness who has conducted DNA test is even not examined before the Trial Court in order to clear these aspects. These are the serious question marks about reliability of DNA report. Though the learned judge has observed about it by recording the reasons. That aspect as well

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as other aspects discussed herein before need to be taken into consideration while deciding the appeal.

20. Having regard to the above reasons and discussion, without making much elaboration and avoiding merits of the case, suffice it to say that the appellant has made out a case to grant bail.

21. So far as the question of fine amount is concerned, it is pointed out by Mr. Bhide, learned counsel for the applicant that in view of section 357 (2) of the Criminal Procedure Code, the compensation awarded by the Additional Sessions Judge, Sangamner is part of the fine amount and as such it can be suspended. Total fine amount comes to Rs.45,000/- which is certainly a big amount. By taking into consideration all these aspects, the application needs to be allowed and the appellant/accused needs to be enlarged on bail. There is no question of tampering of any witnesses when the trial is concluded and result is already on record. The victim girl is also married and she is living happy married life with her husband namely Pandurang
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Gambhire. Having regard to the peculiar facts of the case, the order in respect of fine amount needs to be stayed.

ORDER

- i. The application is hereby allowed.
- ii. The execution of substantive sentence passed by the Additional Sessions Judge, Sangamner, District Ahmednagar dated 16.7.2022 in Special Case no.13 of 2018 against the appellant/accused including the fine amount is hereby suspended till final decision of the appeal.
- iii. The appellant/accused shall be released on bail on his furnishing PR Bond in the sum of Rs.20,000/- (Rs. Twenty Thousand) with one or two solvent sureties of the like amount on following conditions :-
 - a] He shall furnish his in-detail address with Cell number with the trial court and concerned police station.

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- b] Bail before the trial court.
 - c] Inform to concerned court accordingly.
- iv. Criminal application is accordingly disposed off.

(SHRIKANT D. KULKARNI, J.)

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