

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

**INTERIM APPLICATION NO. 2704 OF 2021
IN
CRIMINAL APPEAL NO.1130 OF 2019**

Raj @ Harishankar Shukla
Age 40 years, R/o. Dahila Mau
Post. Dahila Mau,
Dist. Pratapgad, Uttar Pradesh.
(Applicant is lodged in Nashik Road
Central Prison, Nashik.

...Applicant/Appellant

Versus

1. The State Of Maharashtra
(Through the Nerul Police Station,
vide their C.R. No.I-390 of 2016)

2. X-1
Through Y-2.

...Respondents

....

Mr. Niteen Pradhan a/w Mrs. Siddh Vidya a/w Ms. Shubhada Khot
a/w Ms. Sneha Jain a/w Ms. Kajal Bharadwaj a/w Mr. Danish Patel
i/by Siddh Vidya & Associates, Advocate for the Applicant/Appellant.

Ms. Priyanka Chavan, Advocate for Respondent No.2. (Appointed by
Legal-aid)

Mr. S. V. Gavand, APP for the Respondent No.1– State.

....

CORAM	:	PRAKASH D. NAIK, J.
RESERVED ON	:	14th MARCH, 2022.
JUDGMENT PRONOUNCED ON	:	8th JUNE, 2022.

JUDGMENT :

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Corrected version of judgment dated 8th June, 2022 pursuant to speaking to minutes of order dated 9th June, 2022.

1. The applicant is seeking directions under Section 391 of Code of Criminal Procedure (for short “Cr.P.C.”) to allow the applicant to lead additional documentary and oral evidence by summoning witnesses for examination and also to re-examine the prosecution witnesses in Special Case No.70 of 2017.

2. The applicant has preferred Criminal Appeal No.1130 of 2019 challenging the judgment and order dated 9th July, 2019 passed by Special Judge under Protection of Children from Sexual Offences Act, 2012 Act convicting him for offences punishable under Sections 376(f)(i)(n) and Section 506(II) of Indian Penal Code (for short “IPC”) and under Sections 4, 5 (f)(l) r/w Sections 6, 8 & 9(f) r/w Section 10 of Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’). For the offences punishable under Sections 376(f),(i),(n) of IPC and Section 5(f)(l) r/w Section 6 of POCSO Act, the applicant has been sentenced to suffer imprisonment of ten years and fine of Rs.25,000/-. For the offence under Section 506(II) of IPC, the applicant is sentenced to suffer rigorous imprisonment of one year and fine of Rs.5,000/-. For the offence under Sections 4 of POCSO Act, the applicant is sentenced to suffer imprisonment for seven years and fine of Rs.15,000/-. For the offence under Section 8 of POCSO Act, the applicant is sentenced to suffer imprisonment of

three years and fine of Rs.10,000/-. For the offence under Section 9(f) r/w Section 10 of POCSO Act, he is sentenced to suffer imprisonment for five years and fine of Rs.15,000/-. The substantive sentences were directed to run concurrently.

3. The case of the prosecution is that the victim girl was studying in 7th Standard. The accused was her teacher. In the Month of September-2016, the mother of victim girl found that the victim was vomiting and suffered from giddiness and missed her menstrual cycle. The victim was taken to their family doctor. Doctor gave her medicines. Thereafter, on 28th September, 2016, the victim girl was taken to Gynecologist. She was examined and after conducting requisite test, doctor had opined that the victim girl was pregnant. The mother of victim girl inquired with her as to whether anybody has committed wrong with her. The victim girl disclosed that, in the month of April-2016, the accused had committed forceful penetrative sexual assault. She was threatened that, if she discloses the incident to anybody, the accused would kill her and all her family members. She was frightened and could not disclose the incident to anybody. Thereafter, the accused went away. The accused kept on threatening her. In August – 2016, the accused again committed similar act in the ladies washroom. She was again threatened by him. Crime was

registered on the statement of the victim girl vide C.R. No.I-390 of 2016 with Nerul Police Station for offences under Sections 376(f)(i) (n) and 506(II) of IPC and Sections 4, 5(f)(I)(j-ii), 6, 8, 9(f) and 10 of POCSO Act. Statements of witnesses were recorded. Accused was arrested on 14th December, 2016 at Delhi. On completing investigation, charge-sheet was filed.

4. The prosecution examined 18 witnesses. Statement of the accused was recorded under Section 313 of Cr.P.C. Vide judgment and order dated 9th July, 2019, the applicant was convicted.

5. Learned Advocate for the applicant Mr. Pradhan submitted as follows :-

i. Gross injustice of not having appropriate legal assistance and guidance is violative of Articles 21, 14 and 39-A of the Constitution of India.

ii. Section 391 of Cr.P.C. empowers appellate Court to take further evidence or direct it to be taken by the trial Court on the ground that the evidence is essential for the just decision of the case. This exercise can be done during pendency of appeal instead of waiting till appeal is finally heard.

iii. During the course of trial, although the applicant was

initially represented by the lawyer, during the time of recording of evidence the cross of the prosecution witnesses was conducted by the applicant himself in a criminal trial, where the person is charged of a grave offence, the right of an accused to have the services of the lawyer is fundamental and essential to a fair trial. The entitlement to free legal aid is not dependent on the accused making an application to that effect, the Court is obliged to inform the accused of his right to obtain free legal-aid and provide him with the same. This right is implicit in Article 22(1) and Article 39-A of the Constitution of India and Section 304 of the Cr.P.C. If the accused is not represented by the pleader and does not have sufficient means, the Court is required to assign the pleader for his defence at the expense of the State. The Court is required to inform the accused of his right to obtain legal aid. The proceedings before the trial Court does not reflect that the Court had appraised the applicant of his right to avail free legal aid to be appointed by the State.

iv. The applicant was unequipped with the modalities and niceties of legal knowledge and experience, he was not at all adequately skilled to prepare his defense and cross -examine the witness.

v. There was failure on the part of the prosecution to examine relevant witnesses and/or to re-examine them in accordance with Section 311 of Cr.PC.

vi. In the case of Zahira Habibulla H. Sheikh and Another V/s. State of Gujarat and Others¹ it is observed that the legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that, justice is done between the prosecutor and the persons prosecuted and if the appellate court finds that certain evidence is necessary in order to enable it to give correct and proper finding, it would be justified in taking action under Section 391. The courts have to take a participatory role in trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 65 of the Indian Evidence Act confer vast and wide powers on presiding officers of the Court to elicit all necessary material by playing an active role in the evidence collecting process.

vii. The Investigating Officer, API, Vasudev More had recovered CCTV footage of the premises of M.G.M. Law College, which is located on the second floor of the M.G.M. School, where allegedly the second incident took place in August-2016.

1 (2004) 4 SCC 158.

Sajakali Jamadar

The said CCTV footage of M.G.M. Law College was provided by Dr. Geeta Shrivastava, the Principal of the M.G.M. Law College. Vide letters dated 25th October, 2016 and 8th November, 2016 API Vasudev More had requested the principal of M.G.M. Law College to provide CCTV footage. Vide letter dated 26th October, 2016, Principal Geeta Shrivastava had provided the CCTV footage in pen drive as attachment and she had again confirmed in writing on 8th November, 2016 that she had already provided the footage to the Investigating Officer. These correspondence is not exhibited. In the cross examination of PW-18 – Ashok Rajput, Investigating Officer, who took over the investigation from API Vasudev More on 10th December, 2016 has deposed that though CCTV footage in the form of pen-drive was received from the MGM Law College by API Vasudev More, the same was not received by him viz. documents and the CCTV footage ought to have brought on record. API Vasudev More and Dr. Geeta Shrivastava should have been examined as witnesses by the prosecution.

viii. The Investigating Officer had also obtained attendance register of M.G.M. Law College, where the applicant was law student and had taken admission in the year-2015. The

document would indicate that the applicant was not attending the Law College in August-2016. Dr. Geeta Shrivastava, the Principal of M.G.M. Law College had forwarded the letter to Senior Police Inspector, Crime Branch, Vashi, Navi Mumbai on 15th December, 2016, stating that, in the year – 2016, the applicant had never attended college lectures and that he had paid the fees in the August-2016 through online challan. Considering allegations that accused committed sexual assault on second floor, the alleged movement could have been brought to light by producing CCTV footage recorded by API More.

ix. The prosecution examined two teachers of M.G.M. School i.e. PW-7 and PW-14. In her evidence PW-14 has deposed that she taught dance in M.G.M. School for two weeks. Only one permanent teacher was examined by prosecution. The prosecution examined students from the school and tried to tarnish the character of the applicant. They also deposed that the complaint was made about the behaviour of the applicant to Supervisor Shilpa Madam. Mother of PW-8 also made complaints, however, such complaints were not brought on record. The prosecution did not examine Principal Ms. Savita Gulati or Supervisor Ms. Shilpa Madam. The alleged first

incident had happened during the period of physical education in April-2016, while the victim was sitting in classroom. Name of teacher is not disclosed. Hence, examination of principal Savita Gulati was necessary.

x. Dr. Chetan Shyamlal Singhal conducted Sonography of the victim girl and informed the police about her pregnancy. Crime was registered by the Police. He is not examined by the prosecution. In his statement recorded by the API Vasudev More he has stated that when he asked the mother of victim the person responsible for her pregnancy, she muttered something to the effect 'cousin brother'. In his statement dated 10th October, 2016, Dr. Chetan Shyamlal Singhal had stated that the victim was four weeks pregnant when he had examined her on 29th September, 2016. In supplementary statement dated 11th January, 2017 he has stated that the victim was eight weeks pregnant on 29th September, 2016. The Medical case papers of the victim drawn up by Dr. Chetan Singhal which are part of the charge-sheet also shows that the victim was eight weeks pregnant at the time of her checkup on 29th September, 2016. Considering the allegations which is improbable that the victim could have been 4 weeks or 8 weeks pregnant on 29th

September, 2016. Thus, the failure of prosecution to examine Dr. Chetan Singhal had prejudiced the defence of the applicant/accused.

xi. The blood samples were collected from the applicant and the victim girl and sent for DNA analysis. The report shows that the applicant is excluded to be the biological father of product of conception of victim girl. The prosecution has failed to bring on record FSL report of DNA analysis which can be used as evidence during the trial. Report of DNA analysis can be used as evidence in inquiry, trial or other proceedings in accordance with Section 293 of Cr.P.C.

xii. Taking into considering the aforesaid circumstances, the prosecution be directed to adduce the evidence of crucial witnesses in accordance with Section 391 of Cr.P.C. or Section 311 of Cr.P.C. or the applicant be allowed to lead additional evidence by summoning witnesses. This exercise may be done by this Court or by the trial Court during the pendency of the appeal of the applicant. It is further submitted that, since the applicant is in custody for a period of about five & half years, during the process of recording further evidence, the applicant may be directed to release on bail.

xiii. It is the duty of presiding officer to ensure to get best possible evidence. Section 311 of Cr.P.C. empowers Court to summon material witness, or examine person present. Any Court may, at any stage of any enquiry, trial or other proceedings under the Code, summon any person or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

xiv. The CWC report was not taken on record. Statement of victim recorded under provision of Juvenile Justice Act, not adduced in evidence.

6. In addition to the decision referred to herein above the learned counsel for the applicant has relied upon following decisions :-

- i.** Hussainara Khatoon and Others V/s. Home Secretary, State of Bihar, Patna².
- ii.** Asim @ Munmun @ Asif Abdulkarim Solanki V/s. State of Gujarat passed by the Supreme Court dated 28th January, 2020 in Special Leave Petition (Criminal) No.8087 of 2019.
- iii.** Rambhau & Another V/s. State of Maharashtra³.
- iv.** Mohd. Hussain alias Julfikar Ali V/s. State (Government

² (1980) 1 SCC 98.

³ (2001) 4 SCC 759.

of NCT of Delhi)⁴

v. Ranchod Mathur Wasawa V/s. State of Gujarat⁵.

vi. Suk Das V/s. Union Territory of Arunachal Pradesh⁶.

vii. Madhav Hayawadanrao Hoskot V/s. State of Maharashtra⁷.

viii. Olga Tellis and Others Vs. Bombay Municipal Corporation and Others⁸

7. Learned APP Mr. Gavand submitted that the grounds urged by the applicant are devoid of merits. There is no violation of Articles 21, 22 or 39-A of the Constitution of India. There is no breach of Section 304 of Cr.P.C. The applicant is educated person. He filed pursis that he would conduct the cross examination himself. He had engaged the Advocate to represent him. The Advocate representing the applicant was present during examination of all the witnesses. During the cross examination of prosecution witnesses, although the Advocate was present in the Court, the applicant had urged before the Court that he would himself cross examine the witnesses. This fact has been recorded by the trial Court on every occasion when the witnesses were cross examined on completion of their examination-in-chief. It is not the case of the accused as urged

⁴ (2012) 9 SCC 408.

⁵ (1974) 3 SCC 581.

⁶ (1986) 2 SCC 401.

⁷ (1978) 3 SCC 544.

⁸ (1985) 3 SCC 545

before this Court that he cannot afford to engage the Advocate and that the State should provide him lawyer. During the trial he had engaged the Advocate, who was supervising the proceedings and in the presence of the Advocate at the instance of the applicant he was permitted to cross examine. The applicant had cross examined the victim girl at length. He also cross examined the mother of victim girl. The cross examination was conducted in detail which does not indicate that he was handicapped due to lack of knowledge of law or he would not in a position to understand the proceedings before the trial Court. He had himself decided to cross examine all the witnesses. Thus, there is no violation of the right to legal-aid qua the applicant. The prosecution had examined all the relevant witnesses. The prosecution has proved its case on the basis of evidence adduced before the trial Court. On the basis of evidence, the applicant has been convicted by the trial Court. The applicant has challenged the judgment of conviction before this Court by preferring appeal. The appeal is pending before this Court for final disposal. The applicant has urged that the present application may be decided first pending appeal. No case is made out for re-examination of witnesses or examination of new witnesses in exercise of powers under Section 391 of Cr.P.C. or Section 311 of Cr.P.C. The applicant was completely silent till the trial is over and judgment of

conviction is delivered about the examination or re-examination of such witnesses. He was not prevented from examining those witnesses which he deemed fit and proper as defence witnesses. He was under the advise of Advocate, who had present during the trial. Hence, relief sought in this application be rejected. The applicant has been convicted for serious offences. The prayer for bail as claimed by the applicant may not be granted.

8. Learned Advocate for the respondent (victim) submitted that, no case is made out for granting prayers made in this application. No ground is made out for exercise of powers under Section 391 of Cr.P.C. The accused had faced the trial. The victim is suffering from trauma. The victim is minor. She was student in school. The accused was her teacher. The prosecution has adduced sufficient evidence on the basis of which the applicant has been convicted. The victim cannot be subjected to trauma for indefinite period by again asking her to appear before the trial Court for additional evidence or prolonging the proceedings. Failure to conduct DNA test of samples taken from the accused or to prove the report of DNA profile would not result in failure of prosecution case, though the positive result of DNA test would constitute clinching evidence against accused. If however result of test is negative i.e.

favouring accused or if DNA profiling had not been done or not proved in a given case, weight of other material and evidence on record will still have to be considered. The conviction may be possible on remaining evidence.

9. She relied upon the following decisions :-

- i.** Delhi Domestic Working Womens' Forum V/s. Union of India and Others⁹.
- ii.** Sunil V/s. State of Madhya Pradesh¹⁰.
- iii.** Kurshaidan & Another V/s. State of Punjab¹¹.
- iv.** Dashrath S/o Hiranman Johare V/s. State of Maharashtra decided by this Court by order dated 14th July, 2020 in Criminal Application No.392 of 2020.
- v.** Dashrath V/s. State of Maharashtra¹².

10. The factual matrix indicate that the victim girl is minor student, who has been allegedly subjected to sexual assault by the accused. The FIR was registered with concerned Police Station for offences referred to herein above. Investigation proceeded. The application was arrested on 14th December, 2016. He had preferred an application for bail before this Court which was rejected by order dated 26th July, 2017. The applicant also preferred Writ Petition No.

⁹ (1995) 1 SCC 14.

¹⁰ (2017) 4 SCC 393

¹¹ 2013 SCC Online P&H 20517.

¹² 2021 SCC OnLine Bom 2921.

6235 of 2019 which came up for hearing on 17th December, 2019. The order dated 17th December, 2019 passed by the Division Bench of this Court. The said order mentions that, it was pointed to the Court that the petitioner seeks leave to appear in person to demonstrate that he has been wrongfully convicted in a false case. He had preferred an appeal before this Court. He also preferred Writ Petition No.77 of 2018 before this Court. The Court directed that said Petition be listed along with appeal preferred by the applicant. Thereafter, Writ Petition No.6265 of 2019 along with Criminal Appeal No.1130 of 2019 was listed before the Division Bench of this Court on 10th January, 2020. The order dated 10th January, 2020 mentions that the appeal was filed by the appellant through Advocate and now wants to argue that appeal in person. The registry was directed to hold inquiry as per law to find out whether the appellant can be permitted to appear in person.

11. During the trial the prosecution had examined about 18 witnesses. Learned APP has brought to the notice of this Court that the Advocate representing the applicant before the trial Court had filed Vakalatnama to represent him in Special Case No.70 of 2017. The vakalatnama was signed by the applicant. It bears endorsement of Superintendent of Jail, where the applicant was detained. After

recording the examination-in-chief of witnesses they were cross examined. PW-1(victim girl) was examined on 7th August, 2018. She has been cross examined by the applicant in person. The cross examination is conducted in detail. PW-2 is the mother of victim girl. The examination-in-chief of this witness was recorded on 27th August, 2018. On completing the examination-in-chief, the trial Court has recorded that Advocate Smt. Prajakta Deshmukh is present before the Court for the accused. However, the accused wants to cross examine the witness himself. On perusal of Vakalatnama signed before the trial Court on 13th October, 2017 which was filed before the trial Court it is noted that the said vakalatnama was signed by Advocate Prajakta Deshmukh. Thus, the applicant was represented by Advocate, who was present before the trial Court when the evidence of witnesses was recorded. In spite of that the applicant had urged before the trial Court that he wants to cross examine the witness himself. He conducted lengthy cross examination of witnesses in the presence of his Advocate. It is further noted that pursis was filed before the trial Court (Exhibit-78) on 7th August, 2018 which is brought to the notice of this Court by learned APP. In the said pursis it was mentioned that the matter is kept for examination-in-chief and the accused is himself going to conduct the cross examination even though he has engaged the lawyer, pursis were signed by applicant

and his Advocate. The applicant/accused then proceeded to conduct lengthy cross examination of PW-2. PW-3 is the panch witness. He has been cross examined by applicant himself. PW-4 is the child witness. She is the student of the same school. She had deposed that the accused used to tell them dirty jokes. The trial Court has recorded that Advocate Prajkta Deshmukh is present before the Court on behalf of the accused, however the accused submitted that he himself wants to cross examine the witness and he proceeded to cross examine the witness. PW-5 is the panch witness. After making the similar note as above, the accused conducted cross examination of the witness. Subsequently the evidence of PW-6 panch witness, PW-7 - teacher from the school, PW-8 & 9 students of the school, PW-10, PW-11, Medical Officer, PW-12, PW-13, PW-14, PW-15, PW-16, PW-17 & PW-18, the Court has noted that whenever the cross examination was conducted, the Advocate was present and the accused insisted that he would himself cross examine witnesses and proceeded to cross examine them. Thus, although the Advocate representing accused is present through out the trial when the evidence of witnesses was recorded, during the cross examination, the applicant insisted to cross examine himself and conducted cross examination. It is pertinent to note that the applicant is educated person and on his insistence and in the presence of his advocate he had cross examined

the witnesses. Question of depriving him of his right of his legal-aid or breach of Section 304 of Cr.P.C. is ruled out.

12. Section 304 of Cr.P.C. reads as follows :

“304. Legal aid to accused at State expense in certain cases.

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub- sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session.”

13. The other question which is raised by the applicant that several witnesses were examined by the prosecution. Documentary evidence was not adduced in evidence. Once again it is required to be noted that the trial was conducted in the presence of the accused as well as Advocate representing him. It was open to the applicant/accused to examine the witnesses as defence witness. Such an application was never made. The statement was recorded under

Section 313 of Cr.P.C. He did not urge that he wants to examine any defence witnesses. After his conviction, the submission is made that there is failure on the part of the prosecution to examine several witnesses and their evidence be recorded by issuing directions to prosecution or that the applicant be permitted to examine those witnesses. The contention of the applicant is obviously after thought which cannot be accepted.

14. The prosecution adduced evidence of victim girl, students from the school, mother of victim girl and other witnesses. Witness API - Vasudev More had limited role. The prosecution had examined witnesses before the trial Court, who were cross examined by the accused. The trial Court has opined that their evidence is sufficient to establish the offences against the applicant. In the facts and circumstances of this case, the prayers sought in this application cannot be granted.

15. In the case of Hussainara Khatoon and Others V/s. Home Secretary, State of Bihar, Patna (supra) it was observed that right to free legal-aid is implicit in Article 21 without which the procedure cannot be said to be reasonable, fair and just. The Court referred to Article 39-A of the Constitution of India. In the case of Zahira Habibulla H. Sheikh and Another V/s. State of Gujarat and Others

(supra) the Hon'ble Supreme Court had observed that the powers under Sections 311 & 391 of Cr.P.C. are required to be exercised for just decision of the case. In the case of Asim @ Munmum @ Asif Abdulkarim Solanki V/s. State of Gujarat (supra) the Court had considered powers under Section 391 of Cr.P.C. It was observed that Section 391 of Cr.P.C. does not impose any restriction as to when the application filed for adducing additional evidence should be heard by the High Court. It is desirable that the application filed under Section 391 should be heard immediately after it is filed without waiting for the appeal to be finally heard. In the case of Rambhau & Another V/s. State of Maharashtra (supra) it was held that additional evidence can be taken to rectify any irregularity. In the case of Mohd. Hussain alias Julfikar Ali V/s. State (Fovernment of NCT of Delhi) (supra) it was observed that the demand of justice to be hallmark of appellate court's order directing retrial Court has to ensure that accused gets fair trial but at same time no guilty person goes scot free. In the case of Ranchod Mathur Wasawa V/s. State of Gujarat (supra) it was observed that indigence should never be a ground for denying fair trial or equal justice. In the case of Suk Das V/s. Union Territory of Arunachal Pradesh (supra) it was held that fundamental right of an indigeut accused to be provided with, held, cannot be denied on his failure to apply for free legal-aid. In the case of

Madhav Hayawadanrao Hoskot V/s. State of Maharashtra (supra) it was observed that the procedure established by law in Article 21 means procedure which is fair and reasonable. In the case of Olga Tellis and Others Vs. Bombay Municipal Corporation and Others¹³ it was observed that Article 39-A must be recorded equally fundamental in interpreting and understanding the meaning and content of fundamental right. The ratio in the aforesaid decisions is not applicable to the facts of this case.

16. In the case of Delhi Domestic Working Women's Forum V/s. Union of India and Others (supra) it was observed that it is unfortunate that there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such crises eclipse the real plight of the victims. Rape shakes the foundations of the lives of the victims. For many, its effect is a long term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings. In the case of Kurshaidan & Another V/s. State of Punjab (supra) it was observed that the victim was minor. There was no reason for her to

13 (1985) 3 SCC 545

falsely implicate the accused. The accused were unable to bring any material to show that the victim's father had any animosity against the accused. No father can stoop so low so as to bring forth false charge of rape with a view to take revenge from the accused. There is no material to discard the prosecution story. In the case of Dashrath S/o Hiranman Johare V/s. State of Maharashtra vide order dated 14th July, 2020 passed by this Court it was observed that the purpose of DNA test is different and even if it has come in negative, it does not rule out that the accused never committed forcible sexual intercourse on the victim. The said order was passed while rejecting the application for suspension of sentence. The said appeal was subsequently heard by the Court and vide judgment and order dated 9th September, 2021, the appeal was dismissed by relying upon the evidence of the victim girl and other evidence.

17. In the present case as stated herein above there is no breach of Section 304 of Cr.P.C. or violation of fundamental right of the accused in any manner. In the facts of the case it is noted that the prosecution has adduced sufficient evidence before the trial Court on the basis of which the applicant has been convicted. It is not warranted to make any observations on the merits of the case since the appeal preferred by the applicant challenging the judgment of

conviction is pending. On analyzing the judicial proceedings referred to herein above, I do not find that case is made out for recording additional evidence in exercise of power under Section 391 of Cr.P.C. or recall/re-examination of witnesses. The submissions advanced on behalf of the applicant thus deserves to be rejected. The contention of learned counsel for applicant that, during the process of recording further evidence, the applicant be granted bail is turned down. The applicant however is at liberty to pursue his application for suspension of sentence and grant of bail pending before this Court.

18. Hence, I pass the following order :

ORDER

- i.** Interim Application No. 2704 of 2021 stands rejected and disposed of accordingly.
- ii.** Interim Application No.185 Of 2021, Interim Application No.1368 Of 2021, Interim Application No.685 Of 2019 in Criminal Appeal No. 1130 Of 2019, Criminal Writ Petition No. 77 Of 2018 and Criminal Writ Petition No. 6235 Of 2019 are kept pending with Criminal Appeal No.1130 of 2019.

(PRAKASH D. NAIK, J.)