

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

**INTERIM APPLICATION NO.1283 OF 2019
IN
CRIMINAL APPEAL NO.1742 OF 2019**

Deepak Shankar Gawali .. Applicant/Appellant
Versus
State of Maharashtra and Anr. .. Respondents

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Mr.Vikas B. Shivarkar, Advocate for the Applicant/Appellant.
Mr.Arfa Sait, APP for the Respondent – State.
Ms.Grishma Lad, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 26, 2022.

P.C. :

This is an application for suspension of sentence and grant of bail during pendency of Criminal Appeal No.1742 of 2019.

2 The applicant/appellant is convicted for the offence punishable under Section 376(2)(1) of the Indian Penal Code (“IPC”, for short) and sentenced to suffer rigorous imprisonment for ten years, and, to pay fine of Rs.5,000/-. He is also convicted for the offence punishable under Section 366 of IPC, and, sentenced to suffer imprisonment for three years, and, to pay fine of Rs.5,000/-. He is further convicted for the offence punishable under Section 506(2) of IPC, and, sentenced to suffer imprisonment for one year.

3 The case of the prosecution is that the victim was working as a maid servant. She got acquainted with the applicant/accused. She was taken to Kelewadi Bridge on two wheeler by the accused. She was subjected to sexual intercourse. She was dropped again near the temple. Thereafter, she was again taken to another place, and, sexually assaulted by the accused. She was threatened of dire consequences, if she discloses the incident to any other person. First Information Report (“FIR”, for short) was registered. The investigation proceeded. The applicant/appellant was arrested. On completing investigation, charge-sheet was filed. The applicant/appellant was tried for the said offence and convicted vide judgment and order dated 31st January, 2018.

4 Learned advocate for the applicant/appellant submitted that the applicant/appellant is in custody for the period of four years. The victim was a major girl. She was consenting party for the relationship. The victim has admitted that she was having intimacy with the applicant/appellant. The case of the prosecution that the victim was mentally retarded, is afterthought. The FIR does not refer to the fact that the victim was mentally retarded. The evidence of first informant does not disclose about the said fact. The victim had not shown any signs of being mental illness. Victim has categorically

admitted that there was physical relationship between her and the accused.

5 Learned APP submitted that undisputedly the accused had subjected the victim to sexual assault. It cannot be said that the victim has consented for the relationship. Since victim was mentally retarded, she was not in a position to understand the nature of relationship or the consequence of such relationship. The witnesses who had examined the victim and submitted the report that the victim was suffering from mental illness. She was mentally retarded. Certificates issued by the Doctor's who had examined the victim about her mental illness was produced in evidence.

6 Learned APP has relied upon the decision of the Supreme Court of India in the case of *Chaman Lal Vs. State of Himachal Pradesh*¹ and *Tulshidas Kanolkar Vs. State of Goa*².

7 Learned advocate appointed to represent respondent no.2 has supported the submission of learned APP. It is submitted that the documents on record refers to clinical evaluation of IQ of the victim, which indicate that she has mild mental retardation. There is sufficient evidence on record which establishes that the victim was

1 (2020) 17 SCC 69

2 (2003) 8 SCC 590

mentally retarded. She was threatened by the accused. It cannot be said that the victim had consented for the relationship since she was mentally retarded. There is sufficient evidence to prove the charge. The trial Court has rightly convicted the applicant/appellant for the offences punishable under Sections 376, 366 and 506 Part-II of IPC.

8 The case of the prosecution is that the victim was subjected to sexual assault by the accused. She was aged around 19 years. However, according to prosecution, she was suffering from mental illness. Clinical examination reveals that she was suffering from mild mental retardation. P.W.1 is the victim. Her statement was recorded on 29th June, 2013. In the evidence, she disclosed that she was working as a maid servant. She knows the accused. He was resident in the nearby locality. He was engaged in supplying milk to various customers. The accused told her that he would provide her work. He took her on vehicle. They went to Kalewadi. She was subjected to sexual intercourse. After the incident, she again dropped near the temple on his vehicle. Thereafter, she went to her work place. After 4 to 5 days, the accused again met her and she was taken to Kalewadi. She was again subjected to sexual intercourse. She was threatened not to disclose the incident to any person. The accused had sexual relationship with her about 5 to 6 times against her wish. Her

father saw cash of Rs.2,000/-, in her purse, and, questioned her about the source of money. She was assaulted by her brother. Thereafter, she disclosed the incident to her father and brother. In the cross-examination, she stated that she was knowing the accused since her childhood. The accused used to visit her house and help them in household activities. She was having mobile number of the accused. She used to call the accused on his mobile number, and, called him near Gajanan temple. She used to gossip with him. The road going towards temple is crowded place. She used to walk down with the accused towards the spot for about 200 feet. She resisted the act. He put a cotton in her mouth. She had developed intimacy with the accused. She liked him. She did not disclose the incident to her parents deliberately since the accused would be in trouble. Her brother had assaulted the accused.

9 The aforesaid evidence would indicate that the victim had developed intimacy with the accused. There was physical relationship between them about 5 to 6 times. She had liking for the accused.

10 P.W.2 is the mother of victim. She stated that the victim was aged about 19 years at the time of incident. Her IQ level is very less. She knows the accused. From the cross-examination of the said witness, it can be said that in the first information report lodged by

her, it was not stated by her that the victim was mentally retarded. Her supplementary statement was recorded. It was not stated to the police that the victim girl told her that the accused had threatened her in case she disclose the incident to her parents and brother, and that she was taken by the accused to the spot.

11 P.W.5 has stated that she is working as a teacher in a school for handicapped at Nigdi, Pune. She was called by the police at the time when the statement of the victim was recorded. She had conversation with the victim. The victim had answered all the questions are put to her rationally. The statement of the victim was recorded in her presence. The girl was understanding all the questions put to her. She assisted the police in asking the questions to the girl, who was mentally and physically handicapped. The statement of the girl/victim was recorded in her presence, and, read over to her. She was also present when the statement of the victim was recorded before the Court of Magistrate. She had signed the statement. She observed that the victim girl was mentally retarded and physically handicapped. She admitted that she has not done any course in psychiatry. She did not see the medical papers of the victim girl about the medical treatment for psychiatrist. She never obtained the opinion from psychologist. From the evidence of this witness, it can be seen

that the victim girl had answered all the questions. The witness does not say that while recording the statement of the victim, she had shown any symptoms of mental retardation. P.W.11 is the medical officer. He has stated that in 2004, the victim was brought before him for disability certificate. After examination, he found that the patient was suffering from cerebral palsy with right hemi-paresis. He assessed disability to the extent of 62 percentage. He issued certificate. He admitted that mental retardation and cerebral palsy are two different aspects. To assess mental retardation, the family history, personal history, physical examination, mental condition and laboratory examination, is necessary. The patient needs to be kept in close observation. He had issued the certificate only on physical examination and not on mental examination. The certificate about mental certificate of the patient has to be issued by psychiatrist. The procedure in medical board is to examine patient by three different doctors independently and then to get opinion independently. This procedure is not followed in this case. The certificate issued by this witness is marked as "Exhibit-43". The certificate refers to the fact that the patient was suffering from cerebral palsy and the percentage of disability is 62 percentage. It is pertinent to note that the examination of the victim by this witness was in the year 2004. P.W.12 is the medical officer. She stated that the victim was aged about

19 years. Before examination, she took her consent. The victim gave history of sexual assault. She had also given history of assault by her brother. She stated that she knows the accused since 19 years, and, that she was subjected to forceful penetrative sexual intercourse 2 to 3 times, and, threatened not to disclose the incident. The witness did not notice any injury. Hymen was torn and there were old healed tears. Victim's intelligence quotient assessment is suggestive of mild mental retardation. He noticed some injuries on the person of the victim. She admitted that she had not taken family history of the patient regarding mental retardation. He noticed some abnormality and referred the patient to psychiatrist department. The victim was kept in observation at Sasoon Hospital. P.W.14 has stated that victim was referred to her from Sasoon hospital for assessment of intelligence. Patient was found to have mild mental retardation.

12 The case of the prosecution is, therefore, that the victim was suffering from mild mental retardation. The FIR, statement of victim and her deposition is silent in that regard. On perusal of the deposition of the victim, it can be seen that she has categorically stated that she had acquainted with the accused. She had liking for him. She tried to protect him. There was physical relationship between the on 5 to 6 occasions. She accompanied him on his two

wheeler and went to the spot of incident. She was again dropped by the accused. There was intimate relationship between them. Her evidence does not indicate any sign of mental illness. The evidence of the victim also does not make it appear that she is not in a position to decide what is right and what is wrong. It is noted that the applicant/appellant is in custody since last 4 years. Learned APP has relied upon the decision stated herein-above. The factual aspects in the said decision differs from the present case.

13 Hence, I pass the following order:

:: ORDER ::

- (i) Interim Application No.1283 of 2019, is allowed;
- (ii) The sentence of imprisonment imposed *vide* judgment and order dated 31st January, 2018, passed by learned Additional Sessions Judge Pune, in Sessions Case No.864 of 2013, is suspended and the applicant/appellant is directed to be released on bail on executing P.R. Bond in the sum of Rs.25,000/-, with one or more sureties in the like amount;
- (iii) Applicant/appellant is permitted to furnish cash bail security in the sum of Rs.25,000/-, for a period of eight weeks, in lieu of surety;

- (iv) Applicant/appellant shall attend the trial Court once in six months on the first Saturday of the month, till the final disposal of the Appeal;
- (v) Applicant/appellant shall not approach the victim in any manner;
- (vi) In the event there are two consecutive defaults in attending the trial Court, the said fact may be brought to notice of this Court. In such eventuality, the prosecution is at liberty to move an application for cancellation of bail;
- (vii) Interim Application No.1283 of 2019, stands disposed of accordingly.

(PRAKASH D. NAIK, J.)