

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.2655 OF 2022
IN
CRIMINAL APPEAL NO.583 OF 2022

Irfan Sattar Shaikh

.. Applicant

Versus

The State of Maharashtra

.. Respondent

...

Mr.Ritesh Thobde with Mr.Sagar S. Tambe for the Applicant.

Ms.Anamika Malhotra, A.P.P. for the State.

...

CORAM: BHARATI DANGRE, J.

DATED : 30th MARCH, 2023

P.C:-

1. The application filed by the Applicant/Accused No.3, seeks suspension of sentence and his release on bail, on being convicted by the learned Additional Sessions Judge, Solapur vide judgment dated 31/03/2022 in Sessions Case No.183 of 2018. Three persons, including the Applicant, who were tried by the learned Judge, came to be convicted for the offences punishable under Sections 376(D), 341, 394, 323 read with Section 34 of IPC. All of them have been sentenced to suffer R.I. for a period of twenty years and to pay fine of Rs.2,000/- each for the offence punishable under Section 376(D) of IPC. Apart from this, for the offence punishable under Section 394 of IPC, sentence of R.I. for seven years is also imposed. Sentence is also imposed for the offences punishable under

Sections 341 and 323 of IPC. All the sentences are directed to run concurrently.

2. The prosecution case, which has surfaced before the trial Court through PW 1, the prosecutrix is to the effect that on the date of incident, at about 8 p.m., on account of quarrel between herself and her husband, she was proceeding to the house of her daughter. She intimated Ravikiran Gadekar (PW 4) that she was leaving the house and going to her daughter's place. As per PW1, when she reached at Samadhan Nagar, PW 4 reached there and convinced her not to leave the house. At that time, three accused persons came there on a motorcycle and two of them assaulted PW 4 and one of them pulled her towards the math near the spot. One person committed rape on her and in the meantime PW 4 went to call the bypassers. Thereafter, two persons reached there and they also committed rape on her. As per the prosecutrix, PW 4 then brought some persons on motorcycle and on hearing the noise of the motorcycle and commotion, the accused persons fled from the spot.

3. Mr.Ravikiran Gadekar is examined as PW 4 and he categorically admit his love affair with the prosecutrix for about last two years and also admit of having consensual sexual intercourse.

In his deposition before the Court, he narrate that between 8.30 to 9 p.m., the husband of the prosecutrix came to him and disclosed to him that on account of his liquor

consumption, his wife has left the house and proceeded to her daughter's house. As a sequence to this, he also started search of the prosecutrix. When he came near the math, he noticed her walking and he attempted to convince her to return home. At that time, three persons came on the motorcycle and by parking their vehicle, they proceeded towards them. They dragged the prosecutrix towards a farm and due to fear, PW 4 rode away his motorcycle, towards Sahi Galli and there was crowd, at Sahi Galli. He sought help and 4 to 5 persons came with him, for help. Then he states that he noticed two ladies and one male riding on motorcycle and thinking that they were the persons, who had accosted the prosecutrix, he followed them, but to realize that they were not the same persons. He again returned to the spot and when he heard the cries from the prosecutrix, he found three male persons in the light of the motorcycle. He noticed that saree of the prosecutrix was removed and she was on petticoat. He brought her to Sahi Nagar and made call to police. On inquiry, the prosecutrix narrated the incident of forcible sexual intercourse.

4. The prosecutrix, being referred for medical examination, was examined by PW 7, Assistant Professor, Civil Hospital, Solapur, who found certain injuries on her body and hymen. Multiple tears were also present. She was also referred to the Pathology and Forensic Departments.

5. On perusal of the evidence placed before the POCSO

Judge, the inconsistencies in the version of PW 1 and PW 4 are glaring and it makes the prosecution case, vulnerable. Apart from this, it is surprising as to why the husband of the prosecutrix approached PW 4 and it is he, who went in search of her and not her husband. Moreover, the husband is also not examined as a witness by the prosecution. Further, not a single person, who came to the rescue of the prosecutrix at the say of PW 4, has been examined as a witness. It is only PW 4's version that the prosecutrix was found without saree and only on petticoat and she was taken to the police station and the offence under Section 376(D) has been registered and subsequently investigated.

The moot question which arises is about the identity of the accused persons. The prosecutrix as well as PW 4 have stated that they could see the accused persons in the headlight of the motorcycle. The prosecutrix does not say that because these persons had committed rape on her, she could identify them. What she stated, is that the incident though occurred in the night hours, she could see the accused persons in the light of the motorcycle. As per PW 4, after parking the motorcycle, the accused persons rushed towards them and the prosecutrix was taken to an interior place, where she was raped. In contrast, PW 1 stated that one person pulled her towards the bushes and after some time, two remaining Accused reached on the spot. Surprisingly, PW 4 ran away from the spot to take help, but there is not a single statement to the effect that he attempted to restrain the accused persons from committing rape upon the prosecutrix.

This gross lacuna and loopholes in the prosecution case must be clearly taken note of, as the identification of the accused persons is very doubtful and they are identified by the prosecutrix and PW 4 for the first time in the dock, after more than a year. No statement comes from the prosecutrix that she would recognise them because they had physically assaulted her and raped her. The motorcycle light has been cited as a source for identification and the prosecution has not bothered to conduct the TI parade, so as to ensure that they have arrested the right persons. Mere identification in the dock by itself is a weak piece of evidence, though substantive in nature, and that too when the identification of the accused persons by the prosecutrix and PW 4 is with distinct versions of about the time and place, where each of them faced the accused. The version of prosecutrix, herself creates many questions, which are not answered.

6. The Applicant has already undergone the sentence of five years. In the circumstances, I deem it appropriate to suspend his sentence, as the Appeal with all the grounds raised therein, deserve a consideration and it should not happen that subsequently if the conviction imposed on the Applicant is reversed, he would be left to his own fate, having undergone the entire sentence. Hence, the following order.

: ORDER :

- (1) The interim application is allowed.
- (2) The sentence imposed on the Applicant by the learned Additional Sessions Judge, Solapur vide judgment

dated 31/03/2022 in Sessions Case No.183 of 2018 is suspended.

(3) The Applicant is directed to be released on bail on furnishing P.R. Bond of Rs.25,000/-, with one or more sureties in the like amount.

7. Since the R & P is received, hearing of the Appeal is expedited. List the Appeal for final hearing, in the week commencing from 03/07/2023.

(SMT. BHARATI DANGRE, J.)