

*Uday S. Jagtap*

[Corrected as per speaking to the Minutes of order dated 05.09.2023]

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

**INTERIM APPLICATION NO. 2042 OF 2022
WITH
INTERIM APPLICATION NO. 2043 OF 2022
IN
CRIMINAL APPEAL NO. 653 OF 2022**

Sandip Shivaji Kamble .. Applicant
Aged – about 23 years, R/at
Shivneri Chawl Committee,
Sathe Nagar, Mankhurd, Mumbai
(Presently lodged at Taloja Jail)

Vs.

1. The State of Maharashtra
2. XYZ .. Respondents

**WITH
INTERIM APPLICATION NO. 2064 OF 2022
WITH
INTERIM APPLICATION NO. 2065 OF 2022
IN
CRIMINAL APPEAL NO. 657 OF 2022**

Ajay Ramesh Kamble
Aged – about 23 years, R/at
Shivneri Chawl Committee,
Sathe Nagar, Mankhurd, Mumbai
(Presently lodged at Taloja Jail) .. Applicant

Vs.

1. The State of Maharashtra
2. XYZ .. Respondents

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Mr. Hasnain Kazi a/w Shraddha Vavhal, Zeeshan Khan for the
applicant in IA 2042/2022
Mr. Vaibhav V. Ugle a/w Roshan Chavan, Shubham Vasekar and

Vikas Somwanshi for the applicant in IA 2064/2022

Mrs. Pushpa V. Ganediwala, appointed advocate for respondent no.2

Mrs. Manisha Tidake, APP for the respondent – State

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CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 18th AUGUST, 2023

P.C.

1. Applicants – Sandip Shivaji Kamble and Ajay Ramesh Kamble have been convicted along with two more accused namely Pranay Ingle and Amol Nirmal by the Additional Sessions Judge, Bombay of the offences punishable under Sections 376D, 323, 354 r/w Section 34 of the Indian Penal Code by the impugned judgment and order dated 25th May, 2022. The operative part of the order dated 25th May 2022 reads thus :-

“1. The Accused No.1 Pranay Samadhan Ingale, Accused No.2 Amol Izhak @ Razak Nirmal, Accused No.3 Sandip Shivaji Kamble and Accused No.4 Ajay Ramesh Kamble are hereby convicted under Section 235(2) Criminal Procedure Code of an offence punishable under Sections 376-D and 354 r/w 34 of Indian Penal Code.

2. The Accused No.3 Sandip Shivaji Kamble and Accused No.4 Ajay Ramesh Kamble are hereby convicted under Section 235(2) Criminal Procedure Code of an offence punishable under Sections 323 r/w 34 of Indian Penal Code.

3. For offence punishable under Section 376-D of Indian

Penal Code, Accused Nos. 1 to 4 are sentenced to suffer R.I. for 20 (Twenty) years and to pay fine of Rs.20,000/- (Rs. Twenty Thousand only) each, in default, to suffer further R.I. for 6 (Six) months.

4. For offence punishable under Section 354 of Indian Penal Code, Accused Nos. 1 to 4 are sentenced to suffer R.I. for 5 (Five) years and to pay fine of Rs.5,000/- (Rs. Five Thousand only) each, in default, to suffer further R.I. for 2 (Two) months.

5. For offence punishable under Section 323 of Indian Penal Code, Accused Nos.3 and 4 are sentenced to suffer R.I. for 1 (One) year and to pay fine of Rs.1,000/- (Rs. One Thousand only) each, in default, to suffer further R.I. for 1 (One) month.

6. All the sentences shall run concurrently.

7. The Accused are entitled for set off under Section 428 of Criminal Procedure Code of the period already undergone as under trial prisoner.

8. The marked Articles i.e. Labels and photographs be kept with Record and Proceedings of the preent file, being part of the evidence.

9. The seized clothes of Accused Nos. 1 to 4 (Articles-B, C,D,E,F,G,H,I.J and K) and the seized clothes of victim (Unmarked) being worthless, be destroyed, according to Rules provided for after an Appeal period is over.

10. The fine amount if recovered, be paid to the Complainant / Victim as per the provisions of Section 376-D of I.P.C.

11. The judgment is dictated and declared in open Court.

12. The copy of this judgmetn be provided with free of cost as per Sec.363(1) of the Cr.P.C. to the Accused.

13. As the matter is disposed off by this judgment the record and proceedings be sent to Record Department.

14. The copy of the judgment be forwarded to the DLSA for awarding compensation to the victim as per rules.”

2. The applicants – Sandip Kamble and Ajay Kamble have preferred the appeals *inter alia* moved applications under Section 389 of the Cr.P.C.

3. I heard learned Counsel for the applicants, learned APP as well as learned Counsel appearing for the victim.

4. The facts in brief are that the victim who was aged about 30 years and a widow with 3 minor children, was returning after watching a *Lavni* programme on 18th January 2019 at about 9.00 p.m. When she reached near Baban Hotel, she was dashed by one two wheeler. There was exchange of words. The persons on the two wheeler, however, left the spot but two unknown persons approached the victim. They enquired with her in a sympathetic manner. They offered the victim with some Chinese food. The victim had the Chinese food while sitting on the footpath. After her food, when she was about to leave, those two unknown persons

touched her inappropriately. Thereafter, she was dragged in a nearby open ground. She was beaten by the accused. Her mouth was gagged. The first accused removed her trouser. The another accused caught hold of her hands and thereafter the first accused committed rape upon her. Thereafter, the second accused also committed rape in a similar manner. Because of the assault and rape, the victim became unconscious. She regained consciousness after some time and returned home. She was admitted in Shatabdi hospital. A report came to be lodged on the basis of her statement against two unknown persons.

5. In her supplementary statement, which came to be recorded by the police after a few days, she had stated about the complicity of two more persons, who alleged to have committed rape upon her after some time. According to the victim, she was dragged towards back side of a parked autorickshaw. She was beaten and thereafter raped by those persons. Her head was also banged on the floor, which resulted into an injury.

6. The Investigating Officer after investigation, arrested all the accused persons. The victim was medically examined. Statements

of witnesses were recorded and a charge-sheet came to be filed.

7. The trial Court after recording the evidence of the prosecution witnesses, by the impugned judgment and order convicted and sentenced the applicants as above.

8. The incident in question took place on 15th January 2019. The FIR came to be lodged by the victim on 18th January, 2019. In her FIR, the victim did not state about the alleged incident when two other accused alleged to have dragged her in an open ground and subjected her to rape. However, in her supplementary statement, which came to be recorded on 21st January 2019 by the Investigating Agency, she had given the details of the alleged second incident, wherein two persons sympathetically asked her as to whether she would like to have some Chinese rice. She had eaten the Chinese rice. Subsequently, those two persons tried to outrage her modesty and thereafter dragged her in an open space where a person with white T-Shirt dragged her in an open space. When she tried to rescue herself from the clutches of the accused, the person with yellow shirt assaulted her. He pressed her face with his knee and thereafter accused with white T-Shirt committed rape upon her

after removing his clothes. At that time, the person with yellow shirt held her hands. Subsequently, the person with yellow shirt took his turn by raping the victim and by that time, the person in white T-shirt caught hold of the victim. She became unconscious. After gaining consciousness, she returned home.

9. In a supplementary statement as well as in the evidence and also in her statement before the learned Magistrate recorded under Section 164 of the Cr.P.C, the victim had stated that she had consumed *Tadi* (Indian country liquor, which contains alcohol). She admitted that she had consumed a bottle of *Tadi* after the programme of *Lavni*. This definitely indicates that the victim might have been under the influence of *Tadi* and, therefore, *prima facie* her evidence needs to be scrutinized cautiously. Admittedly, the incident had occurred at about 9.00 p.m. on 15th January, 2019.

10. In her FIR she did not state anything about the alleged incident of rape on rear seat of the autorickshaw by other two accused. However, in her supplementary statement dated 21st January, 2019, the victim had stated about the first incident of rape which occurred in an autorickshaw and subsequent incident

occurred in the open ground. She had not stated about the alleged rape in autorickshaw in her FIR.

11. Another important aspect is that the applicants have been charged of the offences punishable under Section 376D along with Section 354, 323 r/w 34 of the Indian Penal Code. Section 376D contemplates that where the woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine.

12. There is absolutely nothing on record to indicate that the two distinct incidences were in furtherance of a common intention of all the four accused. For, there is nothing on record to show that they acted in furtherance of a common intention of each of them. *Prima facie*, it seems that it was not a case of gang rape involving all the four accused. At the most, there could have been two distinct trials relating to two different incidences, which alleged to have occurred

on the same day after a gap of some time.

13. As regards test identification parade, the prosecution did not examine Executive Magistrate and, therefore, it is very difficult to accept the evidence of only the panch witness PW-4 Sanjay Govindwal. This witness in his cross, admits that at the time of Test Identification Parade, the police staff of the Mankhurd Police Station was also present. Admittedly, the applicants and the victim were not acquainted with one another and, therefore, the Test Identification Parade assumes significance, which has not been carried out as per the guidelines issued in the Criminal Manual. It is difficult to rely upon the Test Identification Parade in light of the fact that victim had admittedly consumed one bottle of Tadi before the incidents in question.

14. Even PW-4 Sanjay Govindwal could not identify the applicants during trial. There is no evidence as to how many persons were made to stand in a queue for Test Identification Parade.

15. The victim also did not give description of the accused, who alleged to have committed rape on her for the first time in an

autorickshaw at the time of lodging the report. However, during trial, she identified the applicants. When she was examined in the Hospital on 18th November 2019, she did not disclose to the Medical Officer about the alleged incident of rape. PW-6 Surendra Tak is the eye-witness but he did not witness the actual incident. He testified that he only heard the victim weeping at the relevant time.

16. PW-10 Dr. Shailaja Patil testified that the victim had given a history of sexual assault by unknown four persons. This witness had only described the physical injuries on the person of the victim by giving opinion that those injuries were possible when the head is banged on the floor. The injuries were simple in nature. However, there is no evidence about any sexual assault since this witness has referred the victim to the Psychologist as well as to the Gynecologist.

17. PW-11 Dr. Siddhi Kore, however, testified that the victim was a known case of depression and anti-depression. At the time of examination, she was stable with multiple injuries on her face, shoulder, cheek, left ear and arm. PW-11 on examination, noticed

her cervix and vagina healthy. There was no evidence of pain or discharge nor there were fresh injuries. The doctor further opined that sexual assault cannot be opined without forensic report. Had it been a case of rape of the victim by four persons within a short span of time, there ought to have been some evidence in that regard. This is significant in light of the fact that the victim, who was admittedly under the influence of *Tadi* was a known case of depression and anti-depression.

18. Considering all the aforesaid aspects, *prima facie*, it indicates that the applicants have made out some grounds entitling them to seek a relief of suspension of execution of the substantive sentence, pending the appeal.

19. In the aforesaid facts and circumstances of the case, without expressing any opinion on merits / demerits of the case, the applicants will have to be released on bail by suspending the execution of the substantive sentence, pending the appeal. This is also in light of the fact that the appeal would not be finally heard in the near future, in view of the pendency of the older appeals.

20. Hence, the following order is expedient :-

ORDER

(i) Pending the appeal, the applicants be enlarged on bail upon furnishing a P.R. bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of the Registrar Judicial of this Court, subject to deposit of fine amount imposed by the Trial Court.

(ii) The applicants shall not leave the jurisdiction of the concerned Police Station without seeking prior permission of this Court.

(iii) The applicants shall attend the concerned Police Station on first day of each month between 10.00 a.m. to 12.00 noon.

(iii) If the applicants commit two consecutive defaults in attending the police station, the prosecution will be at liberty to pray for cancellation of their bail.

(iv) The applicants shall furnish their permanent residential address as well as mobile number to the concerned police station.

21. The applications are disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)