



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APPA) NO.656 OF 2023

IN

CRIMINAL APPEAL NO.421 OF 2023

[Ramu Bapurao Tekam .Vrs. State of Maharashtra]

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Mr S. Singha, Advocate (Appointed) for Applicant/Appellant.
Mr A. Ghogre, APP for Non-Applicant/State.

CORAM : ANIL L. PANSARE, J.

DATE : 16th OCTOBER 2023.

. This is an application under Section 389 of the Code of Criminal Procedure, 1973 (for short, "Code").

2. The Applicant has been convicted by the learned Additional Sessions Judge, Chandrapur by judgment and order dated 30.05.2022 in Sessions Case No.164 of 2019, for the offence punishable under Sections 376(2)(j) and 376(2)(l) of the Indian Penal Code, 1860.

3. The Applicant is said to be in jail since 14th September, 2019. According to prosecution, victim is mentally retarded lady and has moderate intellectual disability, having IQ of 45 as against the normal IQ ranging between 92 to 110.

4. My attention has been invited by the learned Counsel for Applicant to the evidence of the victim. She has deposed that the incident is of the year 2019. Her brother and sister-in-law were in the house. Her parents had gone for labour work in agricultural field. She went to fetch sticks in the field. The

Accused, whose name is Ramu Bapurao Tekam, came there. He pushed her, removed her clothes and committed forcible act. She further states that the Accused said to her to not disclose the incident to her parents. He gave life threat to her, if the incident is disclosed to parents.

5. Her evidence is recorded in question and answer form. The question was put to her as to whether any other person, apart from the Accused has forced himself upon her, she answered in the negative. She then deposed that she gave birth to a baby girl. The Applicant (Accused) is said to be a father. In the cross-examination, she states that except for Accused, she did not indulge into sexual activities with any other person. A suggestion has been given that the Applicant is not the father of a child. The victim denied the said suggestion.

6. The aforesaid evidence indicates that except for the Applicant, no one has indulged into sexual assault upon the victim nor her evidence is that she has consensually indulged into sexual activities with any other person.

7. The learned Counsel for the Applicant submits that the DNA Test of the Applicant (Accused) was conducted and the report is at Exh-60. The test is in the negative.

8. Thus, the prosecution failed to prove that the Applicant is father of a child. The evidence of victim is contradictory to the aforesaid report.

9. The learned Counsel for Applicant submits that there is serious doubt about identity of the culprit. If the Applicant is

not father of a child and if the victim is firm on the point that she did not indulge into sexual activity with any other person, the case of the prosecution would become doubtful. That apart, he submits that medical examination of the Applicant has not been done, when he was arrested. According to him, Applicant was, at the relevant time, 70 years old and was not capable of committing penetrative sexual assault.

10. Mr Ghogre, learned Additional Public Prosecutor submits that this point has been raised for the first time. It was not the defence before the Trial Court that he is not capable of committing penetrative sexual assault, and therefore, this defence may not be considered at this stage.

11. It appears that this defence indeed was not taken by the Applicant before the Trial Court. Nonetheless, considering the seriousness of offences, for which the Applicant has been tried before the Trial Court, it was the duty of the prosecution to prove the case beyond reasonable doubt. In the sense, the prosecution was duty bound to prove that the Applicant was capable of committing penetrative sexual assault. He being of the age of 70 years old, the Investigating Officer ought to have been careful on this point.

12. In view of above and considering the nature of evidence put forth, the Applicant has an arguable case. The entire evidence will have to be revisited and scrupulously gone through. In that sense, the Applicant has made out a case for suspension of sentence. At this stage, the learned Counsel for

Applicant submits that the Applicant be released on furnishing P.R. Bond, as he has no financial resources. In fact, the Applicant has sought Legal Aid in accordance with law and the Advocate was appointed. Hence, the following order.

ORDER

- i) The application is **allowed**.
- ii) The execution of sentence imposed upon the Applicant by Additional Session Judge, Chandrapur by judgment and order dated 30.05.2022 in Sessions Case No.164 of 2019, for the offences punishable under Sections 376(2)(j) and 376(2)(l) of the Indian Penal Code, 1860 is hereby suspended.
- iii) Applicant – Ramu Bapurao Tekam, shall be released on bail on he furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount before the trial Court.
- iv) The Applicant shall remain present before this Court at the time of final hearing of the appeal.

Registry to process the appeal for final hearing, as per the Rules.

JUDGE