

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.914 OF 2024

IN

CRIMINAL APPEAL NO.297 OF 2024

Dipak Kashiram Pawar : Applicant

Vs.

State Of Maharashtra & Anr. : Respondents

Adv. Rukmini Khairnar, for the Applicant.

Mr. A. R. Patil, APP for the State.

Adv. Sneha B. Pandey, appointed by Legal Aid, for the Respondent No.2.

CORAM : KISHORE C. SANT, J.

DATE : 18TH APRIL, 2024

PC. :

1. Heard the learned Advocate for the Applicant and Learned APP for the State & the learned Advocate appointed for the Respondent No.2.

2. This Application is for suspension of sentence and for release of the Applicant on bail. The Applicant is convicted by the Special Judge, (POCSO) & Additional Sessions Judge, Nashik by Judgment & Order dated 6th July, 2023 in Sessions Case No.95 of 2021. The Applicant is held guilty for the offences punishable under Section 376(2)(j) of the Indian Penal Code. He is directed to suffer R.I. for ten years and to pay fine of

Rs.2,000/- and in default of payment to suffer further R.I. for one month.

3. In the present case the Applicant was tried along with the other Accused persons. It is the case of the prosecution that the victim in this case is mentally not sound. When she had went to house of her sister i.e. Informant, in the night, she was taken by all the four Accused out of the house and committed a rape on the Victim. In the trial in informant turned hostile. The Victim who is examined as PW-3 in her cross-examination specifically answered that she do not know who were the persons who committed the offence. Although she has identified the Applicant in the Court . The Applicant is merely convicted on the basis of Forensic Science Laboratory Report. Wherein it is proved that the semen on the cloths of the Victim matched with the DNA of the Applicant.

4. Learned Advocate for the Applicant thus vehemently argued that there is no evidence as such against the present Applicant. The incident alleged has taken place in the night when there was dark. The Victim in her cross accepted that she did not know the persons who committed the offence. Except RFSL Report there is no satisfactory evidence against the present Applicant. She submits that the cloths of the Victim were seized from the house of her sister. Cloths of the Accused were seized from brother of the Accused. Though the Accused was

examined by the doctor who collected the blood sample he is not examined before Court. No procedure is followed as envisaged in under Section 53-A of the Criminal Procedure Code. There was no Test Identification Parade. There is also no case that the Victim was knowing the Accused since prior to the incident. She thus submits that the evidence is lacking in this case. In support of her submission in respect of noncompliance of Section 53-A. She relied upon the Judgment of this Court at Aurangabad in Criminal Appeal No. 306 of 2016 in the case of ***Suresh s/o Devidas Malche Vs. The State of Maharashtra***. Court has held that it is imperative for the prosecution to follow the mandate of Section 53-A.

5. Learned Advocate for the Respondent No.2 vehemently opposes the Application. The learned APP also opposes the Application. He invited attention to para 24 of the judgment to show that there is Forensic Science Laboratory Report to prove the offence against the Applicant.

6. This Court has gone through evidence of the Victim and her sister to see *prima facie* case. The sister of the Victim has turned hostile. The victim though in the chief has stated about the incident, in the cross-examination, she has stated specifically that she do not know as to who committed the offence. In her statement recorded before Mahila Dakshata Samiti she stated the names two Accused as Deepak & one Suresh &

Ashok. It is also the case of the Accused that there are many persons with name Deepak in the village and there are four persons by named Deepak Pawar in the village. It is thus seen that the evidence of the prosecution is lacking on the exact identity of the present Applicant. Only evidence is the report of RFSL. This Court finds substance in the submission of the learned Advocate for the Applicant that the doctor who collected the blood sample for DNA Report is not examined. There is also no procedure followed under Section 53-A of the Cr.P.C. Further it is considered that the Applicant had suffered more than one year sentence out of ten years. This sentence is a fix term sentence. The Appeal is not likely to be heard in the near future.

7. This Court is thus inclined to allow the Application on both the terms *prima facie* on the merits as well as for the reason that a sentence is fixed term sentence and considering the judgment in the case of ***Bhagwan Rama Shinde Gosai And Others Vs. State of Gujarat***¹. Hence the following order.

ORDER

(a) The Application is allowed.

(b) The sentence awarded by the Special Judge, (POCSO) & Additional Sessions Judge, Nashik by Judgment & Order

¹ (1999) 4 SCC 421

dated 6th July, 2023 in Sessions Case No.95 of 2021 stand suspended.

- (c) The Applicant shall be released on bail on furnishing PR. bond and solvent surety in the sum of Rs.15,000/-.
- (d) The Applicant shall mark his presence before the Surgana Taluka Police Station once in a month i.e. on first Sunday between the 11.00 a.m. to 1.00 p.m.
- (e) Applicant shall not enter into Surgana Taluka and shall not contact the Victim or any of the Victim witness in any manner.
- (f) Applicant shall not enter jurisdiction Surgana Police Station except for attendance.
- (g) Applicant shall not try to contact Victim or any person from her family and witnesses.
- (h) Application stands disposed of.

(KISHORE C. SANT, J.)