

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

**INTERIM APPLICATION NO. 3108 OF 2023
IN
CRIMINAL APPEAL NO. 1242 OF 2023**

Amol Izhak @ Razak Nirmal

... Appellant/Applicant

Vs.

The State of Maharashtra & Anr.

... Respondents

Adv. Priyal G. Sarda, for the Applicant/Appellant.

Mrs. M. R. Tidke, APP for State.

Adv. Vrushali Maindad, for Respondent No. 2, through legal aid.

CORAM : KISHORE C. SANT, J.

DATE : 12th March, 2024

PC.:-

1. Heard learned Advocate for the Applicant, learned APP and learned Advocate for Respondent No. 2.

2. This Application is filed by Original Accused No. 2. By way of Judgment and Order dated 25.05.2022, passed in Sessions Case No. 647 of 2019 by the Ld. Additional Sessions Judge, City Civil & Sessions Court, Greater Bombay, the Applicant along with 3 other accused came to be held guilty for the offences punishable under Section 376-D, 323, 354 r/w 34 of the Indian Penal Code. All the Accused are sentenced to suffer 20 years R.I. and to pay fine of Rs. 20,000/-, in default to undergo R.I. for 6 months and for the offences under Section 354 of the Indian Penal Code, there is sentence to suffer R.I. for 5 years and to pay fine of Rs. 5000/-, in default to

undergo R.I. for 2 months.

3. The learned Advocate for the Applicant vehemently argued that the Accused Nos. 3 and 4 have been released on bail by this Court by Order dated 18.08.2023. He thus mainly prays the Application on the ground of parity. He further submitted that the incident is of 15.01.2019, whereas the FIR came to be lodged on 18.01.2019, and since then applicant is in jail. He submits that there are no injuries to prove sexual assault on the victim. Test identification parade was carried in presence of the police personnel and thus no evidentiary value can be attached to the test identification. He further pointed out that the observations made by this Court, while granting bail to Accused Nos. 3 and 4 in Interim Application No. 2042 of 2022 and Interim Application No. 2043 of 2022. This Court by Order dated 18th August 2023, allowed both the Applications and suspended the sentence by observing that there was no sexual assault and there is no evidence of sexual assault.

4. The learned Advocate for the Respondent vehemently opposes the Application she submits that in the present case the parity is not applicable as the allegation against the present Applicant are different than Accused Nos. 3 and 4. The incident alleged of sexual assault are also two different incident. The incident in which involvement of Accused Nos. 3 and 4 is distinct than the incident alleged against the present Applicant. She submits that PW-7 was the eyewitness who has also categorically deposed

about the incident though he has not exactly seen the incident. So far as medical evidence is concerned, she submits that case of rape the alleged incident took place on 15.01.2019 and the FIR was lodged on 18.01.2019, the victim is a lady of 30 years of age having two children and in such cases absence of medical evidence cannot be said to be fatal at this stage to disbelieve the story on the first occasion so far as the delay is concerned. The victim was under tromma and was hospitalized. It is the doctor who informed the police the delay therefore cannot be fatal in such cases and prays for rejection of the Bail Application.

5. The learned APP also vehemently opposes the Application. She submits that PW-7 is the eyewitness his evidence is not shattered. Even the Victim have categorically stated about the incident. She has identified the accused persons. It is further submitted that the Victim herself was under influence of 'Tadi' and under that circumstances alleged offence is committed and prays for rejection of the Bail Application.

6. After hearing the parties this courts finds that while considering the Application for Accused No. 3 and 4 this Court has observed that the victim had not given the description of those accused. She has not stated about the second incident in the FIR and in that view Bail was granted. This court accepts the submission of Respondent No. 2 in such cases the medical evidence may not be aggrieved in some cases.

7. Prima facie this Court finds that no case is made out to grant a

Bail. So far as the ground of parity is concerned, this court is clearly discussed the role of Accused Nos. 3 and 4 and then granted the bail.

8. Considering the above position this Court is not inclined to allow the Application. The Application therefore stands dismissed.

(KISHORE C. SANT, J.)