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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 1262 of 2015

IN

CRIMINAL APPEAL No. 477 of 2015

Pramod Dattatraya Jadhav

..Applicant.

Versus

The State of Maharashtra

Respondent.

Mr Ganesh Gole i/by Ritesh Ratnam, Advocate for the applicant.

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

CORAM : A.R.JOSHI,J

DATE : 19th October, 2015

P.C. :

1) Heard the learned Counsel for the applicant on this application for bail during pendency of the appeal and suspension of substantive sentence. Also heard the learned APP for the State.

2) The facts of the matter are very peculiar in nature, inasmuch as the present applicant – original accused no.1, out of total four accused persons, is convicted for the offence punishable under

Section 376 of IPC and sentenced to suffer rigorous imprisonment (RI) for 10 years and to pay a fine of Rs.10,000/-. He is also convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act, 2012') and sentenced to suffer RI for 7 years and to pay a fine of Rs.10,000/-. Both the sentences are directed to be run concurrently. Other co-accused Nos. 2 to 4 are acquitted.

3) During the arguments, it is strenuously contended that the prosecutrix girl was consenting party and on her own she accompanied the applicant/accused no.1 at various places and had sexual intercourse with him with her consent and will. It is further argued that the age of the girl is not established as below 16 years of age. It is also argued that though initially charges were for the offences punishable under sections 363, 376 of IPC and section 4 of the POCSO Act, 2012, the applicant/accused no.1 is not convicted for the offence punishable under Section 363 of IPC.

4) Total four prosecution witnesses were examined during the trial. Exhibit 25 produced before the trial Court is the birth certificate of the prosecutrix showing the date of birth as 28th October, 1999. The alleged incident of the girl missing from her lawful guardianship and in fact not knowing her whereabouts for more than two months

initially occurred on 23rd December, 2013. As such if the said date of birth as mentioned in the birth certificate Exh.25 and as stated by her father PW no.1 and also by the girl PW no.2 is considered then, as on 23rd December, 2013 the girl was apparently 14 years and 2 months old and definitely less than 16 years. This factual position has been ascertained by the trial Court. But it is curious enough to note that though this age, less than 16 years, is accepted by the trial Court and though the applicant is convicted for the offence under section 376 of IPC, there is no mention of sub-section 2 of section 376 of IPC. The case of the prosecution and also the substantive evidence of the prosecutrix girl PW no.2 go to show that she was taking tuition in the neighbouring house of the present applicant accused no.1. Said applicant is apparently aged about 35 years and on the date of the incident when she had attended her school, she was called from her school by the applicant and his brother original accused no.2 on the pretext that one of her relatives i.e. her maternal aunt had visited their house and she was called.

5) It is a factual position that the prosecutrix girl was missing from 23rd December, 2013 and whereabouts of the applicant and the girl were known subsequently and they were traced out and brought to the police station only on 20th February, 2014 i.e. after lapse of about

two months. In between, the couple stayed at various places in Gujarat, Rajasthan, etc. This part of the evidence of PW no.2 prosecutrix was emphasized much by the learned counsel for the applicant in order to canvass the proposition that the girl was the consenting party and there was no coercion on her to leave her lawful guardianship. If the age of the girl is considered, as less than 16 years, as accepted by the trial Court and as stated by the girl, her father and as mentioned in the birth certificate Exh. 25, this argument as to the consent by the girl, is of no significance and cannot be accepted.

6) Considering the factual position brought before the trial Court, in fact, it was a case of aggravated penetrative sexual assault as defined under section 5 of the POCSO Act, 2012. However, apparently, the trial Court misdirected herself and punished the applicant for the offence under section 4 of the POCSO Act, 2012 i.e. for the punishment for penetrative sexual assault. Section 5 (f) of the POCSO Act clearly indicates that on the facts established before the trial Court, it is a case of aggravated penetrative sexual assault.

7) Section 5 (l) of the POCSO Act, 2012 reads thus :

“whoever commits penetrative sexual assault on the child more than once or repeatedly;”

The definition of 'child' as mentioned in section 2 (d) of the POCSO Act, 2012 which reads, “child” means any person below the age of eighteen years.

8) Here the age '18 years' is of much significance, as under the said Act any person below 18 years is termed as child. Of course, this aspect as to not punishing the applicant under section 6 but punishing under section 4 can be independently dealt with while dealing with the appeal.

9) One more aspect is to be looked into as to the acquittal of the applicant for the offence under section 363 of IPC. Once the trial Court concluded that the prosecutrix girl was below 16 years of age, then, definitely there must be application of section 363 of IPC. Also this error in law can be cured at the time of final adjudication of the appeal.

10) Considering the factual position as above, in the opinion of this Court, this is not a case in which the present applicant can be released on bail during the pendency of the appeal and hence the present application is dismissed and disposed of.

(A.R.JOSHI, J.)