

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.222 OF 2016

IN

CRIMINAL APPEAL NO.28 OF 2016

BALAJI SARJERAO KAMBLE

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Satyavrat Joshi, Advocate for the Applicant.

Mrs.M.R.Tidke, APP for the Respondent - State.

CORAM : P N. DESHMUKH, J.

DATE : 31st AUGUST 2016.

P.C. :

1 This is an application for suspension of substantive sentence imposed upon applicant / accused for the offences punishable under Section 376 of IPC and Sections 4 and 8 of Protection of Children from Sexual Offences Act, 2012, (POCSO Act). Applicant is found convicted for 7 years and is directed to pay fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for 3 months for the offence punishable under Section 376 of IPC. Applicant is further convicted for the offences punishable under Section 4 of POCSO Act and is sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of

Rs.5,000/-, in default, to suffer rigorous imprisonment for 3 months, and for the offence punishable under Section 8 of said Act and is sentenced to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for 1 month. All the sentences are directed to run concurrently.

2 Learned counsel for applicant had submitted that evidence of prosecutrix does not corroborate with medical evidence and has also made an attempt to convince that applicant is falsely involved and for that purpose has referred to relevant evidence on record. Application is mainly pressed on the ground of evidence of PW4 Dr.Swati who has stated that the hymen of the victim girl was found old torn. It is, thus, contended that if according to the case of prosecution incident is dated 21st December 2013 and on registering crime on 23rd December 2013 if the prosecutrix is examined on 24th December 2013, it cannot be said that she was subjected to sexual assault as alleged by prosecution, by applicant on 21st December 2013. Learned counsel for applicant has thus submitted that application be allowed.

3 Learned APP opposed the application contending that there is direct evidence.

4 Prosecutrix is found aged 8 years. From her evidence it is clearly established that applicant being her neighbour was known to her and on the day of incident, he took her on the stairs near the terrace of her house where he removed all clothes of victim minor girl and sexually assaulted her, and it is upon prosecutrix's complain of pain in her private part, that she was left free by applicant. It is her further evidence that thereafter she went to sleep, however, as she was suffering from pain in her private part as well as in abdomen, she informed about it to her mother, who took her to doctor and then accompanied further to police station, where report came to be lodged. Learned counsel for applicant referring to above evidence of prosecutrix had contended that though according to evidence of prosecutrix there was complete penetration, her evidence did not corroborate medical evidence, as according to the evidence of PW4 Dr.Swati, there was possibility of penetrative sexual vaginal intercourse. It was, thus contended that the medical evidence do not establish case of prosecution of applicant subjecting victim girl to sexual intercourse. However, above submission do not impress at all, as the age of girl is 8 years only, and as such, she cannot said to have knowledge with regard to above facts of penetration whatsoever is caused to her at the time

of incident. However, it is material to point out that oral version of prosecutrix is fully corroborated by the medical evidence wherein Dr.Swati has in clear terms deposed that on her examining prosecutrix, she found her hymen to be torn at 5 O'Clock position and has expressed possibility of penetrative sexual intercourse. Though, according to her, the hymen is found to have torn old, that by itself does not entitle applicant for being released on bail on this count alone.

5 Learned counsel for applicant has then referred to evidence of complainant – the mother of prosecutrix, who has admitted that one Shailesh More, and Dhanawadebai had narrated incident to police and that police had reduced the complaint in writing upon which she signed and thus submitted that complaint is not aware of contents of report, however, it is noted that complainant has specifically denied that she is not aware of the contents of report Exhibit 12. Moreover, on perusal of cross-examination of Investigating Officer who had received the complaint, it is found that no suggestions are put to this witness with regard to admission of complainant as aforesaid, and thus, same appears to be stray admission on record.

6 Having considering evidence of prosecutrix coupled with medical evidence, application is liable to be rejected.

 However, having considering the fact that applicant / accused is in custody since 23th December 2013, and as such, has undergone almost 2½ years of sentence, following order is passed :

- i) Application is rejected.
- ii) Appeal is expedited.
- iii) It be listed for final hearing on **18th October 2016.**

 To be shown on **Admission Board.**

(P. N. DESHMUKH, J.)