

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.523 OF 2016

IN

CRIMINAL APPEAL NO.286 OF 2016

SACHIN @ BARAKYA PANDURANG PATIL)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.S.V.Kotwal i/b. Mr.Ajit Savagave, Advocate for the Applicant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 29th NOVEMBER 2016.

P.C. :

1 This is an application for suspension of sentence and for releasing the applicant / accused on bail during pendency of the appeal filed by him challenging the judgment and order of his conviction recorded on 18th March 2016 by the learned Specail Judge, Kolhapur, in Special Case No.61 of 2014. The applicant / accused was convicted for the offence punishable under Section 376(2) of the IPC and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act (POCSO Act). For the offence punishable under Section 376(2) of the IPC, he is sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of

Rs.5,000/-, in default, to further undergo rigorous imprisonment for 6 months. Similar sentence is imposed on him for the offence punishable under Section 4 of the POCSO Act. For the offence punishable under Section 6 of the POCSO Act, the applicant is sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for 6 months. All the sentences are directed to run concurrently.

2 Heard the learned counsel appearing for the applicant / accused. He argued that considering the nature of offence and the sentence, there should have been a greater scrutiny of evidence while deciding the sessions case by the learned Special Judge, Kolhapur. The learned counsel argued that there is no evidence to demonstrate that it was the applicant / accused who had committed the crime in question. He argued that identity of the applicant as the perpetrator of the crime in question is not established and evidence of the mother of the victim female child positively shows that the applicant had not committed the crime in question. The learned counsel further argued that the evidence of PW9 Priyadarshini, President of Child Welfare Committee, recording identity of the applicant has come on record by way of omission. In the wake of this discrepant evidence, according to the learned counsel for the applicant, other evidence is prima facie not sufficient to hold that it was the applicant / accused, who had committed the crime in question.

3 The learned APP opposed the application by contending that the identity of the applicant as the person who committed rape on the victim female child is established by the prosecution, and therefore, the applicant is not entitled for bail.

4 According to the prosecution case, rape was committed on a minor girl child in the toilet of the Anganwadi, where she was taking education. Perusal of evidence as well as judgment and order of learned trial court goes to show that parents of the victim female child had chosen not to lodge a report of the incident. Ultimately, FIR came to be filed by PW1 Yuvraj Athare, P.S.I., Laxmipuri Police Station, Kolhapur, on the next day of the alleged incident. The incident, allegedly, took place on 23rd September 2014. The victim minor female girl weepingly came towards PW11 Sunanda Kalekar, Anganwadi Sevika, and disclosed to her that one uncle had touched her private part. Evidence of PW11 Sunanda does not disclose that the crime in question was committed by the present applicant / accused. The victim girl is not examined as witness by the prosecution.

5 PW8 Vaishali Mankar is the mother of the minor female victim. She has stated in her evidence that in presence of Priyadarshini Chorge - President of Child Welfare Committee, Shri Shevale – A.P.I., her husband and father-in-law, her minor female

child disclosed that one uncle touched her private part and in presence of all, minor female victim identified the accused arrested by the police. With this, PW8 – mother of the minor female victim, stated in her evidence that the accused person i.e. present applicant before the court is not the person who was identified by her minor female victim on that day. Thus, the applicant / accused is stated to be some another person and not the person who had committed the crime, by mother of the victim.

6 Priyadarshini Chorge, President of Child Welfare Committee, is examined as PW9. In her statement before the court, she stated that police brought arrested accused and upon seeing the arrested accused, the minor female victim got frightened and embraced her mother and started saying that she should be taken to the house. Then, PW9 Priyadarshini identified the applicant / accused in the dock by stating that he is the same person who was brought by police on that day. However, cross-examination of this witness reveals that this portion of her evidence came on record by way of omission and she had not disclosed the same while recording her statement by police. It is trite that the evidence coming on record by way of omission needs to be ignored. If this improvement in the evidence of PW9 is ignored, then there is nothing in her evidence about identity of the applicant / accused as perpetrator of the crime.

7 According to the prosecution case, process of identification of the accused as perpetrator of the crime, took place in the police station at the behest and in presence of Investigating Officer Pradipkumar Shevale, A.P.I. He is examined as PW16. In his evidence before the court, PW16 Shevale has not deposed that the process of identification of the applicant / accused as the perpetrator of the crime, was conducted by him in the police station. This witness has not deposed that in presence of parents of the minor female victim and other witnesses, he had brought the accused before the minor female victim, or that, thereafter, the minor female victim identified the accused in presence of all of them. Prima facie, if such exercise of identification of the accused by the minor female victim took place in the police station, at the instance of PW16 Shevale, then, nothing prevented him from disclosing that fact to the court while in the witness box. This aspect, particularly, assumes importance, because the minor female victim was not examined by the prosecution and identity of the applicant / accused was attempted to fix through evidence of other witnesses about his identification at the police station by the victim. On this backdrop of not disclosing the event of identification of the applicant / accused by the minor female victim in the police station by PW16 Shevale, makes the prosecution case of sexual assault by the applicant / accused seriously doubtful. There hardly remains any other

evidence of identification of the applicant / accused and its creditworthiness is also shrouded in doubt due to evidence of PW16 Shevale, Investigating Officer.

8 Considering this nature of evidence against the applicant regarding his identity as the perpetrator of the crime and the fact that hearing of the appeal will take its own time, the application deserves to be allowed by the following order :

- i) The application is allowed.
- ii) Substantive sentence of imprisonment awarded on the applicant / accused is suspended and he is directed to be released on bail, on executing P.R.Bond in the sum of Rs.25,000/- and on furnishing surety in like amount before the trial court.
- iii) The applicant / accused should not commit any crime during pendency of the appeal.
- iv) The applicant / accused should report the trial court once in two months and preferably on fourth Monday of second month.
- v) Needless to mention that all the observations made in the order are prima facie observations which shall not have any bearing on the final conclusion in the appeal.

(A. M. BADAR, J.)