

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.745 OF 2017
IN
CRIMINAL APPEAL NO. 455 OF 2017

Mamta Ramesh Dubey and Anr. ...Applicants
Versus
The State of Maharashtra. ...Respondent

Mr.Subhash Jha a/w Ms. Sanjana Pardeshi i/b Law Global
Advocates for the Applicants.
Mr. Prashant Jadhav, APP for the State.

CORAM: SMT.ANUJA PRABHUDESSAI, J.
DATED: 24th AUGUST, 2017

PC:-

1. The Applicants who were the accused in Special Case No.89 of 2013 have filed this application for bail and suspension of execution of substantive sentence imposed by judgment dated 17.04.2017 in Special Case No. 89 of 2013 passed by Special Judge (POCSO Act), Thane.

2. Heard Mr. Subhash Jha, the learned Counsel for the Applicants. He has submitted that there is no prima facie material on record to prove that the victim was below 18 years of age as on the date of the incident. He has further submitted that the conduct of the victim prima facie indicates that the act was conscientious. He therefore, states that this is a fit case for suspending the execution of substantive sentence and for releasing the Applicants on bail pending final hearing and disposal of the appeal.

3. Mr. Prashant Jadhav, the learned APP submits that bonafide certificate issued by Pw-6 vis-a-vis the ossification test conducted by PW-4 prima reveals that the prosecutrix was below 18 years of age. He has further submitted that the evidence of the prosecutrix proves that the Applicant No.2 had forcible sexual intercourse with the Applicant that she was threatened and was not allowed to meet her parents. He submits that the prosecutrix was living with the Applicants and it was not possible for her to leave the house and/or to

disclose the incident to her parents or other relatives. The learned APP submits that the testimony of the prosecutrix prima facie proves that she was subjected to rape.

4. I have perused the records and considered the submissions advanced by the learned Counsel for the Applicant and the learned APP for the State.

5. The Applicant Nos.1 and 2 have been held guilty of the offences punishable under Section 376(2)(1) and 506 r/w 34 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) Act. They have been sentenced to undergo maximum imprisonment for 15 years for the offence punishable under Section 376(2)(i) of the Indian Penal code and to pay fine total fine of Rs.4000/-.

6. The Applicants are also directed to pay compensation of Rs.1,00,000/- each to the victim in addition the State

government is also directed to pay the compensation of Rs.1,00,000/- to the victim.

7. It is the case of the prosecution that the Applicant No.2 Santosh had committed rape on the prosecutrix, who was a minor on the date of the incident. The Applicant No.1 is alleged to have intentionally aided and abetted the commission of the said offences.

8. It is pertinent to note that though it is alleged that as on the date of the incident the prosecutrix was below 18 years of age, the prosecution has not produced the birth certificate of the prosecutrix. In this regard, it is relevant to consider the evidence of PW-1, mother of the prosecutrix. She has stated that she does not know the exact date of birth of her daughter i.e the prosecutrix however, she claims that she was born in a government hospital, Chhaya, Ambarnath. She also claims that she had obtained the birth certificate of the prosecutrix from Ambarnath Municipality. As stated

earlier, the prosecutrix has not produced the said birth certificate and has not made any attempts to verify whether the birth of the prosecutrix was in fact registered in Municipal Corporation at Ambernath.

9. The prosecution has relied upon the bonafide certificate at Exhibit 48 issued by PW-6, who is a head Mistress of 'Priyadarshani Vidyamandir'. The said certificate reveals that the prosecutrix herein was admitted in the said school in 6th Standard and that as per the school records her birth date is 11.10.1998. The testimony of PW-6 prima facie reveals that the birth date of the prosecutrix was shown in the school record as 11.10.1998 based on the affidavit of the mother of the prosecutrix, which was not notarised. It is to be noted that the prosecution has not verified the previous school records and has not made attempts to verify the age of the victim as per the previous school records.

10. The prosecution has relied upon the ossification test conducted by PW-4 Dattatraya. PW-4 has deposed that he had conducted ossification test and has opined that the prosecutrix was within 15 to 16 years of age group. It is to be noted that the medical officer has not specified as to on what basis he has arrived at the said finding. Thus the material on record does not prima facie indicate that the victim was below 18 years of age.

11. As regards the allegation of rape, the evidence of PW-2 indicates that the Applicant No.1 had taken her to her house to do household work. The prosecutrix claims that the Applicant No.2, who is the son of the Applicant No.1 had forcible sexual intercourse with her several times during her stay with the Applicants. Evidence of PW-2 prima facie indicates that her mother used to visit her twice a month. However, she had not disclosed the incident to her mother. PW-2 has further stated that she had disclosed the incident to her mother after about four months. She had continued

residing in the house of the Applicant even after informing her mother. The evidence on record prima facie reveals that the prosecutrix had continued staying with the Applicants even though she had an opportunity of leaving the house.

12. Considering the nature of the evidence, as regards the age of the Prosecutrix as well as the allegation of rape, in my considered view, this is a fit case to grant bail and suspend the execution of substantive sentence pending final hearing and disposal of the Appeal. Hence, the following order.

- (i) The Application is allowed;
- (ii) Execution of substantive sentence imposed against the Applicants vide judgment dated 17.04.2017 in Special Case No. 89 of 2013 passed by Special Judge (POCSO Act), Thane is suspended till the final hearing and disposal of the Appeal.
- (iii) The Applicants are ordered to be released on bail on furnishing bail bond of Rs.50,000/-(Rs.Fifty Thousand)

each with one or two sureties to the like amount to the satisfaction of the Special Judge (POCSO Act), Thane.

- (iv) The Applicants to deposit 50% of compensation within six weeks, before the Special Court, Thane.
- (v) The Applicants shall furnish their contact number, permanent as well as local address, if any, and shall intimate change of address, if any, to the Investigating Officer, as well as to the concerned Court;
- (vi) The Applicants shall not interfere nor contact with the victim in any manner.

(ANUJA PRABHUDESSAI, J.)