

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1114 OF 2016

IN

CRIMINAL APPEAL NO.471 OF 2016

MAHAVIR DEVENDRAKUMAR MISHRA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Hrishikesh Mundargi i/b. Mr.Subir Sarkar, Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 18th JANUARY 2017.

P.C. :

1 This is an application for suspension of sentence and releasing the applicant / accused on bail during pendency of the appeal filed by him. The applicant / accused has been convicted of the offence punishable under Section 6 of the Protection of

Children from Sexual Offences Act (POCSO Act) and he is sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.5,000/-, in default, to undergo simple imprisonment for 1 month.

2 Heard the learned counsel appearing for the applicant / accused extensively. He took me through the entire evidence adduced by the prosecution and the main thrust of argument of learned counsel for the applicant / accused was to the effect that there is no corroborative material in order to justify the conviction. He argued that there is no evidence to identify a person named Rupa – tuition teacher of the alleged victim. He argued that mother of aid Rupa (meaning thereby that mother of the present applicant / accused) is not examined by the prosecution. The learned counsel further argued that other children were also taking tuition as seen from answer to Question No.74 by the very alleged victim and one of them namely Abhinandan is brother of the alleged victim. The learned counsel argued that timing of the tuition class is not matching with the

time stated by the victim. The victim has not made hue and cry during happening of the alleged offence. The learned counsel further argued that clothes of the victim were handed over on the next day and in this view of the matter, C.A. Report is not of any consequence. By drawing my attention to evidence of PW1 Dr.Devki Desai, the learned counsel appearing for the applicant / accused argued that there was no possibility of staining clothes of the victim with blood. Evidence of PW10 Anita Ghadge was pointed out to show omission. My attention is also drawn to evidence of PW2 Subhash Chikhliya and PW5 Ajay Gupta – maternal uncle of the victim. It is argued that possibility of false implication of the applicant / accused in the crime in question cannot be ruled out in the wake of the fact that the applicant / accused is not having friendly relations with relatives of the alleged victim. The learned counsel further argued that the applicant / accused is a young person of 21 years of age and is a student of MBBS. With this, the learned counsel for the applicant / accused argued that the applicant / accused deserves liberty during pendency of the statutory appeal. He further argued

that there is no evidence to justify conviction for the offence punishable under Section 6 of the POCSO Act. With this, he pressed for release of the applicant / accused on bail.

3 The learned APP opposed the application contending that evidence of the alleged victim is duly corroborated by the medical evidence on record. By drawing my attention to evidence of Dr.Prasad, the learned APP argued that this evidence points out confession by the applicant / accused before the Medical Officer which also corroborates the version of the victim of the crime.

4 I have carefully considered the rival submissions and also perused the impugned judgment and order apart from deposition of witnesses.

5 The victim of the crime in question is stated to be a female child aged about 10 years at the time of the incident in question. At the relevant time, this victim female child – PW4 was studying in 5th Standard. She was taking tuition from sister of the

applicant / accused. It is the case of the prosecution that on 6th August 2014, the PW4 / victim female child attended house of the applicant / accused. Her tuition teacher was not present. Therefore, mother of the applicant / accused asked her to wait upstairs. Then, according to the prosecution case, when the victim female child / PW4 was waiting upstairs, the applicant / accused went there and made her to sit on his lap and fondled her and then committed aggravated penetrative sexual assault on her by inserting his finger in her vagina. On return, the victim female child is stated to have reported the incident to her mother which resulted in lodging the FIR. Accordingly, Crime No.217 of 2014 for the offence punishable under Sections 376(1), 354A of the IPC as well as Sections 4 and 8 of the POCSO Act came to be registered. After filing of the charge-sheet and consequent trial, ultimately the applicant / accused is convicted of the offence punishable under Section 6 of the POCSO Act and is sentenced accordingly as indicated in the opening paragraph of this order.

6 Section 3 of the POCSO Act defines penetrative sexual assault and it reads thus :

3. Penetrative sexual assault : A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 5 of the POCSO Act deals with aggravated penetrative sexual assault. Whosoever committed penetrative sexual assault on a child below 12 years of age is also said to have committed aggravated penetrative sexual assault as defined in inclusive definition of the terms found in Section 5 of the said Act.

7 In her evidence, victim female child / PW4 has stated that the applicant / accused made her to sit on his lap, fondled her and then inserted his finger in her private part. While recording evidence of PW4 – victim female child, the learned trial court has taken note of the fact that while answering this question, the child witness has pointed out her private part. In the wake of this answer, so called omission sought to be pointed out from evidence of PW10 Anita Ghadge pales into insignificance. Ultimately, we are supposed to examine and appreciate evidence of a female child victim who was about 11 years of age while standing in the witness box. Her perception about human organs will have to be kept in mind rather than going into technicalities.

8 PW1 Dr.Devki Desai of Nair Hospital had examined female child victim of the crime in question. Relevant portion of her evidence found in paragraphs 3 and 4 read thus :

3 Hymen opening dilated. Though edges were regular, they appeared reddened with a small superficial laceration at 10 O' Clock position of size 0.2 x 0.1 cms, reddish in colour. Above findings

suggestive of attempted penetration consistent with history. Injuries were fresh.

4 We were of opinion that finding suggestive of penetrative vaginal sexual assault. No evidence of any injuries on the body except a small superficial laceration at 10 O'Clock position (0.2 x 0.1 cm) near hymenal region. Her age is 9-10 years. Her blood group is "B Positive."

This makes it clear that there was small superficial laceration on the private part of the female child victim of the crime in question. Opening of hymen of the victim was found dilated. The Medical Officer categorically deposed that these findings are suggestive of penetrative vaginal sexual assault.

9 At this stage, without going to other evidence adduced by the prosecution and its veracity, in my considered view, with this material, the evidence of the minor female victim gains sufficient corroboration to reflect sexual assault on her. Even otherwise, it is well settled that in such type of offence, broader probabilities of prosecution case are required to be kept in mind.

10 So far as the argument regarding false implication of the applicant / accused in the crime in question is concerned, observations of the Hon'ble Apex Court in paragraph 10 of its judgment in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat** reported in **AIR 1983 SC 753(1)** takes care of such type of arguments. The relevant portion of that judgment reads thus :

“Without the fear of making too wide a statement or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :-

- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.
- (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the

society including by her own family members, relatives, friends, and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought in to controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent.

(12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.”

11 In the case in hand, considering the strata of the society from which the victim as well as the present applicant / accused are hailing, at this stage, it is hard to hold that chastity of their daughter who was aged about 10 years would be put to a stake to wreck vengeance against the applicant / accused. That apart, there is no material to show that the prosecuting party was harbouring a grudge against the applicant / accused in order to implicate him falsely in such type of crime, where honour of the family will be at stake.

12 The applicant / accused is a young person studying medicine at the relevant time. However, at the same time, nature of crime is required to be kept in mind. The victim of the crime in question is a female child of 10 years of age. Evidence of the victim child shows that there was insertion of finger by the applicant / accused in her private part. She was just 10 years of

age at the time of the alleged offence. Therefore, with this evidence, it cannot be said that the offence does not fall in the category of the offence defined in Section 5 of the POCSO Act which is made punishable under Section 6 thereof.

13 In the light of these observations, the application is without merit and the same is rejected.

14 Hearing of the appeal is expedited.

(A. M. BADAR, J.)