

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1346 OF 2016

IN

CRIMINAL APPEAL NO.707 OF 2016

Mr Jesus Joaquim Colaco

... Applicant

v/s

Union Territory of India (Diu and Daman)

... Respondent

Mr N.S. Mundargi with Mr Omkar Mulekar for Applicant.

Ms Purnima H. Kantharia for Respondent No.1 – Union Territory –
Diu and Daman.

Mr J.P. Yagnik, APP for Respondent – State.

**CORAM : B.R. GAVAI &
B.P. COLABAWALLA, JJ.**

DATE : DECEMBER 19, 2017

P.C.:

1. This is an Application for suspension of sentence and grant of bail during the pendency of Appeal.

2. The prosecution's case is that the Applicant was working as a Divisional Assistant in the Department of Health, Daman. It is the prosecution's case that on 22nd March 2013, one Mrs Nilima Patel,

another Divisional Assistant had an occasion to access the Applicant's computer at work. The said computer was accordingly opened by the said Nilima and she was shocked to see videos wherein the Applicant was having sex with minor girls. She immediately informed this fact to one Jagruti Tamboli, a co-employee, one Mr Sant Prasad, an immediate superior, one Pradip Joshi and the First Informant. After the matter was informed to Dr K.Y. Sultan, the First Informant, he lodged the F.I.R. bearing C.R. No.12 of 2013 with the Coastal police Station. The Coastal Police Station completed the investigation and filed the charge-sheet before the Chief Judicial Magistrate, Daman. Since the case was exclusively triable by the learned Sessions Judge, the was committed to the Sessions Court, Daman. The learned Sessions Judge, at the conclusion of evidence, has recorded a finding of guilt against the Applicant. The operative part of the order reads thus :-

- “(i) Accused Jesus Joaquim Colaco is hereby convicted under section 235(1) of Cr.P.C. for the offence punishable under section 376(f) and (n) of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for life, which shall mean imprisonment for the remainder of his natural life and to pay fine of Rs.2000/- and in default to pay fine amount, he shall suffer further Rigorous Imprisonment for one year.

- (ii) Accused is convicted under section 235(1) of Cr.P.C. for the offence punishable under section 67 of the Information Technology Act and sentenced to suffer Rigorous Imprisonment for three years and to pay fine of Rs.1,00,000/- (Rupees One Lakh only) and in default to pay fine amount, he shall suffer further Rigorous Imprisonment for two years.
- (iii) Accused is convicted under section 235(1) of Cr.P.C. for the offence punishable under section 67A of the Information Technology Act and sentenced to suffer Rigorous Imprisonment for three years and to pay fine of Rs.1,00,000/- (Rupees One Lakh only) and in default to pay fine amount, he shall suffer further Rigorous Imprisonment for two years.
- (iv) Accused is acquitted under section 235(1) of Cr.P.C. for the offences punishable under sections 66(E) and 67(B) of the Information Technology Act as well as for the offences punishable under sections 4, 6, 8, 14(1), 14(2), 14(3) and 14(5) of the Prevention of Children from Sexual Offence Act.
- (v) All the sentences shall run concurrently.”

3. Since the case was exclusively triable by the learned Sessions Judge, the same was committed to the Sessions Court, Daman. The learned Sessions Judge, at the conclusion of the evidence, has recorded a finding that the Applicant was guilty under section 376(f) and (n) of the I.P.C. and sentenced to suffer R.I. for life and to pay a fine of Rs.2,000/-. In default the Applicant was to suffer R.I. for a further period of one year. Under section 67 of the

Information and Technology Act 2008, the Applicant was again found guilty and sentenced to suffer R.I. for three years and to pay a fine of Rs.1,00,000/-. In default, the Applicant was directed to suffer R.I. for a further period of two years. Under section 67(A) of the I.T. Act 2008 and sentenced to suffer R.I. for three years and to pay fine of Rs.1,00,000/-, in default, to suffer R.I. for two years and acquitted under sections 66(E) and 67(B) of the I.T. Act 2008. In so far as the charges under the provisions of Prevention of Children from Sexual Offence Act 2012 the Applicant was acquitted as the prosecution was unable to establish the age of the alleged victims. However, the learned Judge found that though the prosecution could have placed evidence on record so as to establish the age of the victim, the same having not been done, the offence could not be made out.

4. We have heard Mr Mundargi, learned counsel for the Applicant. Ms Purnima Kantharia, learned counsel appearing for the prosecution, vehemently opposed the Application. She submitted that the Applicant has committed a heinous crime and committed rape on the student. She further submitted that the PW. 6 – Dharmendra Shah, Laboratory Technician from Forensic Science

Laboratory, Ahmedabad has given a Certification under section 65(B) of the Indian Evidence Act. She further submitted that no case is made out for acquittal or for grant of bail.

5. In the present case, the prosecution has not been in a position to examine any of the witnesses. It is candidly admitted on behalf of the prosecution that though the victims have been identified, they are not willing to come forward to depose about the incident. It was the case of the prosecution that even the parents were not willing to come forward. The learned Trial Judge has basically passed the order of conviction on the ground that he has personally seen the video in the presence of the accused as well as his lawyer. The settled principle of law is that the Certificate under section 65(B) of Indian Evidence Act is mandatory and applicable for any evidence in the electronic form.

6. In the present case, it is to be noted that though the computer file was opened on 22nd February 2013 by Mrs Patel, the same was viewed by the expert on 22nd March 2013. As such, there was a gap of almost one month between the two dates. P.W. 6 – Mr

Dharmendra Shah himself admitted in the cross-examination that morphing is possible. Though he has denied that the hard disk supplied was itself morphed, he has admitted that there is possibility of morphing.

7. Apart from that, it is to be noted that the learned Trial Judge himself has found that the conviction under the Prevention of Children from Sexual Offence Act. was not possible in view of the age of the victim not being established. Even in so far as offence punishable under section 376 of the IPC is concerned, the age of the victim would be relevant. Only if it is proved that victim was below the age of 16 years, the question of consent would be irrelevant. However, as already discussed hereinabove, the prosecution has failed to prove the age of prosecutrix.

8. We find that the Applicant has good case on merit. He has been in custody for four years and nine months.

9. The order of sentence is therefore suspended. The Applicant is directed to be released on bail in the sum of

Rs.1,00,000/- with one or two sureties in the like amount. The Applicant shall report to the Coastal Police Station once in a week on every Monday.

(B.P. COLABAWALLA, J.)

(B.R. GAVAI, J.)