

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1365 OF 2016

IN

CRIMINAL APPEAL NO.13 OF 2017

**DHIRENDRA ALIAS MOHNI ALIAS CHHOTU)
GUNANARAYAN SINGH CHOUHAN)...APPLICANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Anjali Patil, Advocate for the Applicant.

Mr.A.R.Kapdnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 7th MARCH 2017.

P.C. :

1 By this application, the applicant / accused in Special Case No.17 of 2013 is seeking suspension of sentence and his release on bail during pendency of the appeal filed him before this court. The applicant / accused has been convicted of offences

punishable under Sections 376(2)(f), 366(a) and 341 of the IPC apart from Section 4 of the Protection of Children from the Sexual Offences Act, 2012, (POCSO Act, 2012). For the offence punishable under Section 376(2)(f) of the IPC and Section 4 of the POCSO Act, 2012, the applicant / accused has been sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.5,000/-, on each count. For the offence punishable under Section 366A of the IPC, the applicant / accused is sentenced to suffer rigorous imprisonment for 5 years apart from payment of fine of Rs.3,000/-, and for the offence punishable under Section 341 of the IPC, he is sentenced to suffer simple imprisonment for 1 month apart from payment of fine of Rs.500/-.

2 Heard the learned advocate appearing for the applicant / accused at sufficient length. He argued that the victim girl, who was 3 years of age, is not examined by the prosecution in order to bring home the guilt to the applicant / accused, particularly when in paragraph 7 of his deposition, her father PW3 Gulab Yadav has candidly accepted the fact that his minor

daughter. who is victim of the crime in question, is able to speak fluently and also understands what others speak. The learned advocate further argued that identity of the applicant / accused as perpetrator of the crime in question is fixed because of so called narration of the victim girl that the act is done by “Samosawala Uncle.” The learned advocate by taking me through evidence of witnesses including that of PW1 Tilawati Yadav and PW3 Gulab Yadav – parents of the victim girl argued that entire evidence regarding fixing identity of the applicant as the accused has come on record by way of omission. It is argued that in paragraphs 1 and 2 of her deposition, PW1 Tilawati Yadav has stated that she is knowing the applicant / accused as she used to see him working in the vicinity of the jilebi shop of her husband. She has further deposed that on the day of incident i.e. on 27th March 2013 – a day of festival of Holi, the applicant / accused came to her house, when her son Kuldeep left the house, and expressed his desire to play holi with her. Narrations of the victim girl allegedly made to this witness at the police station to the effect that Samosawala Uncle had committed rape on her, were also pointed out with

material elicited in paragraphs 10, 14 and 16 of the cross-examination of this witness to point out that all this material has come on record by way of omission, which is also proved by the Investigating Officer. It is argued that PW2 Dr.Sachin Rajput has stated in his evidence that PW1 Tilawati Yadav has not given name of the accused while narrating history. By taking me through the evidence of PW3 Gulab Yadav – father of the victim girl, it is argued that though in chief examination this witness has disclosed that his minor daughter had disclosed in answer to the question put by his wife that Samosawala Uncle had taken her on the pretext of giving chocolate and had done the act, this evidence is coming on record by way of omission as seen from paragraphs 6 and 7 of cross-examination of this witness. Improvements made by PW4 Prashant Jadhav and PW2 Dr.Sachin Rajput in their evidence is also pressed in service. It is argued that PW5 Anil Sarfare is a habitual panch witness. Referring to the evidence of PW6 Premji Mali, it is argued that his evidence is not matching the time given by other witnesses. It is further argued that there is no corroborative evidence demonstrating that the victim girl was in

company of the applicant / accused, though according to the prosecution case, the incident in question took place in broad day light in an open area.

3 The learned APP opposed the application by contending that evidence of PW1 Tilawati Yadav and particularly as found in paragraph 3 of her chief-examination shows that the victim girl was in company of the applicant / accused. The learned APP further drew my attention to the evidence of PW8 Bharat Thakre – a panch witness to show that clothes of the applicant / accused were seized by the police. He drew my attention to evidence of Investigating Officer PW12 Abdul Tadvī reflecting seizure of clothes of the applicant / accused.

4 I have carefully considered the rival submissions and also perused copies of deposition of prosecution witnesses.

5 According to the prosecution case, the victim girl child was just 3 years of age when the incident in question took place. It

was day of festival of holi i.e. 27th March 2013. The applicant / accused kidnapped the minor female victim from lawful guardianship of her mother PW1 Tilawati Yadav and then committed rape on her.

6 According to the prosecution case, the victim girl had referred to the perpetrator of the crime as “Samosawala Uncle.” The victim girl was not examined by the prosecution. Careful scrutiny of evidence of PW1 Tilawati Yadav and PW3 Gulab Yadav – parents of the victim girl, shows that the term “Samosawala Uncle” and narrations of the victim girl came on record by way of improvements, as this material was not found in their first version regarding the alleged incident recorded by the police. Be that as it may, evidence of PW2 Dr.Sachin Rajput is sufficient to prima facie conclude that the minor female victim was subjected to rape.

7 In paragraph 3 of her deposition, PW1 Tilawati Yadav has stated that after the first visit of the applicant / accused to her house on 27th March 2013, when she refused to play holi with

him, the applicant / accused again came to her house at 11 a.m. for playing holi and took the minor female victim with her on the pretext of giving chocolate and bringing samosa for her. She deposed that, at that time, the applicant / accused had latched the door of their house from outside and she got that door opened by knocking it. Her son PW7 Kuldeep had stated that at the time of taking of minor female victim by the applicant / accused, he was inside the house and on instructions of his mother, he opened the door which was latched from outside. This witness has vouched the applicant / accused taking his minor sister. Prima facie, evidence of PW7 Kuldeep does not inspire confidence as his mother is not stating about his presence inside the house when the applicant / accused had bolted the house from outside.

8 As seen from evidence of PW8 Bharat Thakre and PW12 Abdul Tadvī – Investigating Officer, the applicant / accused came to be arrested on the very same day of the incident itself and his clothes came to be seized by preparing panchnama Exhibit 1. In cross-examination, PW8 Bharat Thakre stated that seized

clothes were kept on the table in the police station and he did not ask police, whether by whom and how the accused came to be caught. This, by itself, is not sufficient to hold that clothes were not seized from the applicant / accused.

9 Seized clothes were subjected to chemical analysis. On clothes seized from the applicant / accused as well as clothes seized from the victim, human blood of "A" Group was found. Evidence of PW9 Sunil Rathi and PW10 Dineshbhai Patel goes to show that they had seen the victim soon after the incident and at that time, she was bleeding from her private part. This, *prima facie*, shows complicity of the applicant / accused in the crime in question, even if all improvements and omissions coming on record from evidence of prosecution witnesses are ignored from consideration. Hence, it cannot be said that this is a case where there is no *prima facie* evidence implicating applicant / accused in the crime in question.

10 In this view of the matter, no case for bail is made out.

11 The application is rejected.
Hearing of the appeal is expedited.

(A. M. BADAR, J.)