

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APPA) NO.179 OF 2017

IN

CRIMINAL APPEAL NO.97 OF 2017

Rahul s/o Dagadu Sirsat

..VS..

The State of Maharashtra, through Police Station Officer, Police Station Akot
(Rural), Tahsil Akot, District Akola

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders
.....

Court's or Judge's Order

Shri R.M. Daga, Counsel for the applicant.
Shri P.S. Tembhare, Addl.P.P. for the State.

CORAM : P.N. DESHMUKH, J.
DATED : MARCH 30, 2017.

This is an application for suspension of substantive sentence imposed upon applicant and for bail.

Heard learned counsel for the applicant and learned Additional Public Prosecutor.

Accused is found convicted for the offences punishable under Sections 450, 452, and 376(2) of the Indian Penal Code and under Section 5(k) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for one year for the offence punishable under Section

450 of the Indian Penal Code. Applicant is sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for six months for the offence punishable under Section 452 of the Indian Penal Code and is also sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.25,000/-, in default, to suffer rigorous imprisonment for one year for the offence punishable under Section 5(k) read with Section 6 of the Protection of Children from Sexual Offences Act. All sentences are directed to run concurrently. No separate sentence is imposed for the offences punishable under Sections 376(2) and 354-A of the Indian Penal Code.

Learned counsel for the applicant contended that as per case of prosecution, though prosecutrix is claimed to be mentally challenged, her statement under section 161 of the Code of Criminal Procedure is recorded during the course of investigation, and in spite of prosecutrix being shown as a witness in the charge-sheet, during Trial learned Trial Judge did not find her to be mentally fit to depose and as such did not examine prosecutrix and has thus contended that in the absence of evidence of prosecutrix, conviction imposed upon applicant cannot sustain and for that purpose has relied upon the decision of this Court in the case of Suresh .vs.. State of Maharashtra, reported at 2004(2) Crimes 329.

It is further contended that even otherwise statement of prosecutrix under Section 161 of the Code of Criminal Procedure is recorded after gap of 20 to 22 days on 9.12.2015 though incident is alleged to have taken place on 17.11.2015. By referring to compilation of evidence consisting of evidence of mother, complainant, brother of prosecutrix it is contended that their evidence does not inspire confidence establishing identity of applicant as no name of applicant is mentioned by brother in his statement and complainant alleged that she had lodged report on the basis of information received by her from her son i.e. brother of prosecutrix and as such in spite of no name of applicant being revealed by complainant in her report, F.I.R. is registered against applicant on the same day. It is further contended that from the evidence of brother, who is minor aged 11 years, name of applicant as deposed by him for the first time is a material omission as no such name is stated by this witness in his statement recorded under Section 161 of the Code of Criminal Procedure, however learned counsel has admitted that no such omission has been brought on record nor is proved at the time of the Trial.

It is further contended that from the evidence of brother of victim, thus it cannot be said that it is applicant who is involved in present crime and has concluded his submissions contending that C.A. report

falsified case of prosecution.

Learned Additional Public Prosecutor opposed the application on the ground that learned Trial Judge has considered all these aspects in its correct prospective which *prima facie* established involvement of applicant and has contended that application be rejected.

In the background of submissions as aforesaid, it is noted that offence came to be registered on the basis of report lodged by Shobha, on the basis of information received to her from son PW 2 Amol. Complainant has specifically named applicant as a person involved in present crime who has committed rape on minor prosecutrix. On her report, offence as aforesaid, came to be registered. Evidence of mother corroborates with evidence of Amol though in the cross-examination of complainant she has admitted that prosecutrix had not disclosed anything after she came home, however such a stray admission by itself does not doubt case of prosecution as according to its case, complaint is based on information given to complainant by Amol. With reference to the case of prosecution that prosecutrix is mentally challenged girl appears to be duly dealt with in the impugned judgment, wherein learned Trial Judge has noted that evidence of victim could not be recorded as she is not having capacity to understand questions and as such was unable to give

evidence in proper sense and as such her evidence was not recorded. From the judgment it also appears that from medical evidence as well as from the evidence of investigating officer, on medically examining the prosecutrix, she was found aged about four years and six months which age was assessed on duly considering her state of mental illness. It is thus found that the Trial Court had considered victim to be suffering from mental disability as contemplated under Section 5(k) of the Protection of Children from Sexual Offences Act, 2012.

In that view of the matter and considering evidence of brother, mother, the complainant, and medical evidence since *prima facie* involvement of applicant is established, application is liable to be rejected, however considering peculiar facts involved in the application, particularly the mentally unchallenged state of health of prosecutrix, the following order is passed:

Application is rejected, however, criminal appeal is expedited.

On receipt of record and proceedings, same be shown in the caption of final hearing.

JUDGE

!! BRW !!

C E R T I F I C A T E

I certify that this Order/Judgment uploaded is a true and correct copy of original signed Order.

Uploaded by : Bhushan R.Wankhede.
(Personal Assistant)

Uploaded on :- 31/3/2017