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

CRIMINAL APPLICATION(APPA) NO.466 OF 2016
IN
CRIMINAL APPEAL NO.315 OF 2015
(Dharmendra S/o Kawaduji Uike ..vs..State of Maharashtra, through PSO.P.S.Kurkheda,District-Gadchiroli)

Office Notes, Office Memoramda of Coram, appearances, Court's orders of directions and Registrar's Orders.	Court's or Judge's orders.

Shri S.V.Sirpurkar, advocate for applicant
Shri N.B.Jawade, A.P.P. for State.

CORAM : V.M. DESHPANDE, J.
DATED : JULY 10 , 2017

Heard learned counsel for applicant and learned A.P.P. for State.

2. This is an application for suspension of substantial jail sentence and for grant of bail.

Applicant-original accused no.1 is convicted by the Learned Additional Sessions Judge,Gadchiroli on 30/7/2015 in Special Child Case No.5/2014. By the said judgment and order of conviction the applicant is convicted for the offence punishable under Sections 363 and 342 of the Indian Penal Code and Section 4 of Protection of Children from Sexual Offences Act.

3. In so far as the sentence part is concerned, applicant was sentenced to suffer R.I. for 3 years on account

of his conviction for the offence u/s 363 of the Indian Penal Code and to pay fine of Rs.500/- and in default of payment of fine further R.I. for 3 months. The sentence of 6 months was awarded against him by the Court below for the offence punishable under Section 342 of the Indian Penal Code.

4. In so far as offence under 4 of the Protection of Children from Sexual Offices Act is concerned the applicant is directed to suffer R.I. for 7 years and to pay fine of Rs. 1000/- and in default of payment of fine to suffer further R.I. for 6 months.

5. The other two accused persons were acquitted for all the offences. The State has not filed any appeal against their acquittal.

6. Learned counsel for applicant submits that though the applicant was not on bail during the course of trial, however the applicant has already undergone half of the maximum sentence awarded against him. He further submits that the prosecution has not proved the age of the prosecutrix. He submits that applicant is in jail since 6/1/2014. He therefore submits that application be allowed and applicant be released on bail.

Per contra, learned A.P.P. submits that charge against the applicant is of serious in nature. The applicant has taken undue advantage of the prosecutrix and has committed rape on her. He submits that application be rejected.

7. Exh.42 is the arrest panchnama. It shows that applicant was arrested on 6/1/2014 and since then he is in jail. The half of the maximum jail sentence that is awarded against the present applicant under Section 4 of the Protection of Children from Sexual Offences Act is undergone by him.

8. All other sentences which were awarded against the applicant to run concurrently. Thus, as on today the applicant has undergone half of the maximum sentence of 7 years .

9. With the assistance of learned counsel for applicant and learned A.P.P. for the State I have gone through the notes of evidence of father of prosecutrix(PW1), prosecutrix(PW3) and Dr.Pravin Sukhdeo Kilnake(PW4).

10. From the evidence of Pralhad(PW1) and prosecutrix(PW3) it is clear that both of them are silent by not disclosing the date of birth of the prosecutrix. Further no attempt is made on the part of the prosecution to file any documentary evidence to prove the date of birth of the prosecutrix. Thus, prima facie, it appears that the age of the prosecutrix is not at all proved. While lodging the report the prosecutrix has stated that her age is 16 years.

11. The provisions of POCSO Act are stringent in nature in that event it is the absolute duty on the part of the prosecution to prove the age of the prosecutrix. Further, even from the evidence of Dr.Pravin(PW4) no fresh injuries on the

private part of the body of the prosecutrix were noticed.

12. In view of the quality of the evidence of the prosecutrix prima facie, the possibility of extending the consent is not completely ruled out. Further the age of the prosecutrix that she is below the 18 years is not strictly proved by the prosecution. Therefore, prima facie in my view the prosecution of Section 4 of the POCSO Act cannot be made applicable. Further the applicant has undergone half of the punishment.

13. Looking to the pendency of the criminal appeals before this Court , there are least chances of taking the present appeal for final hearing in near future. In that view of the matter , though applicant was not on bail during the course of trial, however he has undergone half of the punishment , therefore, applicant is entitled to release on bail during the pendency of the present appeal. Hence, I pass the following order.

ORDER

I) The application is allowed.

II) Applicant be released on bail on his furnishing P.B. of Rs. 5000/- with one solvent surety in the like amount.

III) The learned trial Court is directed to ensure that the applicant has deposited the entire fine amount before he is released on bail.

IV) The appellant is directed to remain personally present before this Court at the time of final hearing.

V) With this application is disposed of.

JUDGE

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