IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.620 OF 2018
IN
CRIMINAL APPEAL NO.185 OF 2018

LAKHU @ LAKHAN DHARMA GAIKWAD)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Manoj Mohite i/b. Mr.Rohan Hogle, Advocate for the Applicant.

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

CORAM : A. M. BADAR, J.

DATE : 3rd OCTOBER 2018

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 is convicted of the offence punishable under Section 376(2)(i) of the Indian Penal Code as well as under Section 6 of the Protection of Children from Sexual Offences Act, 2012. On each count, he is sentenced to

suffer rigorous imprisonment for 10 years apart from imposition of fine of Rs.25,000/- and default sentence of rigorous imprisonment for 1 month.

2 Heard the learned counsel appearing for the applicant/accused. He argued that the applicant/accused is a Police Constable in charged as line orderly where the prosecuting party was residing. The applicant/accused was objecting to the visits of several male persons to the house of mother of the victim girl in absence of her husband, who was working at Gadchiroli. Similarly, there was dispute between the parties regarding the room, and therefore, case of false implication cannot be ruled out. It is further argued that even if evidence of the prosecution is accepted, then also, the offence does not travel to that of penetrative sexual assault or rape. For this purpose, the learned counsel drew my attention to the Medico Legal documents as well as evidence of Medical Officer and doctors namely PW5 Dr.Shirasi, PW9 Dr.Gurram and PW8 Dr.Jadhavar. It is argued that when the alleged victim was taken to Markandey Hospital at

about 1.10 a.m. of 22nd February 2016, the history given was not that of sexual assault, but it was in respect of pain during urination and defecation. There was no noting regarding pain in the private part of the victim upon her admission to the hospital. For the first time, at about 12.45 p.m. of 22nd February 2016, findings that there was redness at the external genital of the victim are surfacing on the Medico Legal papers. At that point of time also, it is not mentioned as to who had given history in respect of the incident to the Medical Officer. The learned counsel further argued that material part of evidence of PW5 Dr.Shirasi had come on record by way of omission as this Medical Officer has not noted the finding of swelling of external genital in the Medico Legal Papers. It is further argued that even PW9 Dr.Gurram has not mentioned name of the person who had given history about the incident in question. Evidence of PW8 Dr.Jadhavar also does not support the case of the prosecution as this Medical Officer has not noticed evidence of injuries on genitals of the victim. With this, the learned counsel argued that there is no evidence of penetration, and therefore, the offence as alleged is not proved,

and therefore, the applicant/accused who is behind bars from the year 2016, is liable to be released on bail.

3 The learned APP opposed the application by contending that apart from crime in question, another crime for similar offence under Section 353, 354, 504 and 506 of the Indian Penal Code was registered against the present applicant/accused at Osmanabad. The learned APP drew my attention to evidence of mother of the victim child as well as that of victim child and argued that there is enough evidence for holding that the offence stood proved.

4 I have considered the rival submissions and also perused the impugned judgment as well as copies of deposition of prosecution witnesses. Upon admission of the PW3/victim child, who happens to be aged about 5 years, to Markandey Cooperative Hospital, history of sexual assault was not mentioned. It was disclosed at about 12.45 p.m. of 22nd February 2016 when PW9 Dr.Gurram examined the patient. Upon examining, PW9

Dr.Gurram found that there was redness at the external genitals of the PW3/victim child.

5 The victim child along with her mother was residing at Block No.37, Room No.144 of the Police Colony at Solapur. The applicant/accused was also residing in the same building at Room No.142. PW1 Sonam – mother of the victim child deposed that her daughter PW3 had been to the house of the applicant/accused. Subsequently, two persons came and enquired about the house of the applicant/accused to her. She showed the house of the applicant/accused to them and those persons rang the bell. PW1 Sonam deposed that the applicant/accused then opened the door and at that point of time, her daughter PW3 came out of house of the applicant/accused and while crying disclosed her that the applicant/accused had inserted finger in her private part. PW1 Sonam has stated before the court that upon examining the private part of her daughter PW3, she noticed that it had turned reddish.

6 PW3/victim child, on similar lines, deposed that the applicant/accused had inserted his finger in her vagina.

7 Penetrative sexual assault is defined by Section 3 of the Protection of Children from Sexual Offences Act. Penetration of penis to any extent in the vagina constitutes an offence of penetrative sexual assault. The learned trial court upon examining the evidence, as stated in foregoing paragraph, came to the conclusion that the offence stood proved. At this juncture, meticulous examination of such evidence is not permissible. Suffice to state that there is prima facie evidence in the matter for holding that offence, as alleged, did take place.

8 In this view of the matter, considering the nature of offence, no case for bail is made out.

9 The application is, therefore, rejected. However, hearing of the appeal is expedited.

10 Needless to mention that all observations made in this order are prima facie in nature and shall not have any bearing on final hearing of the appeal.

(A. M. BADAR, J.)

Arti Vilas Khatate

Digitally signed by Arti Vilas Khatate
Date: 2018.10.04 12:26:42 +0530