

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.857 OF 2018

IN

CRIMINAL APPEAL NO.697 OF 2018

Rakeshlal Babulal Garg ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

Ms.Afshan G for the applicant.

Mr.S.V. Gavand, APP for the respondent/State.

CORAM : A.M.BADAR J.

DATED : 21st AUGUST 2018.

P.C. :

1. This is an application for suspension of sentence and for releasing the applicant/accused on bail during pendency of appeal filed by him. The applicant/accused is convicted of offence punishable under Section 376 2(i)(n) of the Indian Penal Code read with Sections 4 and 6 of the Protection of Children from Sexual offences Act, 2012. In addition, he is also convicted of

offence punishable under Section 8 of the Protection of Children from Sexual offences Act, 2012. The applicant / accused is sentenced to suffer rigorous imprisonment for ten years apart from directing him to pay fine of Rs.20,000/- and in default to undergo simple imprisonment for four months for the offence punishable under Section 376 2(i)(n) of the Indian Penal Code read with Sections 4 and 6 of the Protection of Children from Sexual offences Act, 2012. The applicant is sentenced to suffer simple imprisonment for three years and to pay fine of Rs.10,000/- and in default to undergo simple imprisonment for four months in default of payment of fine.

2. Heard the learned Advocate appearing for the applicant / accused. She argued that the applicant/accused is an aged person and cross-examination of PW1 Radhika who is mother of victim child goes to establish this fact. The learned Advocate further argued that alleged incident took place in the slum and the spot of the incident i.e. house of the applicant is located in the populous area. The road in front of the house of the applicant is always busy with passers-by and therefore case of the prosecution

is totally improbable. The learned Advocate further argued that the applicant was residing in his house with his three children and therefore the case of the prosecution does not appear to be in tune for the common sense. It is further argued that cross-examination of the PW2/victim female child goes to show that she is tutored by her mother and therefore she kept mum to the specific question to that effect put to her by the defence. It is further argued that medical evidence adduced by the prosecution totally falsified the case of the prosecution as PW3 Dr. Nishita Nath has categorically deposed and there were no signs of sexual violence on the victim female child.

3. As against this, the learned Additional Public Prosecutor submitted that the victim female child / PW2 has categorically denied tutoring to her by her mother and therefore the victim female child is justified in not answering the same question which is again repeated. The learned Additional Public Prosecutor further argued that evidence of PW5 Dr.Narendra Kumar reflects extra judicial confession made to him by the applicant/accused.

4. I have carefully considered the rival submissions and also perused the copies of deposition of prosecution witnesses so also the impugned judgment and order of conviction and resultant sentence.

5. The applicant/accused was arrested on 29th April, 2017 and during pendency of the trial he was not on bail.

6. According to the prosecution case, the first informant/PW1 Radhika is mother of the victim female child / PW2. The victim child was seven years of age, at the time of the incident. The applicant/accused was neighbourer of the first informant/PW1 and the victim female child/PW2. When the victim female child/PW2 was playing in front of her house, the applicant/accused took her to his house and indulged in penetrative sexual assault on her.

7. It is in evidence of victim female child/PW2 that when she was playing with her friend in the lane, the applicant/accused had taken her inside one room, made her to lie on a cot, denude her and inserted his finger in her private part. She further deposed

that the applicant inserted his private part in her private part and therefore, she sustained pain. As per version of the victim female child/PW2 she disclosed this incident to her mother on the next day while returning from the hospital. She duly identified the applicant as perpetrator of the crime in question. In the cross-examination, the victim female child categorically stated that her mother never tutored her as to what should be deposed before the Court. However, the victim female child did not answer the similar question put to her again at the end of the cross-examination.

8. PW1 Radhika who is mother of the victim female child has deposed that her seven years aged daughter disclosed the fact of pain in her private part and therefore she questioned her. As per version of of PW1 Radhika her minor daughter then disclosed to her that the applicant has taken her to his house, denude her and inserted his finger in her private part so also had inserted his private part in her private part.

9. Evidence of PW1 Radhika proves the narration made to her

by her seven years old daughter viz. PW2 soon after the incident and as such this evidence of proof of former statement of the victim female child is admissible under Section 157 of the Indian Evidence Act, 1872. PW3 Dr. Nishita Nath had medically examined the victim female child on 29th April, 2017. Evidence of this medical officer goes to show that there were no evidence of physical violence to the victim. It is well settled that injuries on the victim are not sine qua non for making out offence of penetrative sexual assault. If evidence of the victim of sexual offence is trustworthy and reliable, non finding of injuries on the person of the victim is not material. In cases of sexual offences, version of the victim does not require further corroboration through the medical evidence. *Prima facie* scrutiny of evidence of the victim female child does not reflect any material to disbelieve her. (Refer ***The State of Punjab Vs. Gurmeet Singh & ors. Reported in 1996 Cr.I.L.J. 172*** and ***B.C. Deva Vs. State of Karnataka (2007) 12 SCC 122.***

10. Evidence of the PW2/victim female child *prima facie* appears to be trustworthy, believable and inspiring confidence. There is no

material to indicate that this female child witness is tutored to depose falsely before the Court. Cross-examination of the child witness / victim female child PW2 as well as her mother PW1 Radhika does not indicate any reason for false implication of the applicant in the crime in question. Such possibility is remote nay impossible in tradition bound non permissive society of India where such incidents reflect on honour of the entire family apart from chastity of the victim.

11. PW5 Narendra Baluram Kumar had medically examined the applicant on 3rd May, 2017. Evidence of this witness which is corroborated by contemporary medical record indicates that extra judicial confession made by the applicant before witness.

12. Nature and seriousness of offence and the manner in which it is committed are relevant factors for releasing the accused on bail. Taking over all review of matter, though the applicant / accused appears to be aged person of 60 years of age, it does not deserved him to release on bail. Therefore, the order.

:: ORDER ::

- (i) The application is rejected.
- (ii) Hearing of the appeal is expedited.

Vina
Arvind
Khadpe

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Vina Arvind
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(A.M.BADAR J.)