

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1400 OF 2018

IN

CRIMINAL APPEAL NO.1012 OF 2018

Navinkumar Chhotelal Tiwari and anr. ... **Applicants**

V/s.

Union Territory of India and ors. ... **Respondents**

Mr.H.H.Ponda a/w. Mr.Gaurav Chaubey, Ms.Priya Ponda for the applicants.

Mr.H.J. Dedhia for respondent no.1.

Mr. P.H. Gaikwad-Patil for the respondent/State.

CORAM : A.M.BADAR J.

DATED : 26th SEPTEMBER 2018.

P.C. :

1. This is an application for suspension of sentence and for releasing the applicants/accused on bail during pendency of the appeal filed by them. The applicants are convicted of the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences

Act, 2012 (for short. "POCSO Act"). They both are sentenced to suffer rigorous imprisonment for seven years apart from directing to pay fine of Rs.15,000/- by each of them.

2. Heard the learned Counsel appearing for the applicants/accused. He argued that the learned Trial Court has disbelieved the prosecutrix virtually on each and every aspects of the case except for the offence punishable under Section 376 of the Indian Penal Code. It is further argued that cross-examination of the prosecutrix/PW1 shows that the persons who had committed rape on her were present at the time of recording her FIR still the prosecutrix has not named them in the FIR. It is further argued that the chargesheet shows that the accused persons were arrested subsequent to the filing of the FIR. The prosecutrix has given complete go-by to her version in the FIR. Similarly, it is also argued that age of the prosecutrix is not proved by the prosecution.

3. The learned Additional Public Prosecutor opposed the application by contending that the prosecutrix was brought to

India from Bangladesh and she was not knowing hindi. By hiring services of the translator her FIR came to be recorded and because of her brief stay in the hotel i.e. only for two days she was not aware who was owner of the hotel. The prosecutrix was cross-examined and minor discrepancies which are there in her evidence are needs to be overlooked. It is further argued that from cross-examination of the prosecutrix, her date of birth is brought on record by the defence.

4. I have considered submissions so advance and perused the impugned judgment and order of conviction and resultant sentence, so also the copies of deposition of prosecution witnesses. According to the case of the prosecution, the victim girl/PW1 was brought to India from Bangladesh and she was forced into prostitution. The accused persons detained her in the hotel for the purpose of forcing her for prostitution and caused grievous hurt to her. The entire case of the prosecution is based on the version of the victim girl who is examined as PW1. The learned Trial Court disbelieved her so far as offence under Sections 325, 343, 363, 366-B, 370, 372, 373 are concerned. However, it is held that the

applicants/accused no.1 and 2 had committed rape on her and at that relevant time she was a child.

5. The learned Trial Court relied on evidence of PW9 Dr.Sudhir Nair to hold that the prosecution has established the fact that the victim child/PW1 was below 18 years of age at the time of commission of the alleged offence. Evidence of PW9 Dr.Sudhir Nair shows that he had not conducted any test on the victim girl in order to determine her age. Some other doctors had conducted the test and PW9 Dr.Sudhir Nair just issued the medical certificate regarding age of the victim. Doctors who had conducted the test including the ossification test to determine the age of the victim girl are not examined by the prosecution.

6. True it is that in cross-examination the victim girl has stated that her date of birth is 20th January, 2002 but it is well settled that oral evidence is hardly sufficient for determining the age of the person concerned. Similarly, even evidence of PW9 Dr.Sudhir Nair goes to show that as per report prepared by him, age of the the victim girl was stated as 16 years to 18 years, 14 years to 16

years and less than 18 years. In the matter of *Jaya Mala vs Home Secretary, Government Of Government of State of Jammu & Kashmir, reported in 1982(2) SCC 538* the Supreme Court has held that there is always margin of two years on either side while determining the age of a person by the ossification test.

7. So far as, evidence regarding the offence under Section 376 of the Indian Penal Code, so also under Section 4 of the POCSO Act is concerned, the case of the prosecution as reflecting from the FIR lodged by the victim girl/PW1 on 18th April, 2016 at 10.30 am is to the effect that she was taken from Ahmednagar to Daman and was entrusted to one person who brought her to hotel Ratnakar. The prosecution case as reflected in the FIR is further to the effect that the said person forced the victim girl/PW1 to indulge in sexual relations with three customers of the hotel. As against this, while in the witness box the victim/PW1 has deposed that the applicant/accused no.1 Navinkumar is the owner of hotel Ratnakar and he was detaining her to do the work of prostitution and he had performed forceful sexual intercourse with her. The victim girl/PW1 however deposed that the applicant/accused no.2

also committed rape on her at about 7.00 pm. This version of the prosecutrix before the Court is giving complete go-by to her version reflected in the FIR. Cross-examination of the victim girl/PW1 reflects that her FIR came to be recorded in presence of accused persons however still the FIR is not mentioning the names of the accused persons. The FIR came to be lodged at 10.30 am on 18th April, 2016 but the chargesheet reflects that applicants/accused persons were arrested at 11.05 pm on 18th April, 2016. This factual position indicates that the applicants/accused were not present at the police station when the FIR came to be recorded meaning thereby that the perpetrator of the subject crime may be somebody else than the applicants/accused persons.

8. Considering this nature of evidence available against the applicants/accused and the fact that they are acquitted of all other offence alleged against them by dis-believing the victim/PW1, I am of the considered opinion that the applicants/accused deserve to be released on bail during pendency of the appeal filed by them as

the appeal filed by them may not be heard in near future. In this view of the matter, the following order;

:: ORDER ::

- (i) The applicants/accused be released on bail on their executing P.R. Bond in the sum of Rs.15,000/- each and on furnishing surety in the like amount by each of them.
- (ii) As a condition of this order, the applicants/accused should not indulge in commission of similar offence in future.
- (iii) The applicants/accused to report the concerned police station once in six months i.e. on 1st Monday of the first month.

Digitally
signed by
Vina Arvind
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(A.M.BADAR J.)