

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

CRIMINAL APPLICATION (APPA) NO.176/2018

IN
CRIMINAL APPEAL NO.118/2018
Nilesh s/o Sahebrao Kinkar

..vs..

State of Maharashtra, thr. PSO Talegaon (Shamajipant), District Wardha

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

Court's or Judge's Order

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Shri J.H. Mahajan, Counsel for the appellant.
Shri N.R. Rode, Addl.P.P. for the State.

CORAM : V.M. DESHPANDE, J.
DATED : APRIL 6, 2018.

1. This is an application for suspension of substantive jail sentence and for grant of bail.

2. By judgment and order of conviction dated 16.1.2018 passed by learned Special Judge for POCSO, Wardha in Special (Ch.) Case No.21/2015, the applicant/appellant is convicted for offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "*the said Act*") and is directed to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2000/- and, in default of payment of the fine amount, to suffer simple imprisonment of 2 months.

The applicant/appellant is also convicted for offence punishable under Section 452 of the Indian Penal Code and he is directed to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1000/-

and, in default of payment of the fine amount, to suffer simple imprisonment for 1 month.

The applicant/appellant is also convicted for offence punishable under Section 506 Part II of the Indian Penal Code and he is directed to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1000/- and, in default of payment of the fine amount, to suffer simple imprisonment for 1 month.

3. I have heard learned counsel Shri J.H. Mahajan for the applicant/appellant and learned Additional Public Prosecutor Shri N.R. Rode for the State.

4. Learned counsel Shri Mahajan for the applicant/appellant strenuously urged before me that the prosecution has not established the age of the girl in order to bring its case within the meaning of child as defined under the said Act. He further submitted that the evidence in that behalf by the victim cannot be accepted. He also submitted that there were no injuries on the body of the victim.

5. The victim is examined as PW3. In her deposition, she gave her date of birth as 24.10.1998. The date of incident is 24.6.2014, which clearly shows that the girl was below the age of 18 years and, therefore, she is a child within the meaning of the said Act.

6. In one of the recent decisions of this Court (Coram : B.P. Dharmadhikari and A.S. Chandurkar, J.J.), in the case of Kundan s/o Nanji Pendor vs. The State of Maharashtra, reported at 2017 ALL MR (CRI) 1137, the Division Bench has ruled that the date of birth given by

victim has its own importance.

7. Further, original school certificate is also brought on record, which also shows the date of birth as 24.10.1998.

Though learned counsel Shri Mahajan for the applicant/appellant has seriously disputed its genuineness, the same can be considered at the time of final hearing of the appeal. However, at this stage, on the basis of the evidence it is clear that the victim was child.

8. Dr. Manisha Arunrao Nasare (PW14) has examined the victim. Her evidence shows that on physical examination of the victim, she noticed stretched marks on the left breast of the victim admeasuring 2 x 0.5 cm.. She also noticed that her hymen was ruptured and is having 6 O'clock position.

This particular finding of the doctor supports the version of the victim that the applicant/appellant has committed a rape on her.

9. Merely because the applicant/appellant was on bail during the course of the Trial, that cannot be the ground to release him on bail especially when the prosecution has successfully pointed out that the victim was sexually assaulted at the hands of the applicant/appellant.

10. In that view of the matter, the criminal application is rejected and disposed of accordingly.

JUDGE

!! BRW !!

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