

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.79 OF 2019

IN

CRIMINAL APPEAL NO.78 OF 2019

SANTOSH DHONDIRAM KENDE)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Harshawardhan Salgaonkar, Advocate for the Applicant.

Ms.P.N.Dabholkar, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 21st FEBRUARY 2019

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)(m) of the Indian Penal Code as well as under Sections 4 and 6 of the Protection of

Children from Sexual Offences Act, 2012. He is sentenced to suffer rigorous imprisonment for 10 years apart from imposition of fine of Rs.1,000/- and default sentence of simple imprisonment for 1 month.

2 Heard the learned counsel appearing for the applicant/accused at sufficient length of time. He argued that the learned trial court came to the conclusion that whatever happened with the victim was with her consent, but the applicant/accused was convicted on the basis of the DNA report showing paternity of the child of the victim as well as evidence regarding age of the victim. The learned counsel further argued that evidence of PW5 Prakash Padye, Carrier Constable, goes to show that he collected sample on 6th February 2017 and deposited the same on 7th February 2017. With this, my attention was drawn to the document at Exhibit 67 which is a request letter issued by the Investigating Officer to the Forensic Science Laboratory containing an averment that the samples are sent for examination vide letter dated 3rd February 2017. This, according to the learned counsel,

is improbable. He further argued that the request letter at Exhibit 48 shows that samples were packed in two cardboard boxes whereas evidence of Forensic Expert PW14 Rohan Shinde shows that he had received the samples in a sealed envelope. The learned counsel further argued that Investigating Officer PW12 Chandrakant Lad has admitted that samples were in the hospital for 4 to 5 days. My attention is drawn to the Identification form in respect of the applicant/accused to point out that there were three witnesses to this identification. It is argued that neither those witnesses nor the person who had drawn samples of blood was examined by the prosecution during the course of the trial. It is argued that PW6 Dr.Prashant Sonkamble has deposed on the basis of record that sample of blood of the applicant/accused was drawn. With this, it is argued that chain of custody of sample is not proved, and therefore, DNA report cannot be pressed in service in order to establish paternity of the child born to the victim. The learned counsel further argued that evidence of PW7 Dattaram Jagde, Junior Assistant with the Panchayat Samiti, regarding record of date of birth of the victim is full of

discrepancies. The Birth Register was not properly maintained as seen from cross-examination of this witness. By drawing my attention to evidence of PW9 Varsha Walwi, Assistant Teacher, the learned counsel argued that even evidence regarding record of date of birth in the school, so far as victim is concerned, is not reliable. The entry was not endorsed by the Head Master in order to demonstrate that the same is a complete entry.

3 The learned APP opposed the application by contending that evidence of the victim shows that she was forced to go to the spot of the incident for a period of 4 months under threat by the applicant/accused. The learned APP argued that there is presumption under the Protection of Children from Sexual Offences Act, 2012, and it is not rebutted by the applicant/accused. She argued that age of the victim is not challenged but what is challenged is non-maintenance of the record properly, and therefore, the applicant/accused is not entitled for bail.

4 I have considered the submissions so advanced and perused the material placed on record. The main contention of the applicant/accused that the samples were already sent for chemical analysis on 3rd February 2017, as reflected from the letter at Exhibit 47, prima facie does not contain any merit. The letter at Exhibit 47 is the request letter addressed to the Forensic Science Laboratory by the Investigating Officer and in the very same letter itself, by giving the outward number of this very same letter, it is informed to the Forensic Science Laboratory that samples are being sent for forensic examination. In the light of this averment, evidence of PW5 Prakash Padye, Carrier Constable, shows that, infact, he collected the samples on 6th February 2017 and then took them to the Forensic Science Laboratory and submitted those samples with this forwarding letter dated 3rd February 2017. Even otherwise, proof of mathematical precision is not required in criminal trial. The aspect regarding appreciation of evidence of the prosecution cannot be considered at the stage of considering the application for grant of bail of the

applicant/accused. Suffice to state that DNA report is favouring the case of the prosecution.

5 So far as evidence regarding age of the victim is concerned, what is challenged is non-maintenance of record properly. The prosecution has placed reliance on the Birth Certificate issued under provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969, showing date of birth of the victim as 14th September 2000. The Birth Certificate shows the name of mother as well as father of the victim. Whether the Birth Register was properly maintained or not will have to be considered at the stage of final hearing of the matter. However, the very same date of birth of the victim is also reflecting in her school record. Thus, apart from evidence of the victim of the crime in question, evidence of the DNA examination so also age of the victim is favouring the prosecution, and as such, this is not the stage at which, evidence is required to be evaluated meticulously. Suffice to state, on considering the fact that the victim of the crime in question, prima facie, appears to be a child, and that she

has given birth to a child because of the sexual intercourse committed on her by the applicant/accused, I am not inclined to grant bail to the applicant/accused. Therefore, the order :

ORDER

The application is rejected.

(A. M. BADAR, J.)