

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 854 OF 2019
IN
CRIMINAL APPEAL NO. 780 OF 2019

Narayan Shankar Khamkar .. Applicant

Versus

The State of Maharashtra and Anr. .. Respondents

...

Mr. Vasant Ghorpade, for the Appellant.

Mrs. M.R. Tidke , APP for the Respondent No.1/State.

CORAM: P. N. DESHMUKH, J.

DATED : 18th NOVEMBER, 2019.

P.C.

1. Heard learned Counsel for the appellant and learned APP .
It is submitted that there is absolutely no evidence against appellant thereby establishing his involvement in present crime as according to prosecution case itself the incident is alleged to have occurred on 22nd July 2017 at around 11.30 p.m. of which no complaint was lodged by the minor victim to anybody till 8.30 pm. of 23rd July 2017. It is therefore, contended that there is every possibility of somebody else engaging into said act as complained by prosecutrix any time between

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11.30 p.m. on 22nd July 2017 till 8.30 p.m. on the following day and by referring to evidence on record, had submitted that from complainant's evidence said possibility is substantiated and therefore contended that sentence be suspended and application be allowed.

2. Prosecution has opposed the application on the ground that there is direct evidence of prosecutrix supported with medical evidence and has thus contended that application be rejected.

3. Applicant is found convicted the offence punishable under section 6 of Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer RI for 10 years and to pay fine of Rs. 10,000/- in default to suffer RI for 6 months and for the offence punishable under section 10 of Protection of Children from Sexual Offences Act, 2012, he is sentenced to suffer RI for 5 years and to pay fine of Rs. 5,000/- in default to suffer RI for 3 months.

4. It appears to be case of prosecution that victim was residing with her parents on the ground floor while accused was residing on upper floor. On 22nd July 2019 at about 10.45 p.m., victim's mother saw her daughter aged 4 years old girl going to the house of applicant
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and noted that she came down at 11.30 p.m. On 23rd July 2017 at about 3.30 p.m. victim started crying when she went for urination. On inquiry, disclosed that applicant has inserted his finger into her private part. Accordingly report came to be lodged on 24th July 2017. According to evidence of victim, on the day of incident when she went on upper floor, applicant inserted his finger in her private part.

5. From evidence of P.W.2, mother of victim, she saw victim coming from the house of applicant on 22nd July 2017 at 11.30 p.m. and on 23rd July 2017 at about 8.30p.m. victim complained of sustaining pain when she went for urination and on inquiry informed that applicant had inserted his finger in her private part. According to mother's evidence, she also noted swelling and reddish-ness on the private part of victim girl. In view of evidence of above two witnesses, it has thus come on record that victim came from house of applicant on 22nd July 2017 around 11.30 p.m.. Admittedly for almost 24 hours i.e. till 8. 30 p.m. of 23rd July 2017 she had not made any complaint of any type of pain sustained by her to her private part. From evidence of above two witnesses, it is infact found that for the entire period of 24 hours victim had not urinated, as according to evidence of mother of victim, it is only on 23rd July 2017 at 8.30 p.m. when the girl when for

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urination, she sustained pain. In view of above evidence, case of applicant as put-forth is infact found probablised involving some other person as complainant has admitted that on 22nd July 2017 her daughter did not made any complaint to her, after coming down from applicant's house at 11.30 p.m. In fact, according to complainant for this reasons she had not lodged report on 22nd July 2017. She further admitted that even on 23rd July 2017 after she left for her work at 9.00 a.m. and returned by at 12.30 p.m, there was no complaint by victim of any kind, while she was playing nor such complaint was made till late evening. In view of above admissions, there is reason to believe that there is possibility of victim having been subjected to such insertion sometime in the day on 23rd July 2017 of which she sustained pain when she went for urination at 8.30 p.m.

6. P.W.3 Doctor Priyanaka in her evidence stated that there is redishness around private part and she has also opined possibility of vaginal penetration cannot be ruled out. In that view of the matter, though it is noted that victim was subjected to vaginal aggravated penetrative sexual assault, as is case of prosecution, from evidence on record she cannot said to have sustained such act on 22nd July 2017 at 11.30 p.m. when she was seen coming down from the house of *Yugandhara patil*

applicant. In that view of the matter, application is liable to be allowed.

ORDER

1. Applicant Narayan S. Khamkar shall be released on bail on his executing P. R. Bond in the sum of Rs. 25,000/- with one surety in the like amount.
2. While on bail, applicant shall mark his presence with Kalachowky Police Station, monthly on the first day of each such month, pending appeal.
3. Above order shall come into effect only on applicant's placing proof of payment of fine before Registry.
4. Application is disposed off as allowed.

(P. N. DESHMUKH, J.)