

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.441 OF 2019
IN
CRIMINAL APPEAL NO. 545 OF 2019

Ajay Dipak Jadhav
Age : 26 Yrs, Occu.:Nil
R/at Sarvoday Colony,
Anandnagar, Mundhwa, Pune
(Presently At Yerwada Central Jail) ... Applicant

Versus

1. The State of Maharashtra
2. Jayshree Subhash Pawar ... Respondents

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Ms. Anjali Patil, Advocate for the Applicant.
Ms. A. A. Takalkar, APP for the Respondent No.1 – State.
Mr. Kirankumar Phakade, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK, J.
DATE : 4th DECEMBER, 2020.

PER COURT:

1. Leave to amend, Paragraph-1 of the application to add averment in respect to conviction under Section 376(D) r/w 107 of Indian Penal Code (for short “IPC”). Amendment to be carried out immediately.

2. This is an application for suspension of sentence of imprisonment imposed vide Judgment and order dated 10th January,

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2019 passed by the learned Additional Sessions Judge, Pune in Spl. S.C. No. 299 of 2016. The applicant is convicted for the offence under Section 376 r/w 107 of IPC, Section 376(D) r/w 107 of IPC, and Section 506(II) r/w 34 of IPC and for the offence under Section 11(i) punishable under Sections 12 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). He was sentenced to suffer imprisonment for Seven years, Twenty years, One year and Two years respectively for the aforesaid offences.

3. The applicant had preferred an appeal challenging the aforesaid Judgment of conviction which has been admitted and pending before this Court.

4. Learned advocate for the applicant submitted that the entire case of the prosecution is false. The applicant has been falsely implicated in this case. Accused No.2 Varsha Gaikwad is sister-in-law of the complainant. There were disputes between accused No.2 and her in laws. There is delay in lodging First Information Report (for short 'FIR'). The allegations about rape were after thought. The complainant and the victim had concocted the story and alleged rape which was absent in the previous statement. The complainant is mother of victim. FIR was lodged by her with Mundhwa Police Station for the offences punishable under Section 509 r/w 34 IPC

and Sections 12 and 17 of POCSO Act. The statement of victim was also recorded. There was no reference of sexual assault on the victim in the said FIR and statement of victim. Accused No.1 has filed complaint under Section 498-A of IPC against her husband and others. Accused No.2 is wife of brother of complainant. The medical evidence does not support the prosecution case. The history provided by the victim does not refer to involvement of the applicant in the incident of alleged rape. The role attributed to the applicant is that he caught hold of the hands of victim while accused no.1 sexually assaulted her. History given by victim to Medical Officer do not involve applicant in incident of rape. Although there was opportunity for the complainant and victim to narrate the incident of rape to police immediately, when the FIR was lodged with Mundhwa Police Station, no such grievance was made by them. In the supplementary statement dated 9th June, 2010, concocted version about rape was introduced by them. The Medical case papers shows the opinion of Medical Officer that there were no injuries on body of victim. Hymen was torn completely. Multiple old healed tear. The victim has referred to one incident of sexual assault on her looking at medical opinion, it cannot be co-related with the alleged incident.

5. Learned APP submitted that the victim was minor aged

about 12 years at the time of incident. She has no reason to falsely implicate the applicant and the other accused. All the accused were involved in sexually assaulting the victim. Medical evidence corroborates the version of the victim. The offence is serious. Considering the age of victim it cannot be expected that she would provide history in detail.

6. Learned counsel for respondent No.2 adopted arguments of learned APP. In addition he submitted that the role has been assigned to the applicant in crime. The evidence discloses that the complaint under Section 498-A was lodged by the accused No.2 after the incident in question and registration of FIR in the present case. The victim was minor and the accused had subjected her to sexual assault.

7. I have perused the documents placed on record. The complainant is mother of victim. The accused No.2 is wife of brother of complainant. The complainant is residing at Buldhana along with her husband and other family members. According to complainant, her parents, brother and his wife Varsha Gaikwad (Accused No.2) were residing at Mundhwa, Pune. The mother of complainant had visited the house of complainant and since there was vacation, the victim had accompanied her to Mundhwa on 13th April, 2016. On

25th May, 2016 the complainant visited her parental home and on 26th May, 2016 she returned to Buldhana along with victim. After disclosure made by victim the complainant lodged the FIR with Mundhwa Police Station on 31st May, 2016 for offences under Section 506 r/w 34 IPC and Sections 12 & 17 of POCSO Act. The FIR was registered vide C.R. No. 00 of 2016. In the said FIR the complainant alleged that the victim had disclosed to her that while the victim was at Mundhwa, accused No.2 took her to Khardi, Pune to house of accused No. 4 – Prashant Gaikwad. Accused No. 1 and accused No.4 were residing together. The victim was taken to the flat where accused No.1 & 4 were present. The accused No.2 told the victim to talk with accused No.1. Accused Nos. 2 & 4 went inside the room and came out after sometime. The victim was told to keep physical relationship with accused No.1 and that she should marry him. The victim refused to do so. Thereafter, they returned home. Subsequently accused No.2 took the victim to the area known as Gairan. Accused No.3 (applicant) and accused No.1 came there. The victim saw them having physical relationship with accused No.2. The victim was threatened by accused No.2. Thereafter, once again accused No.1 and applicant visited the house of accused No.2. Accused No.2 had physical relationship with accused No.3. Thus, the FIR dated 31st May, 2016 do not refer to incident of rape of victim.

The said FIR does not mention the date of incidents. The offences were registered under Section 506 r/w 34 IPC and Sections 12 & 17 of POCSO Act. The investigation was transferred to Chandan Nagar Police Station since the incident had commenced within jurisdiction of the said Police Station. In pursuant to that, FIR was registered with Chandan Nagar Police Station vide C.R. No.116 of 2016 on 1st June, 2016 for offence under Section 509 r/w 34 IPC and Sections 12 & 17 of POCSO Act. The statement of victim was recorded on 1st June, 2016. In this statement the victim had stated that she had been to house of her grand mother on 13th April, 2016. Accused No.2 took her to Khardi in the house of accused No.4. At that time, accused No.2 who is her maternal aunt told her to chat with accused No.1. Thereafter accused No.2 and accused No.4 went inside the room and came out after sometime. The victim was threatened by accused No.2 and accused No.4 not to disclose what has happened in the room. After about 4 days thereafter accused No.2 took the victim at the place known as Gairan. Accused No.1 and accused No.3 joined them. Accused No.2 had physical relationship with accused No.3 (applicant). The victim was threatened. On 19th May, 2016 applicant and accused No.1 came to the house of accused No.2. The victim was told to have physical relationship with accused No.1. Accused No. 3 and accused No.2 entered into room, thereafter, both of them

came out. They left the said premises. No reference to sexual assault on victim. On 25th May, 2016 complainant came to Mundhwa. The victim left with complainant to Buldhana. Thereafter, she disclosed the incident to her mother (complainant) on 28th May, 2016.

8. Supplementary statement of the complainant was recorded on 9th June, 2016. Statement of the victim was also recorded on that day. In the said statement of complainant it was alleged that on 14th May, 2016 accused No.2 took the victim to the flat belonging to victim's grand father. Accused No.1, accused No.3 and accused No.4 also visited the said flat. Accused No.2 pushed the victim on the floor, accused No.4 caught her legs and accused No.3 (applicant) caught her hands. Accused No.1 committed sexual intercourse with her. The accused threatened her that they would kill her family members and hence she did not inform the incident to anyone. This version was disclosed to her by the victim girl. The statement of the victim is also similar. Thus, for the first time the allegations of rape were disclosed on 9th June, 2016 in the supplementary statement of the complainant. The victim's statement dated 9th June, 2016 refers to incident dated 14th May, 2016. She stated that on 14th May, 2016 accused No.2 took victim to flat of her grandfather. Accused No.2,3 and 4 came there. Victim was sexually assaulted by accused No.1

with the aid of other accused. This version was not given by victim in her previous statement.

9. The complainant was examined as PW-1. She has narrated the incident reflected in the FIR and the supplementary statement. She admitted that accused No.2 had lodged FIR under Section 498-A of IPC against them on 20th June, 2016. She attended last rites of father of accused No.2 who had expired on 22nd May, 2016, from Buldhana. They had executed adoption deed of son Shardul in favour of accused No.2. She was at her parental home from 25th May, 2016 till night of 26th May, 2016. At that time only 3 of them i.e. herself, victim and her mother were in the house. While returning to Buldhana there was general talk between the victim and complainant. Both the panch witnesses are her relatives. There were major omissions in her evidence which was incorporated in paragraph No.13 of her cross examination. She admitted that she along with victim met four times to the police till 4th June, 2016. During that period victim did not tell to the police about the sexual intercourse with her, though police had asked her about it. Victim was examined as PW-4. She has narrated the incident as above. She stated that from 13th April, 2016 to 25th May, 2016 she stayed at her maternal uncle's home at Pune. She used to make phone calls to her

mother every day. She used to talk on phone with her mother, father and her brothers. She volunteered that whenever she used to talk with her parents and brothers, accused No.2 was remaining present besides her. She also stated that when the statement was recorded before the magistrate she did not remember to depose that at the house of accused No.4, accused No.2 told her to talk and chitchat with accused No.1 and accused No.2 and accused No.4 went to another room. She had not stated that after half an hour they came out. She had not stated that she asked accused No.2 as to how she is behaving. She had not stated before the magistrate that she saw accused No.2 having sexual relationship. She did not stated before the magistrate specifically that accused No.2 told her to perform sexual relations with accused No.1 and she had seen what the accused No.2 and accused No.3 had done. She had not stated specifically that accused No.2 had been up-stair along with accused No.3 and she was told to talk with accused No.1. PW-6 is the Medical Officer. The history was narrated to her by the victim. She was examined on 10th June, 2016. The history provided by the victim refers to the visit of the victim along with accused No.2 to the flat. She has stated that accused No.1 raped her on 14th May, 2016. There is no reference to presence of the applicant at that time in the flat. Thus, the evidence of prosecution witnesses reflects several

infirmities in the evidence. The allegations of rape on victim were disclosed subsequently. This is not the stage to give any findings on the evidence. However, considering the nature of the evidence and the fact that the applicant was on bail during trial, the sentence of imprisonment can be suspended. It is also pertinent to note that after registration of FIR on 31st May, 2016 the applicant was arrested and granted bail. Subsequently on the basis of supplementary statement, the additional charges were invoked and he was rearrested. Learned advocate for applicant relied on order passed by the Hon'ble Supreme Court dated 7th May, 2018 granting bail to the accused with liberty to the prosecution to apply for cancellation of bail, to seek custody. It is submitted that no such application was filed. The applicant is in custody after Judgment of conviction.

ORDER

- i) Criminal Application No.441 of 2019 is allowed;
- ii) Pending hearing and final disposal of Criminal Appeal No. 545 of 2019, the sentence of imprisonment awarded by learned Additional Sessions Judge, Pune, by Judgment and order dated 10th January, 2019 in Spl. S.C. No. 299 of 2016 is suspended.
- iii) The applicant is directed to be released on bail on furnishing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount.

- iv) The applicant shall attend concerned Police Station once in a month on very first Saturday between 11 am and 1 pm till further orders;
- v) The applicant shall not approach the victim or her family members.
- vi) Application stands disposed of accordingly.

10. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)