

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1426 OF 2019
IN
CRIMINAL APPEAL NO.439 OF 2019

Kishor Shivaji Bhide, Age 20 years,
Occ.Driver, R/o.Behind Bagade Company,
Indira Nagar, Turbhe, Navi Mumbai
(Presently lodged in prison) Applicant
versus
The State of Maharashtra and another Respondents

Mr.Sagar Tambe i/by Mr.Amresh Sharma for applicant.
Mr.A.R.Kapadnis, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 11th December 2020

PC :

1. The applicant has preferred this application for suspension of sentence of imprisonment imposed vide judgment and order dated 24th January 2019 passed by Additional Sessions Judge-5, Thane in Special Case (POCSO) No.158 of 2016. The applicant is convicted for offences punishable under Sections 376 IPC, S.3 r/w 4 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'), Sections 5(j)(ii), 5(1) r/w S.6 of POCSO Act. The applicant was sentenced to suffer imprisonment for ten years on each count.

2. The prosecution case is that the victim was sexually assaulted by the accused. The victim was minor at the time of incident. She was pregnant. The complaint was lodged by father of the victim on 5th April 2016. On the same day the applicant was arrested and since then he is in custody.

3. Learned advocate for applicant made several submissions in support of the application for suspension of sentence. It is submitted that there is delay in lodging the FIR. The proof of age of the victim was not established. The relationship, if any, was consensual. The victim has not supported the prosecution case. There is discrepancy with regards to obtaining DNA samples for forwarding it to the forensic expert. The evidence of witnesses is contradictory. The applicant is in custody for about four and half years. The appeal may not come up for hearing in near future.

4. Learned APP submitted that there is sufficient evidence to establish that the victim was sexually assaulted by the applicant. The victim was minor. The offence is of serious nature. The DNA report supports prosecution case. The victim was pregnant. The medical evidence has corroborated the case of prosecution.

5. The accused is in jail since 5th June 2016. Thus, the applicant has so far undergone imprisonment of four and half years. I have perused the evidence on record. At the time of deposing before the Court the victim was aged about 21 years. She stated that she was acquainted with the accused through her friend. There was sexual relationship between the victim and her friend Ashok and she lodged the FIR against accused under fear. She disclosed the name of accused in the hospital as she was having pain in her stomach. The prosecution then examined parents of the victim. Their evidence is in the nature of hear say. PW-2 has stated that the age of victim was between 15 and 16 years at the time of incident. PW-3 is the mother of victim. She stated that her marriage was performed in 1991 and

the victim was born after two years from the date of marriage. On the basis of this version, learned counsel for applicant had contended that the victim could not be minor at the time of incident. PW-6 is the Doctor who had examined the victim. She stated that there was no history of physical and sexual assault. There are discrepancy as to how and when samples of DNA were obtained. It is pertinent to note that the victim has not supported the prosecution case. The applicant was aged around 20 years at the time of incident. For substantial period he is in custody. Hence, there is no impediment in suspending sentence of imprisonment during pendency of appeal. Hence, I pass following order :

ORDER

- (i) Criminal Application No.1426 of 2019 is allowed and disposed of;
- (ii) The sentence of imprisonment imposed vide judgment and order dated 24th January 2019 passed by Additional Sessions Judge-5, Thane in Special Case (POCSO) No.158 of 2016 is suspended during pendency of appeal preferred by the applicant challenging the judgment of conviction;
- (iii) The applicant is directed to be released on bail on executing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount
- (iv) The applicant shall attend Turbhe MIDC Police Station, Navi Mumbai once in three months on first Saturday of the month between 11 am and 1 pm till further orders.

(PRAKASH D. NAIK, J.)

MST