

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.1461 OF 2019
IN
CRIMINAL APPEAL NO.1411 OF 2019

Arvind @ Rohit Gajraj Dubey
Age 22 Yrs. Occ : Nil
(In custody at Kolhapur Prison)
Navasa Tekdi, Kurar Village,
Malad East, Mumbai, 400097. ... Applicant

Versus

The State of Maharashtra ... Respondent

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Mr. Abhilash Panickar a/w Ms. Jyoti Panicker a/w Mr. Siddharth
Kejriwal i/b Entrust Legal Services LLP, Advocate for the Applicant.
Mr. A. R. Kapadnis for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 07th OCTOBER, 2020.

PER COURT:

1. This is an application for suspension of sentence of imprisonment awarded by the Special Judge under the P.O.C.S.O. Act, Sessions Court, Borivali Division, Dindoshi vide Judgment & Order dated 26th June, 2019.

2. The applicant is convicted for the offence punishable under Section 6 of Protection of Children from Sexual Offences Act,

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2012, Act (For short “POCSO”) and directed to undergo rigorous imprisonment for twelve years and pay fine of Rs. 10,000/- and in default to undergo rigorous imprisonment for one year.

3. The prosecution case is that the victim is aged about 3 years. The first informant is father of victim. According to informant on 14th August, 2015 in the night at around 11 p.m. the victim started crying and was touching her private part and complained of pain. Initially the informant felt that the victim must have sustained insect or ant bite. She was taken to Dr. Nawaz Tantra who examined and informed the parents of the victim that the victim has been subjected to fingering to her private part. The parents took the victim in confidence and asked her whether anybody has touched her private part. The victim said ‘uncle-uncle’. The victim was taken to Shatabdi Hospital, Kandivali (W) for treatment. Doctor informed them that somebody has caused injury to the vagina of the victim by finger. The First Information Report (for short “FIR”) was registered vide C.R. No. 240 of 2015 under Sections 376 (2)(i), 354(B) of IPC and Sections 4, 6, 8 & 12 of POCSO Act. The investigation proceeded. Statements of witnesses were recorded. Charge-sheet was filed. The prosecution examined about 15 witnesses. The defence examined 9 witnesses.

4. Learned counsel for the applicant submitted that the

applicant has been in custody for a period of about five years. The applicant has been falsely implicated in this case. The parents of the victim had initially felt that the victim had got insect or ant bite to her private part. The victim was allegedly taken to doctor who opined about fingering to victim. The witnesses has changed their belief and opined that the victim was sexually assaulted. There are discrepancies in evidence to PW-2 and PW-3. Dr. Nawaz Tantra who had allegedly examined the victim has in fact not examined her. It is submitted that PW-2 and PW-3 had initially stated that they had taken the victim to Dr. Tantra, but subsequently changed their version. The said witnesses contradicted their version in 2017. The statement of the Doctor was recorded after about two years in 2017. The photograph of place of incident would show that it is crowded place and it would be highly impossible to commit the alleged act. The offence under Section 6 of the POCSO Act is not made out. The medical certificate of examination of the victim indicate that there were no external injuries. The prosecution has failed to show that sexual assault was of penetrative form. The C.C.T.V. footage is not incriminating evidence against accused. The defence witnesses has established no offence was committed at the main gate of this school. The motive behind falsely implicating the applicant is rivalry between bus operators and van operators. The evidence of the victim does not refer to penetration. She did not gave any details as to how the

accused have committed the act of penetration. She has not described the act. It is further submitted that there was penetrative sexual assault. There was no injury to private part of victim. Assuming that the prosecution case about touch is true, at the most the touch could have been to perineum which is not part of private part of victim. There was superficial abrasion which is contradictory to alleged sexual assault. Learned counsel further submitted that the evidence of the witnesses including the Medical Officer, the nature of medication prescribed by Medical Officer indicate that there was no sexual assault. In any case there was no penetrative sexual assault. It is submitted that considering the evidence on record no charge under Section 6 of POCSO Act is made out against the applicant. Although list of several witnesses was given all the witnesses were not examined by the prosecution. The accused has examined defence witnesses which falsifies the prosecution case. Learned counsel pointed out the evidence of witnesses. The appeal would not come up for hearing immediately. The applicant is in custody for a substantial period of time. Hence, the sentence of imprisonment may be suspended and the applicant be directed to be released on bail.

5. Learned APP submitted that the victim was minor aged about three years. The victim has deposed that the accused has committed the act. The victim was going to school by Van. Accused

was working on the Van. Specific overt act has been attributed to him. At the time of recording evidence, victim was five years old. She has conveyed by gestures that the accused had touched her private part. There is nothing to doubt veracity of the evidence of victim. PW-2 and PW-3 has supported the prosecution case. The FIR was lodged promptly. The defence witness has examined by the accused do not support his defence. On the contrary the defence evidence of accused indicate that the sticker at victims urination part was removed by the accused. The testimony of the medical officer reveal that upon local examination they observed redness on the perineum area. There is presumption under the provision of the POSCO Act. The accused was not on bail during the trial. Learned APP pointed evidence of witnesses which according to him is incriminating evidence against the applicant.

6. The appeal preferred by the applicant is pending before this Court. The alleged incident had occurred on 14th August, 2015. The victim was aged about three years at the time of alleged incident. The prosecution case is that the victim was subjected to fingering by the accused. The evidence of the victim was recorded. She has narrated the incident by her version and by gestures. The evidence of victim refers to the question asked to her about place of touch, and by keeping her right index finger on her right thigh and

slightly curved her finger towards her private part. The defence evidence of accused suggests that child was crying and she wanted to answer nature's call and when she came back, the accused saw sticker at her urination part which was pulled by him. The evidence of several witnesses is on record. Documentary evidence is also on record. The submissions advanced by the learned counsel for the applicant are in the nature of appreciation of evidence. No findings can be given at this stage. The offence related to victimization of the child aged about three years. Considering the material on record, the prayer for suspension of sentence cannot be granted. Hence, I pass following order.

ORDER

- i) Criminal Interim Application No. 1461 of 2019 is rejected.
- ii) Hearing of appeal is expedited.
- iii) The paper book of the appeal be prepared expeditiously. After the paper book is ready the applicant will be at liberty to apply for fixing the appeal for hearing.
- iv) The observation made in this order are only for considering the application for suspension of sentence.
- v) Criminal Interim Application No. 1461 of 2019 stands disposed of accordingly.

7. 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.)