

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 353 OF 2019
IN
CRIMINAL APPEAL NO. 1289 OF 2019

Sunny Shyam Kamble

..... Applicant

VERSUS

State of Maharashtra

..... Respondent

Ms. Kavita Pawar, Advocate for Applicant.

Mrs. P. P. Shinde, APP for the Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATED : 14th OCTOBER, 2020

P. C.

1. The Applicant is seeking suspension of sentence of imprisonment imposed vide Judgment and Order dated 29th July 2019 passed by Special Judge under POCSO Act in POCSO Special Case No. 69 of 2018. The Applicant is convicted for offences punishable under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") Act and Section 506 (ii) of Indian Penal Code (for short "IPC"). He has been sentenced to undergo Rigorous Imprisonment for 20 years, 5 years and 3 years respectively.

2. The Applicant was on bail during the trial. On conviction, his bail bonds were forfeited and he was taken in custody.

3. The prosecution case is that, the victim was aged about 14 years at the time of incident. On 2nd December 2017, she disclosed to her mother that she got acquainted with the accused before two weeks. The accused asked her to give pen and piece of paper while she was returning from school and she handed over pen and piece of paper to the accused. The accused noted his mobile number on the said piece of paper and handed over the same to the victim. After reaching home, the victim gave a missed-call on the said mobile number. After the missed-call, the accused called on the said number. The accused started meeting the victim at the bus stop of school everyday. On 26th November 2017, the accused called the victim on phone and informed her to bring one dress in school bag as she has to accompany him to Siddhivinayak Temple. Victim carried one dress in her school bag. Accused collected her from the school. He took her near the public toilet situated at Dadar and told her to change the school uniform. The accused informed the victim that he wanted to talk with her and took her to guest house. He committed forcible sexual intercourse with her at the guest house. He took her nude photographs in his mobile phone. She did not disclose about the same to anybody as she was scared. On 30th November 2017 the accused took the victim to his house. The accused pointed out nude photographs of victim to friend of her sister and also

disclosed that he committed sexual intercourse with the victim. The accused also pointed out nude photographs even to sister of victim. The incident was not informed to mother by victim's sister as her father was not keeping well. The mother of victim called the accused and made inquiry with him and he denied the incident.

4. Pursuant to order dated 25th August 2020, victim was added as respondent No.2. Notice was issued to newly added respondent no.2. Senior Inspector of Police, Wadala T.T. Police Station, Mumbai has submitted report dated 8th September 2020 stating that, attempt was made to serve the notice to the victim at her address mentioned in the title of the application. However, it could not be served upon respondent no.2. Some other person was found to be occupying the premises. He disclosed that he do not know the victim. The police tried to contact owner of the premises, but the contact could not be established. The tenant could not provide information about the place of her residence. The neighbour also expressed inability to identify the victim. It is pertinent to note that, the Applicant had provided the address of the respondent no.2 which is disclosed in the statement of complainant (mother of victim) and the victim which forms part of charge-sheet. The report of the police is taken on record. Learned advocate for the

Applicant has tendered the envelope containing notice to respondent No.2 alongwith affidavit stating that, notice was sent to victim on 2nd October 2020 but the envelope was returned with remarks "left". The affidavit/envelope is taken on record.

5. Learned Advocate for the Applicant submitted that, the Applicant was young boy aged about 18 years at the time of incident. He was on bail during the trial. He had not misused facility of bail. The Applicant has been falsely implicated in this case. There are various omissions and contradictions in the evidence of the witnesses. No date was mentioned on the photographs produced by the prosecution. There was no recovery of register from the lodge by investigation agency to verify that the room was occupied by the accused and the victim. Nothing incriminating was recovered from the spot of incident. No independent witness was examined by the prosecution. There is delay in lodging complaint. Owner of the lodge was not examined by the prosecution to establish that the room in the lodge was occupied by the accused along with victim. The evidence of PW No.3 (sister of the victim) and PW No.4 (friend of PW No.3) discloses that the nude photographs shown to them by the accused in his mobile phone were deleted and hence it is difficult to believe how photographs were found in the cellphone of the Applicant. The prosecution has not

established that the photographs of the victim were nude and that they were removed from the cellphone of the Applicant. The version of PW No.3 and PW No.4 is afterthought. They did not disclose the incident to mother of victim or to the police. The sentence awarded by trial Court is disproportionate.

6. Learned APP submitted that, the victim was minor at the time of incident. The consent of the victim is immaterial. The offence is of serious nature. Presumption under Sections 29 and 30 of the POSCO Act can be invoked in this case. Medical evidence supports the case of prosecution.

7. The alleged incident had occurred on 26th November 2017. From the evidence of victim, it appears that, she was acquainted with accused. The accused used to meet her at the bus stop everyday. On 26th November 2017 she accompanied accused. She carried her dress in the school bag. Both of them alleged to have occupied the guest house. The accused had forcible sexual intercourse with her. The accused also took her nude photographs. The accused again met her on 30th November 2017 and took her to his residence. Thereafter, they met PW No.4 who is the friend of victim's sister. The accused allegedly shown nude photographs of victim to him. PW No.4 had disclosed his fact to PW No.3 who is the sister of victim.

She confronted the accused to shown photographs of victim to her in his cellphone. Thus, PW No.3 and PW No.4 were aware about the incident, on 30th November 2017, however, this incident was not disclosed to the parents of the victim by them. PW No.1 has stated that her sister (PW No.3) had deleted the photographs from the cellphone of accused. In the cross-examination, it was stated that, in the photographs shown to her there was no photographs in compromising position. The nude photographs indicate that the face of the victim was not visible. PW No.3 has stated that, photographs from the cellphone of the accused was shown to her by the accused. PW No.4 has stated that, he disclosed to police, that PW No.3 had deleted the photograph from the mobile handset of the accused and there was quarrel between PW No.3 and accused. He went to the police station on 2nd January 2018 and 16th January 2018. Prior to that, he did not disclose the incident to police. The appeal preferred by the Applicant is pending. The applicant was on bail during the trial. The sentence of imprisonment prima facie appears to be disproportionate.

7. Considering the aforesaid circumstances and the evidence on record, the sentence of imprisonment can be suspended, pending the appeal of the Applicant.

ORDER

- (i) The sentence of imprisonment imposed vide Judgment and Order dated 29th July 2019 passed by learned Special Judge POCSO Act in POCSO Special Case No. 69 of 2018 is suspended, pending the appeal preferred by the Applicant and the Applicant is directed to be released on bail on furnishing PR bond in the sum of Rs. 25,000/- (Rupees Twenty Five Thousand Only) with one or more surety in the like amount;
- (ii) The Applicant shall attend concerned Police Station once in a month on first Saturday of month between 11.00 a.m. to 01.00 p.m. till further orders;
- (iii) The Applicant shall not try to approach the victim or her family members;
- (iv) Interim Application stands disposed off.

(PRAKASH D. NAIK, J.)