

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.704 OF 2021
IN
CRIMINAL APPEAL NO.141 OF 2021

DNYANESHWAR LAXMAN DUDDE
VERSUS
THE STATE OF MAHARASHTRA

...
Mr. V. V. Bhavtankar, Advocate for applicant.
Mr. A. M. Phule, APP for the respondent – State.
...

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 09-04-2021

Pronounced on : 27-04-2021

ORDER :-

. Present application has been filed for suspension of sentence that has been imposed on the applicant – appellant by learned Special Judge, Biloli, Dist. Nanded in Special Case Child Prot. No.02 of 2017 on 23.02.2021, whereby the applicant who is accused No.1 therein has been convicted for the offence punishable under Section 376 of Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5,000/-, in default, to suffer simple imprisonment for three months.

2. Heard learned Advocate Mr. V. V. Bhavthankar for the applicant and learned APP Mr. A. M. Phule for the respondent – State.

3. It has been vehemently submitted on behalf of the applicant that the sentence that has been awarded to the applicant is small sentence and, therefore, in view of the decision in ***Kiran Kumar Vs. State of M. P [(2001) 9 SCC 211]***, he deserves to be released on bail. Further, it is required to be seen that the applicant was on bail throughout the trial and he has not misused his liberty. The appeal has been admitted and there are certain points which the appellant – applicant wants to canvass at the time of final hearing. The applicant has been acquitted of the offences punishable under Sections 363, 366, 366-A read with 34 of Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as the ‘POCSO Act’). The age of the girl has not been proved by the prosecution beyond reasonable doubt. If we consider the testimony of the victim girl, it can be seen that she had left the house on 16.07.2016 at about 8.30 a.m. Thereafter, she had felt like vomiting and, therefore, she had gone to the medical shop to buy tablets. She purchased the tablets and returned to the school. She was sitting in the classroom. When the school peon told her that somebody had come to meet her, she came out of the classroom and then saw the present applicant standing outside. He told that her mother is not feeling well and then she should go to the house immediately. After taking permission from the class teacher, she went

outside the classroom. According to her, the applicant was still standing and was with her, but then she doesn't say that any force was applied by him at that time. She waited for the bus and without noticing where the bus was going, she boarded it. She also states that inside the bus, the applicant sat near her and showed her knife and threatened not to make any shouts and then she says that she was feeling giddiness. She regained her consciousness around 6.00 p.m. and found that the applicant was besides her. She then says that she asked him as to where she has been brought. Applicant told her to keep quiet and not to shout and then she says that she was alighted from the bus. It was Isnapur stop. She was taken to applicant's maternal uncle's house. Even she says that in Hindi, the applicant had told his uncle that he has kidnapped the victim. According to her, the applicant had kept her there for two days. All these facts would show that she never tried to get herself rescued. She never raised human cry for help. Therefore, the possibility of voluntary act on her part to accompany applicant cannot be ruled out. She then states that the father of the applicant had arrived and gave her threats. They had taken her to Railway Station Hyderabad and then to Belgaon. She then states that by giving threats with the help of knife, the applicant had committed rape on her between 22.07.2016 to 26.07.2016. She never raised human cry even between

her journey through railway. In her cross examination it has come that she knew the applicant since childhood. She has made various improvements in her testimony and it shows that it was the act by consent. When her age is not proved, that means she has been considered as major and the act is voluntary, it will not attract the offence under Section 375 of Indian Penal Code. Therefore, the said conviction awarded to the applicant is wrong and, therefore, he deserves to be released on bail till the disposal of his appeal.

4. Per contra, learned APP has strongly opposed the application and submitted that a well reasoned judgment has been passed by the learned Special Judge. Though the prosecution appears to have not proved the age of the girl, the act of sexual intercourse was against her wish. Her medical report is consistent to her testimony and, therefore, the applicant has been rightly convicted. Suspension cannot be as of right and, therefore, the application deserves to be rejected.

5. At the outset, the points which are in favour of the applicant are that the sentence that has been awarded is small sentence. Secondly, he was on bail throughout the trial and there is nothing on record to show that he has misused that liberty. Only these two grounds may not be sufficient and, therefore, the other aspects are also required to be considered. The acquittal of the applicant from Sections 363, 366, 366-

A of Indian Penal Code and Sections 4 and 6 of the POCSO Act speaks for itself. The only thing remained was the charge under Section 376 of Indian Penal Code. The learned Special Judge has then come to the conclusion that though the age has not been proved, yet, the act of sexual intercourse was against the wish of the victim. Whether under the said circumstance, as to how the testimony of the victim could be appreciated and her testimony whether reliable or not would be decided. When for a part of acts her testimony has been discarded, then for certain offence only whether that testimony can be believed, is a question. In other words, if the acquittal of the applicant under Sections 363, 366, 366-A of Indian Penal Code as well as Sections 4 and 6 of POCSO Act is considered, then the question arises as to how the girl would have reached to the uncle's place of applicant, Railway Station Hyderabad and by railway up to Belgaon. When there was opportunity for her to flee away, she has not utilized it nor she had raised human cry for help. Even when it is stated that the applicant had gone to her classroom and thereafter, after taking permission from the class teacher, she had left, then how it could take such a long time to trace out the victim, is a question. The sole testimony of the victim is believable or not will have to be reconsidered in the appeal. Therefore, when points are made to deal with the appeal and it would take long time for the

applicant - appellant to wait for the decision taking into consideration the pendency of the cases in this Court, the applicant deserves to be released on bail by suspending the sentence. Hence, the following order:-

ORDER

1. The Criminal Application stands allowed.
2. The substantive sentence, imposed upon the applicant by learned Special Judge, Biloli, Dist. Nanded in Special Case Child Prot. No.02 of 2017 vide judgment and order dated 23.02.2021, is hereby suspended till hearing and final disposal of the appeal.
3. The applicant be released on P. R. Bond of Rs.30,000/- (Rupees thirty thousand) with two sureties of Rs.15,000/- (Rupees fifteen thousand) each.
4. The applicant shall not indulge in any criminal activity.
5. The applicant shall remain present before the learned Trial Judge once in six months, till final hearing and disposal of the appeal, commencing from the date he tenders bail paper/s and, thereafter, the Trial Judge to fix dates for the subsequent appearances.

6. In case of two consecutive defaults on the part of the applicant to remain present before the Trial Court, the Trial Court to inform this Court about the same and in that eventuality, the prosecution would be at liberty to file an application for cancellation of the bail granted to the applicant.

7. Bail before the Trial Court.

[SMT. VIBHA KANKANWADI, J.]

scm