

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.795 OF 2021
IN
CRIMINAL APPEAL NO.170 OF 2021

ROHIT @ DICHYA S/O NANA KAMBLE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Mr. R. V. Gore, Advocate for appellant.
Mr. A. M. Phule, APP for the respondent – State.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 08-04-2021

ORDER :-

. Present application has been filed for suspension of sentence that has been imposed on the applicant – appellant by learned Extra Joint District Judge and Special Judge (POCSO), Jalna in Special Case (Ch.) No.27 of 2017 on 24.02.2021 whereby the applicant who is original accused therein has been convicted for the offence punishable under Section 354 of Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for two months. Further, he has been convicted for the offence punishable under Section 7 read with Section 8 of the Protection of Children from Sexual Offences Act, 2012

(hereinafter referred to as the 'POCSO Act') and thereby sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for two months.

2. Heard learned Advocate Mr. R. V. Gore 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 applicant was on bail throughout the trial. He has not misused the liberty. The sentence awarded is small sentence and, therefore, the applicant deserves to be released on bail in view of the decision in ***Kiran Kumar Vs. State of M. P [(2001) 9 SCC 211]***. The learned trial Judge has not appreciated the evidence properly and has given unnecessary wattage to the testimony of the victim. The status of the victim as child is not proved. Evidence on record to prove the age of the victim is not sufficient i.e. Exhibit-37 which is only the attested copy of entry in respect of birth of the victim in the register. It also appears that the two witnesses examined i.e. PW.2 and PW.4 have improved their version and it is not consistent with the story told by the victim. Section 29 of the POCSO Act has been wrongly considered by the learned trial Judge. Testimony of defence witness No.1 has not been properly appreciated. If it would have been appreciated properly, the applicant would have been

acquitted. Therefore, there are many such aspects which the appellant intends to submit at the time of final hearing. As it would take long time for this Court to take up the matter for final hearing, the applicant deserves to be released on bail.

4. Learned APP strongly opposed the application and submitted that a well reasoned order has been passed by the learned Special Judge. The acts done by the present applicant have outraged the modesty of the victim girl. The testimony of the victim was sufficient to bring home the guilt of the accused. If the applicant is released on bail, then a wrong message would be sent in the society. Already the security of the women is questioned. The girl had gone to fetch water and then she is required to face such acts as narrated by her. It is difficult for a woman, especially the adolescent girls to move freely. Suspension of sentence is not as of right and, therefore, the application deserves to be rejected.

5. At the outset, it can be said that the sentence awarded to the applicant is definitely a short sentence. It also appears that the applicant was on bail throughout the trial, but these points are not sufficient to grant the suspension of sentence which is not as of right. Even in the decision in *Kiran Kumar (Supra)*, Hon'ble Apex Court has not stated that whenever there is small sentence that is imposed on any

accused – appellant, then the Court should suspend the sentence till the appeal is finally disposed of. It is stated in ***Kiran Kumar (Supra)*** that if it is not possible for the Court to take up the appeal for final hearing, then it may consider the application for suspension of sentence of the concerned accused. The evidence that is brought on record against the applicant is required to be considered *prima facie*. P.W.1 is the victim who is admittedly child, though now the applicant – appellant is disputing the said fact. The girl was available for cross-examination when she has given her age as per the record. P.W.4 is the mother of the victim and she has tried to tender photocopy of birth certificate issued by Jalna Municipal Council which was taken as Article-A. The learned Judge has considered the other documents also i.e. school leaving certificate which is filed later on record. Exhibit-37 is the attested copy of the entry of birth of the victim. On this phase, it appears that *prima facie* fact that the victim being child has been held to be proved.

6. The prosecution story was that the victim, who was then aged 14 years, gave report that when she was filling water in the water pot at about 6.00 p.m. and was returning to her house, in front of house of one Gajanan, the accused intercepted her way with ill intention. The applicant had caught hold of her hand and dragged the victim towards him and uttered words “काम होउ देते की नाही”. The victim has stated that

she had resisted the accused and in the meantime, the accused had thrown her water pot and pressed her breasts. When the victim had tried to go out of the clutches, the accused had threatened her with dire consequences and beaten her by giving slaps and fist blows. The applicant has not come with the case of any previous enmity. Therefore, the question arises as to for what purpose, the applicant would have been implicated, if we want to believe the story of implication. Now, with this kind of act, which definitely amounts to “Sexual Assault” as defined in Section 7 of the POCSO Act, the prosecution story went further. In order to support her testimony, the prosecution has examined the mother to whom the immediate disclosure would have been made. When the testimony of victim is inspiring confidence, there is no hurdle in convicting the accused on the basis of that sole conviction. Therefore, on merits, this Court does not find any reason to release the applicant on bail. In view of the directions in *Kiran Kumar (Supra)*, the matter can be expedited and can be heard by this Court by giving preference. Under such circumstance, application stands rejected.

[SMT. VIBHA KANKANWADI, J.]

scm