

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

943 CRIMINAL APPLICATION NO.1545 OF 2020
IN APEAL/477/2020

BHAGWAN ALIAS BALU APPASAHEB DALVE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Mr.A.A.Khande, advocate for the applicant
Mr. R.V. Dasalkar, APP for the respondent/State.
Mr. Shrikant G.Kawade, advocate for respondent
no.2.

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CORAM : V.K. JADHAV
AND
SHRIKANT D. KULKARNI, JJ.

DATE : 07TH OCTOBER, 2021

PER COURT :-

1. Pending Criminal Appeal No.477 of 2020 preferred against the judgment and order of conviction dated 10.02.2020 passed by the Additional Sessions Judge and Special Judge, Ambajogai, convicting the applicant – accused for the offence punishable under sections 376(2)(i)(j)(n), 328, 506 of the Indian Penal Code (IPC) and offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.20,000/-, in default, to suffer rigorous imprisonment for 2 months under section 376(2)(i)(j)(n) of IPC, to suffer rigorous

imprisonment for 10 years and to pay fine of Rs.20,000/-, in default, to suffer rigorous imprisonment for 2 months under section 328 of the IPC and to suffer rigorous imprisonment for 7 years and to pay fine of Rs.20,000/-, in default, to suffer rigorous imprisonment for 2 months under section 506 of the IPC, the applicant-accused has preferred this application for suspension of the substantive part of sentence and for bail.

2. The prosecution case, in brief, is that a girl child of 10 years of age has faced the sexual assault for a long. The applicant herein is 40 years of age as on the date of the incident. He is married person.

3. Learned counsel for the applicant-accused submits that the evidence of convict-PW-1 is not reliable, trust worthy and consistent. There is no corroboration to her evidence. As per the prosecution story, she was subjected to intercourse on 5 occasions in between 2012-2013 and in the year 2016. Learned counsel submits that so far as first four incidents, as alleged by PW-1/victim, she was not in a position to narrate as to what happened to her. However, so far as fifth incident is concerned, PW-1-victim has alleged against the applicant-accused that he had committed rape on her. Learned counsel

submits that PW-1-victim has not disclosed the earlier incident to any one and even the last incident to the family members. Though, PW-1-victim allegedly taken to the hospital, where for the first time, she has disclosed about the said fifth incident to Dr. Swati, however, the prosecution has not examined said doctor as prosecution witness. Learned counsel submits that considering the nature of the evidence, the trial Court has committed an error in relying upon uncorroborated testimony of PW-1. So far as fifth incident is concerned, PW-1-victim was allegedly taken from her school by the applicant-accused by pretending himself as the uncle of the victim and also disclosed same to teacher by name Kshirsagar, however, the prosecution has not examined the said teacher as prosecution witness. The prosecution has also not examined the material witnesses to corroborate the testimony of PW-1-victim. In support of the above contentions, learned counsel for the applicant has placed reliance on the judgments in the case of **Radhu V/s State of Madhya Pradesh** reported in (2007) 12 SCC 57, **Mohd. Ali alias Guddu V/s State of Uttar Pradesh** reported in (2015) 7 SCC 272 and **Ramesh S/o Fagulal Amdare V/s State of Maharashtra** reported in 2018 DGLS (Bom). 295.

4. Learned APP submits that the evidence of PW-1-victim is reliable, trustworthy and

consistent on material aspects. PW-1-victim was 10 years old at the time of first incident. She was offered glass of cold water by the applicant-accused through her girlfriends and thus, PW-1-victim remained semiconscious for some time. The applicant-accused by taking undue advantage of the same has committed rape on her, which PW-1 - victim could not explain due to her tender age so also due to semiconscious state of mind. Learned APP submits that PW-2-Nikhita has supported the prosecution story. PW-1-victim was subjected to medical examination and her hymen was found torn. Learned APP submits that the trial Court has considered the evidence of the victim, so also, the corroborations from the other evidence. There is no substance in this application and thus the application may be dismissed.

5. We have gone through the evidence of PW-1-victim and PW-2-Nikhita. *Prima facie*, we find the evidence of PW-1-victim reliable, trustworthy and consistent on material facts. First incident had taken place in the year 2012 at about 1 p.m. At that time, three girlfriends came towards the victim and gave her glass of water and after drinking the said water, she felt giddiness. Thus girlfriends took her towards one tamarind tree and wood apple tree and lie her down there. PW-1-victim further deposed that accused came there, she felt giddiness, therefore

she could not understand what happened next. However, when she regain conscious, she found herself in the house of her friend. After 8 days, when they were playing under the tree at about 11 a.m., the applicant-accused came there on the spot, at that time, the applicant - accused lifted her and took towards river. PW-1 victim started shouting and after hearing shouts, their friends told her that she should go and they will come later on. She know till she was taken towards river side and she was not knowing what happened to her thereafter. However, when she regain consciousness, at that time, she felt giddiness and there was stomach ache. In the next summer vacation, when she again went to village Jaigaon and at about 2 to 2.30, friends of PW-1 - victim went to nature's call at that time, one girlfriend gave her eclare chocolate. The victim ate said chocolate. The applicant-accused also came there. PW-1 - victim has deposed that the applicant-accused lifted her dress and committed rape. According to her, at that time, she was conscious. Thereafter, she became unconscious and again regain conscious and found herself on the terrace of Shririam Bhaiyya. She has deposed that "the applicant-accused removed her pant, and other friends caught hold her hands and applicant-accused slept over her body and committed Sambandh."

6. PW-2 Nikhita has deposed that the incident which had taken place in the year 2012 at about 1 p.m., they were under the tree of tamarind. At that time, all three friends and victim were present on the spot. She has further deposed that at that time, applicant came there, other two friends caught hold hands and legs of PW-1 – victim and applicant-accused committed wrongful act with the PW-1-victim. She further could not explain, after she has used the word i.e. applicant-accused Balu Kaka committed wrongful act at the place of urine of PW-1-victim. It is observed by the Court that the witness could not complete the sentence inspite of sufficient time given.

7. It appears that it was difficult for PW 2 – Nikhita, who is of 14 years of age at the time of her evidence before the Court to narrate complete act which requires to be narrated in the legal language, however, it could be gathered as to what she was deposing before the Court. We find no substance in the submissions of learned counsel for the applicant that at the time of first four incidents, the victim could not narrate as to what happen to her, and there is no evidence about commission of rape and so far as fifth incident is concerned, since there is no disclosure of the said incident to any one in the family, the evidence of PW-1-victim is not

reliable, trustworthy and consistent. We find sufficient evidence against the applicant – accused and there is enough corroboration to victim's testimony before the Court. The applicant-accused who is 40 years of age and married person, has taken undue advantage of situation and also of her girlfriends and time and again whenever he got opportunity, taken the advantage of the said opportunity with the help of other girlfriends of the victim and committed rape on her. It also appears from the evidence of one of those girlfriend that even they were not knowing what accused was doing with the victim. Though, learned counsel for the applicant has placed reliance on the judgment in the case of **Radhu V/s State of Madhya Pradesh** reported in (2007) 12 SCC 57, **Mohd. Ali alias Guddu V/s State of Uttar Pradesh** reported in (2015) 7 SCC 272 and **Ramesh S/o Fagulal Amdare V/s State of Maharashtra** reported in 2018 DGLS (Bom). 295, however, those cases may be useful while deciding appeal on merits.

8. Thus considering the entire evidence on record and the manner in which the applicant-accused had committed rape on PW-1-victim, we are not inclined to release the applicant on bail by suspending the substantive part of the sentence. Hence the following order :-

ORDER

The application is rejected.

(SHRIKANT D. KULKARNI, J.)

(V.K. JADHAV, J.)

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