

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 1021 of 2021
IN
CRIMINAL APPEAL NO. 485 OF 2020

Jayesh Sudhir Dolas	.. Applicant
Versus	
The State of Maharashtra	.. Respondent

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Mrs.Anjali Patil for the applicant.
Mr.Y.Y. Dabake, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 5th APRIL 2021

P.C:-

1 By the present application, the applicant who has been convicted in POCSO Special Case No. 50 of 2019 by the Special Judge at Greater Mumbai and sentenced to suffer RI for a period of two years on being convicted under Section 376(2)(i) of IPC and for Section 10 of the POCSO Act directed to suffer RI for seven years, seek suspension of sentence imposed on him. The applicant seek his release on bail and claim parity with co-accused Shubham who has been released on bail by this Court on 10th February 2021.

2 I have heard Mrs.Anjali Patil, learned Advocate for the applicant and Advocate Mr.Y.Y. Dabake, learned APP for the State.

3 C.R. No. 350 of 2018 was registered at R.A.K. Marg police station on the complaint filed by the mother of the victim girl aged three years who complained of sexual abuse. On completion of investigation, the applicant was charge-sheeted along with accused no.2, applicant being charge-sheeted for commission of offence punishable under Section 376(2)(i) IPC and Section 6 and 10 of the POCSO Act whereas the accused no.2 came to be charged under Section 10 and 17 of the POCSO Act.

4 In order to prove guilt of the accused persons, the prosecution examined 10 witnesses which included the prosecutrix herself as PW 1, the complainant - the mother of the prosecutrix as PW 2, two independent witnesses, along with Medical Officer being examined as PW 5 and another Medical Officer being examined as PW 8, two panch witnesses (PW 6 and 7) and two Investigating Officers (PW 9 and 10). The prosecution also relied upon the documents including the FIR, the statement of the complainant and the prosecutrix recorded under Section 164 of the Cr.P.C along with the medical report of the prosecutrix and the accused no.1, birth certificate of the

prosecutrix, FSL report etc. The statement of the accused was also recorded under Section 313 of the Cr.P.C where he claimed complete innocence.

On appreciation of the material placed on record, the Special Judge under the POCSO Act, found the accused no.1 guilty of offence under Section 376(2)(i) and Section 10 of the POCSO Act and imposed sentence upon him, to which reference has already been made. An Appeal has been preferred against the said judgment and the Appeal came to be admitted on 16th December 2020.

5 I have perused the impugned judgment along with the compilation of documents which form part of the Appeal.

The prosecution case which can be discerned from the same is that on 20th November 2018, accused nos.1 and 2 committed penetrative sexual assault/sexual assault on the prosecutrix by inserting finger in her vagina by making appropriate touch to her vagina and anus. The complainant who has entered into the witness box deposed that on the date of the incident, while she was inside the house, her daughter aged 3 years was playing in the common passage in front of the house and at that time, her brother-in-law was consoling his daughter in the passage. He reported to have noticed that the victim girl was seated between the two accused persons on the Sofa set and by observing her silent demeanor, he brought the victim girl and

suspected something unusual. When inquiry was made with the victim girl, she referred to a person wearing green colour shirt by naming the present applicant and narrated that he had inserted finger in her vagina, which she pointed out by indication. She also reported that she was feeling pain at the place of urination. When her private part was examined by the complainant, it was found to be red in colour and also reflected swelling and there appeared to be opening on her vagina. The victim girl specifically pointed to the applicant as the one who was wearing green shirt. Immediately, the victim girl was taken to the Doctor – PW 5 who examined the prosecutrix in the backdrop of the history given by the complainant and noted reddishness, swelling on her private part and also a tear of hymen. She advised the complainant to approach the police station.

6 After registration of the offence, victim girl was examined by PW 8 on 21st November 2018. He deposed about her condition as under :-

“There was redness and tenderness present over labia and minora and fourschette and introitus, hymen torn at 11 to 1 ‘O clock position – posteriolaterally, margin irregular, hyperemic redness present”

When examined, the said witness opined that there is evidence of recent forceful vagina penetration and issued the medical certificate in the prescribed format. The witness in his

cross-examination, denied the suggestion that in case of insertion of finger, there will be bleeding. The witness admitted that the injury can be caused to labia majora and labia minora if anything is inserted inside the vagina and also admitted that the injuries are possible in case of infection due to unhygienic condition. However, he categorically ruled out the possibility of the same in the present case and he also rule out the possibility of the tear being caused due to insertion of finger by the prosecutrix herself. The medical evidence brought on record by the prosecution is therefore, clinching and suggestive of sexual assault upon the victim and is suggestive of forceful vaginal penetration in terms of the opinion of PW 8. The trial Court relied upon the said evidence brought on record which establish that the victim was subjected to penetrative sexual assault/rape on the basis of the medical evidence.

7 For establishing the implication of the accused persons for the sexual assault on the victim girl, the prosecution has relied upon the testimony of the prosecutrix, the complainant and two independent witnesses PW 3 and PW 4. The appreciation of their evidence is what is the fulcrum of the argument of the learned counsel Ms.Patil and she point out certain discrepancies in the evidence of the prosecutrix, which according to her, have not been properly appreciated.

The Special Court taking into consideration the age of the prosecutrix has observed that considering her young age, she was not able to understand the implications and consequences and minor discrepancy like Sofa or bed which was the place on which she was subjected to sexual assault, loses its significance. The prosecutrix in her statement recorded under Section 164, however, had succinctly pointed out that it is the accused no.1 who had inserted finger in her vagina. The Special Court had the occasion to observe the demeanor of the victim and has recorded that at the time of her examination, the victim girl who was aged four, had categorically deposed that accused no.1 made inappropriate touch to her private part.

Her testimony is corroborated by PW 2 who is the complainant and to whom the victim girl had narrated the incident on being inquired. There is some discrepancy about the name of the accused no.1 being taken by the victim girl as, at one point of time, she said that she do not know the name of the accused no.1. However, she has pointed to the accused no.1 as the person who had inserted finger in her vagina. The minor discrepancies in the testimony of the prosecutrix and the complainant were noted by the Special Court, but they were not found to be fatal, to state their trustworthiness as nothing so glaring was brought on record to shake the credibility of the said witnesses. The applicant who was arrested immediately after the incident was found to be wearing green T-shirt. The attempt on

behalf of the counsel for the applicant to confuse the witness on the issue as to whether it was a green T-shirt or a green shirt has also not been found to be sufficient enough to doubt the prosecution case and on recording that on the conclusive facts established by the prosecution, which remain unshaken during the cross-examination, the accused nos.1 and 2 were found to be guilty.

8 It is the accused no.1, who is found guilty of having committed the rape and therefore, he has been sentenced under Section 376(2)(i) of the IPC to undergo RI for 20 years and to pay fine of Rs.20,000/-. He has also been found guilty of aggravated sexual assault as defined in Section 9 of the Act and sentenced to suffer RI for a period of seven years. The finding of guilt recorded by the Special Court is based on the evidence placed before the Court and in the elaborate judgment, the minor discrepancies were held to be not sufficient to doubt the prosecution case. With the finding recorded in the impugned judgment, recording the conviction of the applicant, the presumption of innocence, the attribute of criminal jurisprudence is no longer available to the applicant.

The attempt to rely upon the order passed by this Court in case of the accused no.2 in Criminal Interim Application No. 132 of 2021 in the same Appeal, in my considered opinion, is of no benefit to the present applicant as the role assigned to

accused no.2 is only of keeping watch on the movements to facilitate to commit an unpleasant act. Recording the *prima facie* view that the material on record do not suggest that the accused no.2 facilitated the commission of the offence as alleged, the said co-accused who was charged under Section 17 read with Section 10 of the POCSO Act was released on bail. On the material on record against the present applicant, he cannot drive any benefit of the said order.

9 In light of the aforesaid fact and circumstances, with a conviction based on the prosecution having established its case, the Application is dismissed.

10 At this stage, the learned Advocate Mrs.Anjali Patil make a request for early hearing of the Appeal, which I feel I must decline since the Appeal has been preferred in the year 2020 and on account of the pendency of the Appeals of the previous years, the Appeal will have to wait its turn.

SMT. BHARATI DANGRE, J