

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 56 OF 2020
IN
CRIMINAL APPEAL NO.990 OF 2019**

Deelip Tatoba Raje

...Applicant/
Appellant

Versus

State of Maharashtra & Anr.

...Respondents

....

Mr. Kedar J. Patil, Advocate for the Applicant/Appellant.

Mr. Arfan Sait, APP for the Respondent – State.

Mr. Arfan Sait, Advocate for Respondent No.2.

**CORAM : PRAKASH D. NAIK, J.
DATE : 31st JANUARY, 2022.**

PER COURT:

1. This is an application for suspension of sentence and grant of bail pending Criminal Appeal No.990 of 2019.

2. The applicant is convicted for offence under Section 376(2)(f) of Indian Penal Code (for short “IPC”) and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.25,000/-. The applicant is also convicted for the offence under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’) and sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.15,000/-. He

is also convicted for offences under Sections 8 & 12 of POCSO Act and sentenced to suffer rigorous imprisonment for three years and one and half year respectively.

3. The appeal preferred by the applicant has been admitted and pending for final disposal.

4. The First Information Report (for short “FIR”) was lodged by mother of victim on 12th August, 2017. The victim had disclosed that accused is touching her inappropriately. The FIR was lodged under Section 354(A) (1) and Sections 8 & 10 of POCSO Act. In supplementary statement, it is alleged that accused had subjected victim to fingering and oral sex. Thereafter, offences were added under Section 376 of Indian Penal Code and Sections 4 & 12 of the POCSO Act.

5. Learned Advocate for the applicant submitted that the applicant is in custody for a period of about 4 years and 5 months. The appeal may not come up for hearing immediately. There are discrepancies in the evidence adduced by the prosecution. The victim and the other witnesses have not supported the prosecution case. The medical officer was not examined. The trial Court has relied upon the order refusing bail passed by the Court during the

pendency of the trial and the statement of the victim recorded under Section 164 of Cr.P.C. It is submitted that the victim was declared hostile and she was cross examined which was of no assistance of the prosecution. The contents of the statement recorded under Section 164 of Cr.P.C. were denied by the victim. Reliance is placed on the decisions of the Supreme Court in the case of Ram Kishan Singh V/s. Harmit Kaur and Anr. (1972) 3 SCC 280 and Baij Nath Sah V/s. State of Bihar (2010) 6 SCC 736. Both the decisions relates to the relevance of statement recorded under Section 164 of Cr.P.C. In the case of Ram Kishan Singh (supra) it was observed by the Apex Court that the statement under Section 164 of Cr.P.C. is not substantive evidence. It can be used to corroborate the statement of the witness. It can used to contradict the evidence. In the case of Baij Nath Sah (supra) has observed that mere statement of prosecutrix under Section 164 of Cr.P.C. is not enough to convict the accused.

6. Learned APP submitted that the victim was minor at the time of incident. Statement of the victim recorded under Section 164 of Cr.P.C. was admitted in evidence. The victim has not denied her signature. The medical evidence supports the prosecution case. The statement of the victim

under Section 164 of Cr.P.C. can be relied upon. The Magistrate, who had recorded the statement was examined by the prosecution. The medical report determines that there was sexual assault. He relied upon the decision of this Court in the case of Imran Shamim Khan V/s. State of Maharashtra 2019 ALL MR (Cri) 1375 and submitted that the statement of the victim recorded under Section 164 of Cr.P.C. was taken into consideration by this Court while convicting the accused. In that decisions this Court had relied upon the decision in the case of Ashok Kumar Rout V/s. State of Bihar (2006) Cri.L.J. 3362 decided by Patna High Court.

7. Learned appointed Advocate representing respondent No.2 submitted that, merely on the basis of the evidence of the victim it can be said that the accused was not involved in the crime. Although the victim was declared hostile and she was cross examined by the prosecution, there are certain circumstances spelt out in her evidence which supports the case of the prosecution. The victim has not supported the prosecution, may be on account of the standing of the accused in the area. The medical evidence supports the prosecution case. The age of the victim was proved through proforma of medical examination as well as through

school bonafide certificate. The statement of the victim was recorded under Section 164 of Cr.P.C. in which she had referred to sexual assault by accused. The victim has stated that, she does not remember the incident. It would not mean that she was not subjected to sexual assault.

8. It is noted that the applicant is in custody for a period of about 4 years and 5 months. The victim and the other witnesses, who were relatives of the victim has not supported the prosecution case. The victim in her evidence has categorically denied that the accused had committed alleged act. The medical officer was not examined. The judgment of the trial Court indicate that the reliance was placed on the order refusing bail during the pendency of trial passed by this Court. It is also apparent that the trial Court had relied upon the statement of the victim recorded under Section 164 of Cr.P.C. The victim had denied the contents of the said statement.

9. The appeal is pending. This is not the stage to give any findings on evidence recorded by the trial Court. However, prima facie it can be seen that the victim and other relatives have not supported the prosecution case. The accused is in custody for substantial period of time and hence,

the sentence of imprisonment can be suspended.

10. Hence, I pass the following order:

ORDER

- i. Interim Application No. 56 of 2020 is allowed;
- ii. During the pendency of Criminal Appeal No.990 of 2022, the sentence of imprisonment imposed by learned Special Judge (POCSO), Gadhinglaj, dated 20th June, 2019 in Special Case (POCSO) No. 12 of 2017 is suspended and the applicant is directed to be released on bail on executing P.R. Bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- iii. The applicant shall attend the trial Court once in six months on first Saturday of the month till the disposal of appeal;
- iv. The applicant is permitted to furnish cash bail security in the sum of Rs.25,000/- for a period of eight weeks in lieu of surety.
- v. In the event of two consecutive default in attending the trial Court, the said fact may be brought to the notice of this Court and the prosecution will be at liberty to prefer application for cancellation of bail.
- vi. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)