

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 1033 OF 2019
IN
CRIMINAL APPEAL NO. 1109 OF 2019

Gundu @Prasad Harishchandra ...Applicant/Appellant
A. Toraskar

Versus

State Of Maharashtra And Anr. ...Respondents

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Mr. A. S. Khandeparkar a/w. Mr. Rohit P. Mahadik, Mr. Rajdeep D. Gude, Mr. Rushikesh Bhagat, Mr. P. A. Sharma, Ms. Apporva Khandeparkar and Mr. Saurabh Mittal i/b. M/s. Khandeparkar & Associates for the Applicant/Appellant.

Ms. Meghna Gowalani for Respondent no. 2

Mr. Arfan Sait, APP for the State.

CORAM : PRAKASH D. NAIK, J.
DATE : 7th APRIL, 2022

PER COURT:

1. This is an application for suspension of sentence and bail during the pendency of the appeal challenging the judgments of conviction.

2. The case of the prosecution is that on 1st April, 2014 the victim had visited the shop of the accused to buy certain articles. The accused pulled her inside the shop and subjected her to anal sexual intercourse. The victim informed the incident to first informant. The First Information Report was registered on 5th April, 2018 under section 376(2)(i), 377, 354-B and 506 of the Indian Penal Code, 1860 and Section 4 and 8 of the Protection of Children from Sexual Offences Act, 2012. The applicant was arrested on 5th April, 2018.

3. By Judgment and Order dated 21st June, 2019 the applicant is convicted for offences under Section 376(2) (i), 377, Section 354-B and 506 of IPC and Section 4 and 8 of the POSCO Act. The applicant has been sentenced to suffer imprisonment of 12 years and 10 years for the offences under Section 376 and 377 of IPC. No separate sentence was imposed for the other conviction.

4. Learned Advocate for the applicant has submitted that the case of the prosecution suffers from serious doubts. There is no cogent evidence to convict the applicant. There is a delay of four days in lodging the FIR.

Medical evidence does not support the prosecution case. There is serious infirmities in the evidence in the nature of omission and contradictions. There is a discrepancy in the evidence of spot panchnama. According to the victim the clothes on her person at the time of incident were thrown in the courtyard. However according to the first informant the clothes were seized during the course of investigation. The case of the victim and prosecution proceeds on the basis that victim was subjected to anal intercourse, however the medical officer has opined that there were no injuries to the private part of the victim. The Trial Court has convicted the applicant for the offences under Section 376 of the IPC as well as Section 377 of the IPC. The applicant is in custody for a period of four years.

5. Learned APP and learned Advocate for respondent no. 2 submitted that the prosecution has proved the charges on the basis of evidence. The victim was a child aged around 9 years. She was cross examined by the defence. However her evidence is consistent to the extent that she was sexually assaulted by accused. The injuries were noticed on the private parts of the victim. The omissions do not affect prosecution case. The clothes

of the victim were recovered. Delay is not fatal to the prosecution case. The victim was child and the first informant is under dilemma as to what steps were required to be taken. There is sufficient evidence on record to establish the charges against the accused. The offence is serious in nature. There is independent evidence to support the prosecution case. The evidence of the first informant is very clear. Minor infirmities does not affect the case of the prosecution. The victim had immediately narrated the incident to her mother. Presumption under Section 29 has to be invoked. It is proved that the victim was minor at the time of incident. There is no serious dispute about the age of the victim. The accused has admitted the incident before witnesses.

6. The alleged incident had occurred on 1st April, 2018. The FIR is lodged on 5th April, 2018. The case of the prosecution is that the victim had visited the shop of the accused and at that time she was subjected to anal sexual assault by the accused. The victim [PW-1] has stated that she was subjected to sexual assault in the shop. She also stated that her clothes on her person at the time of the incident were thrown by her mother in the courtyard.

She also stated that blood was passing through stool for two months. She was not taken to the doctor immediately after the incident. The doctor at Vengurla hospital refused to examine her. The doctor was not available at Sawantwadi hospital. She was examined at Shiroda by the doctor from Vengurla. After examination she returned home. The exact date of incident had not been mentioned by the victim. It is also disclosed by her that her real parents are different and while recording statement she did not know who her real parents.

7. Victim further stated that, Dr. Meghna Musale was present at the time when the statement was recorded by the police. She did not examine her. Her mother had informed Dr. Musale that there is bleeding and requested her to examine her. However the doctor informed that there is nothing to worry and that nothing would happen, it would cure. Dr. Musale did not examine her. She only looked towards her.

8. The evidence of the first informant and Dr. Musale is contrary to the deposition of the victim. PW-1 thereafter

stated that Dr. Musale found that there was swelling to her private parts. When Doctor at Shiroda had examined her he did not ask whether she is having pain. She did not disclose it to the doctor that she is suffering from pain. She was not taken to any doctor for medical examination on 6th April, 2018.

9. There are several omissions in her evidence. Her version that the accused came out from the shop and that when she came on the road she met Komal didi's husband and he tried to speak to her is not appearing in her statement. Her mother appraised all the information to her relatives and that all of them went to the shop of the accused is also not appearing in the statement. Her uncle called Abu Kaka [Shekar Tulaskar] and thereafter they went to the shop of the accused and that accused was present at the shop is not reflected in her statement. The fact that Abu Kaka made inquiries with the accused and that the accused had admitted the act and he was assaulted by Abu Kaka is also not appearing in her statement. The victim went to the toilet along with her mother and it was noticed that there was blood in the

stool and she told about it to her mother is also not reflected in her statement. The clothes of the victim were thrown in the courtyard. Her mother was telling her that they should lodge complaint and she insisted not to go to the police, blood was dripping at the time of passing stool for one or two months after the incident. They did not go to the doctor after the incident immediately and her mother felt that it may be due to any other reason, therefore they did not go to the doctor. All these facts are not mentioned in her statement before police.

10. PW-2 is the first informant. She was referred by victim as her mother. She has disclosed that she is not real mother of the victim. Name of the parent of victim were Vilas Avchari and Viday Avchari. The victim is staying with her for several years. The victim had disclosed that on 1st April, 2018 she was subjected to anal intercourse by the accused. Thereafter they went to the shop of the accused. Her brother Suryakant called Shekhar Tulaskar. The accused admitted the incident. Shekhar Tulaskar slapped him and they returned to their house since the victim was scared. They did not approach

police. In the past Dr. Meghana Musale was having her clinic in her house. She was called by her. Dr. Musale examined victim examined the victim. She advised them to go to the police. Applicant was advised to approach police.

11. On 5th April, 2018 they approached the police and complaint was lodged. The explanation for lodging complaint to the police belatedly suffers from doubt. It is stated that immediately after the incident Dr. Musale had visited the house of the victim and informant was advised them to go to the police. The evidence of PW-2 also suffers from several contradictions. Although her evidence discloses that the victim is daughter of Vilas Avchari she was enrolled in school by mentioning name of brother of complainant as her father. She has admitted that she did not see any blood or injury in the anal section. She tried to contact the parents of the victim girl. There are several omission in her evidence. She did not inform the police that Vilas Avchari was doing labour work with Shekhar Tulaskar and that he owed some money to him, and there was quarrel between Vilas Avchari and Shekhar Tulaskar. Parents of the victim left her with the

complainant and they also left the village. She also did not mention that complaint was made to Child Committee and before the Child Committee she had agreed to handover the victim girl to the parents of the victim. The fact that she was thinking of filing complaint to the police and since she was tensed she did not lodge the complaint immediately is not appearing in her statement. She also did not disclose to police that she called Dr Musale and that her clinic was in her house in the past. The fact that she informed the incident to Dr. Musale and told her to examine the victim, and due to illness of her children she did not visit her house is not in her statement. She did not state to the police that blood was noticed while the victim was passing stool, till the FIR was lodged.

12. PW-3 Panch Witness for recovery of victims clothes. He has stated that he was called by the relative of the victim. PW-5 is investigating officer. He stated that he did not record statement of Dr. Musale because she was frightened. Dr Musale was informed that her statement is important. Dhe was not ready to make a statement. She admitted that there is no reference of windows in the

panchnama of place of incident. The omission appearing through evidence of the other witness are proved through her.

13. PW-9 Dr. Meghana Musale has stated that the private part of the victim was reddish. She admitted that she refused to give statement to the police. She admitted that she just observed the victim. She did not touch her.

14. PW-10 Medical Officer who examined the victim. He stated that he examined the victim and found redness and swelling over the vaginal part. He found no injury over the anal part. Considering the examination he opined that sexual intercourse or assault cannot be ruled out. He kept his final opinion pending till receipt of FSL Report. From the evidence of this witness it is apparent that his opinion and observation run counter to the version of victim as well as first informant. The case of the prosecution is that victim was subjected to anal sexual intercourse. Penetrative sexual assault is doubtful. There are several discrepancies in the evidence. The applicant is in custody for four years. Considering the aforesaid aspects the sentence can be suspended.

ORDER

- i.** Interim Application No. 1033 of 2019 is allowed;
- ii.** During the pendency of Criminal Appeal No.1109 of 2019, the sentence of imprisonment imposed vide Judgment and order dated 21st June, 2019 passed by Designated Judge, Protection of Children from Sexual Offences Act, 2012, Sindhudurg in Special Case No. 21 of 2018 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 is permitted to furnish cash bail in the sum of Rs.25,000/- for a period of eight weeks in lieu of surety.
- iv.** The applicant shall attend the trial Court once in six months on first Saturday of the month till the final disposal of the appeal;
- v.** In the event, there are two consecutive defaults in attending the trial Court, the said fact may be brought to the notice of this Court and in such

eventuality, the prosecution will be at liberty to prefer an application for cancellation of bail.

vi. The applicant shall not approach the victim and/or not cause any harassment to the victim and her family members.

vii. The observations made in this order are prima facie for consideration application for suspension of sentence.

viii. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)