

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 455 OF 2021
IN
CRIMINAL APPEAL NO. 99 OF 2021

Raju @ Dashi Imansing Tamang ... Applicant/appellant

V/s.

The State of Maharashtra and Anr. ... Respondents

Mr. Sachin Deokar for the applicant/appellant.

Mr. Arfan Sait-APP for the respondent-State.

Ms. Sayali Dhuru, advocate (appointed) for respondent no.3

Mr. Yuvraj Dhole advocate (appointed) for respondent no. 2.

CORAM : PRAKASH D. NAIK, J.

DATED : MARCH 15, 2022.

P.C. :

This is an application for suspension of sentence and grant of bail pending Criminal Appeal No. 99 of 2021.

2. The applicant has been convicted vide judgment and order dated 8th December 2020 passed by the Special Judge (POCSO), Pune for offence under section 4 and 6 of Protection of Children from Sexual offences Act, 2012 and section 376 of Indian Penal Code. He has been sentenced to suffer rigorous imprisonment for ten years. The applicant is acquitted for the offence punishable under section 10 of POCSO Act.

3. The case of the prosecution is that the complainant received information that the victim has been sexually abused. The complainant is a social worker, she visited spot of incident. Hence, the First Information Report was registered. The applicant was arrested. On completing investigation charge-sheet was filed.

4. Learned advocate for the applicant submit as follows:-

- i. The applicant is in custody for 3 years and 8 months.
- ii. The applicant has been falsely implicated in this case.
- iii. The identity of the applicant as the person who has sexually assaulted the victim is not proved.
- iv. The Test Identification parade was not conducted.
- v. The accused was not identified in the Court.
- vi. The victim has also disclosed that she was also sexually assaulted by one Prachi.
- vii. The victim has not disclosed about the act of fingering by the accused in her statement.
- viii. The lady from whom the information was received, namely Alka Gunjal is not examined by the prosecution.

- ix. The evidence of PW.1 is in the nature of hearsay.
- x. The mother of the victim was not examined by the prosecution.
- xi. The F.I.R. was registered by PW.1 in the absence of victim, mother of victim and Alka Gunjal for whom the information was received.
- xii. The medical evidence does not support the case of prosecution.
- xiii. In the statement recorded under section 164 of Cr.PC., the victim has stated that she was sexually assaulted by one Sathe.

5. Learned APP submit that there is substantial evidence against the applicant. On the basis of evidence, the trial Court has convicted the applicant. The victim was minor, aged about 13 years. Medical evidence supports the prosecution case. The complainant had received the information that the person who was employed as 'cook' on the 3rd floor of the building had subjected the victim to sexual assault. The name of the accused has been disclosed in the statement of witnesses.

6. Learned advocate for respondent nos. 2 and 3 supported the submission of learned APP. It is submitted that there is no reason to

disbelieve the version of the victim. There is sufficient evidence to establish that the accused had subjected the victim to sexual assault. The victim was minor. The evidence adduced by the prosecution establishes the fact that the applicant was involved in the offences.

7. The first information report was lodged by PW.1. She is a social worker. She is working for Foundation for Child Protection. According to her, information was received about sexual assault on a child at Budhwar Peth. The complainant and others went to the spot. They met Alka Gunjal. She informed them about sexual assault. Enquiry was made with the victim and it was stated by her that uncle working as cook on 3rd floor has sexually assaulted her. The victim had also stated that such incident had happened twice in the past. She enquired with Alka Gunjal and other people about accused. They disclosed that his name is Raju @ Dashi Tamang. F.I.R. was lodged. Mother of victim was doing prostitution. Alka Gunjal had told her that the victim is suffering from HIV. Victim had disclosed that Prachi didi had touched her inappropriately. Victim did not disclosed that uncle had inserted finger in her private part. The evidence of PW.1 is in the nature of hearsay. Alka Gunjal from whom information was received about sexual assault on victim and who had disclosed the name of accused has not been examined.

8. Dr. Sheetal Agarwal (PW.3) has conducted medical examination of the victim. She has stated that the history was given about attempted fingering and that uncle working as cook on the 3rd floor had sexually assaulted her. Uncle who cooks food outraged her

modesty. He put his finger at her genitalia. Victim did not give history of touching uncles genitalia to her private part. In her opinion clinical examination is consistent with history of attempt of fingering.

9. The victim – (PW.4) has stated that she was residing at Budhwar Peth for last five days. One uncle had fingered her. She also stated that one Prachi had also sexually assaulted her. Thus the identity of the person who has subjected the victim to sexual assault is not disclosed by the victim. No test identification parade was conducted . There is no identification of accused by victim in the Court. In the statement under section 164 Cr.P.C. the name of person who had subjected victim to sexual assault is given as Sathe uncle.

10. PW.5 Dr. Sayali Agashe has stated that victim was referred to her for examination. She conducted IQ test of victim. Patient had mild IQ disability. In medical papers no where mentioned pertaining to normal IQ score. PW. 6 is working as Coordinator of Child Committee. Information was received from Alka. They met victim she disclosed sexual assault. Her statement under section 184 (5) of Cr.P.C. was recorded. She stated that she had told Deepali madam that Sathe uncle who cooks has fingered victims private part. The accused touched her inappropriately.

11. Thus the identity of the accused is doubtful. The applicant is in custody for a period of 3 years and 8 months. There are serious discrepancies in evidence.

12. Considering the aforesaid circumstances, the sentence of imprisonment can be suspended.

13. Hence, the following order :-

ORDER

(i) Interim Application is allowed and disposed of;

(ii) The sentence of imprisonment imposed vide judgment and order dated 8th December 2020 passed by learned Special Judge (POCSO) Pune in Special (POCSO) Case No. 338 of 2018 is suspended and applicant is directed to be released on bail on executing PR bond in the sum of Rs.20,000/- with one or more sureties in the like amount;

(iii) The applicant is permitted to furnish cash bail in the sum of Rs.20,000/- for a period of eight weeks in lieu of sureties;

(iv) The applicant shall attend Trial Court once in six months on First Saturday of the month till disposal of the Criminal Appeal;

(v) In the event there are two consecutive defaults in attending the Trial Court, the Trial Court shall submit

report to this Court;

(vi) In the event of default committed by the applicant in attending the Trial Court, the prosecution will be at liberty to prefer application for cancellation of bail.

(PRAKASH D. NAIK, J)