

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

**INTERIM APPLICATION NO. 1125 OF 2020
IN
CRIMINAL APPEAL NO. 367 OF 2020**

Ishwar Kallappa Naik ...Applicant/Appellant
Versus
The State of Maharashtra And Anr. ...Respondents

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Mr. Prashant P. Raul a/w Mr. Kunal V. Patil, Advocate for the Appellant.
Mr. Kartik Garg, Advocate for Respondent No.2.
Mr. Arfan Sait, APP for the Respondent – State.

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

PER COURT:

1. This is an application for suspension of sentence and grant of bail pending criminal appeal No.367 of 2020.
2. The applicant was charged for offence under Section 376(2)(f)(i) of Indian Penal Code (for short “IPC”) and Sections 6 & 10 of Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’). Vide judgment and order dated 31st January, 2020, the applicant has been convicted for offences punishable under Section 376(2)(f)(i) of IPC and Sections 6 & 10 of POCSO Act. He has been sentenced to suffer imprisonment for 10 years and to pay fine of Rs. 5,000/-.

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3. The case of the prosecution is that the victim was aged around 10 years. The First Information Report (for short 'FIR') was lodged by the mother of victim. She is working in the agricultural field. The sister-in-law of the informant is working in adjacent field. The applicant/accused is the son of sister-in-law of the complainant. The victim confided with her mother that the accused had touched her private part. Fifteen days ago, the accused tried to insert his private part in the private part of victim. The FIR was registered on 2nd November, 2016. Pursuant to registration of FIR, the applicant was arrested. He was aged around 19 years at the time of incident. Statements of victim and other witnesses were recorded. Medical examination was conducted. On completing investigation, charge-sheet was filed.

4. Learned Advocate for the applicant has submitted as follows:

- i.** The applicant was juvenile. Although there is sufficient evidence to prove that the applicant was juvenile in conflict with law, the trial Court has not considered the said fact. He has been falsely implicated in this case, on account of rivalry between the families.
- ii.** The applicant is in custody for two years. The appeal may not come up for hearing immediately.

- iii.** The applicant was on bail during the trial. He has not misused the facility of bail.
 - iv.** The age of victim was not proved. The accused was asked any question seeking explanation under Section 313 of Cr.P.C. in respect to the school leaving certificate of victim.
 - v.** There is delay in lodging FIR. The medical evidence does not support the prosecution case.
 - vi.** The prosecution has not proved that there was penetrative sexual assault.
 - vii.** The evidence of witnesses is contrary to each other. The versions of witnesses are doubtful.
 - viii.** There is no corroborative evidence to support the prosecution case. Thus, the report does not support the prosecution case.
 - ix.** The victim as well as informant is not given the date of incident.
- 5.** Learned APP submitted that specific overt act has been attributed to the applicant. The victim was minor aged around 10 years at the time of incident. There is no reason to disbelieve her version at this stage. Even slight penetration is sufficient to attract

Section 376 and Section 6 of POCSO Act. The presumption under Section 29 of the POCSO Act is in favour of the prosecution. At this stage the minor contradictions or infirmities need not be looked into. The evidence on record is sufficient to prove that there was penetrative sexual assault by the accused. The contention of the applicant that he was juvenile has been rejected by the trial Court. The prosecution has proved that the victim was minor at the time of incident. There cannot be dispute that victim is minor considering her age. The medical report and depositions of witnesses are sufficient to draw conclusion that the victim was subjected to penetrative sexual assault.

6. Learned APP placed for consideration following decisions:

- i.** Aman Kumar & Anr V/s. State of Haryana¹
- ii.** Radhakrishna Nagesh V/s. State of Maharashtra²
- iii.** Nirmal Kumar @ kaka V/s. State of Haryana³
- iv.** Babul Khan Wai V/s. State of Maharashtra⁴

7. Learned Advocate for respondent No.2 supported the submissions of learned APP. He submitted that the victim was minor and she has been subjected to penetrative sexual assault. The

¹ (2004) 4 SCC 379.

² (2013)11 SCC 688

³ (2002) SCC online P & H 227

⁴ (2021) ALL M.R (Cri.) 1140

accused was aged around 19 years at the time of incident. There is sufficient evidence to prove that the accused had subjected the victim to sexual assault. The victim was less than 12 years of age. Although the applicant was on bail during the trial, now he has been convicted. Reliance is placed on the decision of the High Court of Meghalaya at Shilong decided on 14th March, 2022, in the case of Cheerfulson Snaitang V/s. State of Meghalaya.

8. It is not disputed that the accused/appellant was on bail during the trial. There is no adverse report about the misuse of facility of bail. The victim has stated that, fifteen days ago the accused had tried to commit the act by inserting his private part in the private part of victim. The FIR was registered by the mother of victim (PW-3) on 2nd November, 2016. The accused is related to the victim. Both families are residing in the field adjacent to each other. The accused is son of sister-in-law of the first informant. The evidence of PW-3 mentions that the incident had occurred 15 days prior to the FIR. The tenor of evidence indicates that there was no penetration. In the FIR she had stated that the incident had occurred in the house. Whereas in the substantive evidence it is stated that the victim had informed her that the accused dragged her into the cattle shed and subjected her to sexual assault. PW-2 is

the victim. The date of incident is not reflected in her evidence. The evidence of PW-3 does not mention the date of incident. The victim has stated that the accused slept over her. She did not specifically stated that there was penetration. Learned APP submitted that, considering the age of the victim, there is reason to believe that victim was subjected to penetrative sexual assault. It is also submitted that the victim had referred to presence of sticky substance on her body which would be semen of accused. PW-10 is the Medical Officer, who had examined the victim. He has stated that the victim was brought to the hospital on 2nd November, 2016. History was given by the mother of victim that there were two attempts of rape by the accused. The attempt of rape had occurred 15 days ago. The injury on the private part can be healed. He admitted that the finding of the report is not consistent with sexual assault. He did not find any external injury on the person of the victim. In case of sexual intercourse there should be damage in the inner part of the vagina. He did not find any old tear on the private part hymen. PW-8 is assistant Police Inspector. He stated that the age of accused was given by complainant as 17 Years.

9. In the case of Aman Kumar & Anr. V/s. State of Haryana (supra) it was observed that, penetration is sine qua non

for an offence of rape. In the case of Radhakrishna Nagesh V/s. State of Maharashtra (Supra) the apex Court has analyzed the evidence of Medical Officer to determine the age of the victim and in the facts of the case observed that the Medical Officer had stated that, considering the age of victim and seeing that the parts were tender to touch, the witness could show that there was attempt to rape the victim girl. The factual aspects of the said case also indicate that there was evidence to corroborate the prosecution case. In the present case the Medical Officer (PW-10) has stated that medical examination is not in conformity with the prosecution case. In the case of Nirmal Kumar @ kaka V/s. State of Haryana (Supra) the victim was minor. On examination, Medical Officer had noted congestion and inflammation of labia majora and labia minora, redness of inner side of labia minor and vaginal mucosa. However, the hymen was intact. Punjab and Haryana High Court turned down the submissions of accused that there was no penetrative sexual assault. As stated above, the examination of Medical Officer indicates that there were signs of sexual assault. In the present case the Medical Officer had not noticed any injuries on the person of the victim or even on the private part. In the decision delivered by this Court in the case of Babul Khan Wali V/s. State of Maharashtra (supra) the court on the basis of

evidence had inferred that the offence under Section 375 of IPC was made out. In the decision of the High Court of Meghalaya relied upon by learned counsel for the respondent No.2, observed that the hymen of victim was found ruptured.

10. The question is whether the suspension of sentence of imprisonment imposed against the applicant could be suspended. It is noted that the applicant was on bail during the trial. In the light of the factual aspects and infirmities in evidence as referred herein above, case for suspension of sentence and grant of bail is made out.

11. Hence, I pass the following order:

ORDER

- i. Interim Application No. 1125 of 2020 is allowed;
- ii. During the pendency of Criminal Appeal No.367 of 2020, the sentence of imprisonment imposed vide Judgment and order dated 31st January, 2020 passed by learned Designated Court under POCSO Act, Kolhapur in Special POCSO Case No.12 of 2017 is suspended and the 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 ten 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. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)