

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1455 OF 2019
IN
CRIMINAL APPEAL NO.934 OF 2021

Manoj Ramlal Roy
versus
The State of Maharashtra

Applicant

Respondent

Ms.Keral Mehta, Advocate for applicant-appellant.
Mr.Manas Gavankar, Advocate for respondent no.2.
Mr.S.V.Gavand, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 22nd March 2022

PC :

1. This is an application for suspension of sentence and grant of bail pending Criminal Appeal No.934 of 2021. The applicant has been convicted vide judgment and order dated 20th December 2018 passed by Special Judge under POCSO Act for Greater Bombay in POCSO Special Case No.478 of 2016. The applicant has been convicted for the offence under Section 376(2)(i) of Indian Penal Code and Section 6 of Protection of Children from Sexual Offences Act, 2012. He has been sentenced to suffer imprisonment of 15 years on each count. Both the sentences were directed to run concurrently.

2. The case of prosecution is that complainant and accused are neighbours. The accused is minor girl. The incident had occurred on 19th September 2016. The accused had allegedly applied vegetable oil on the private part of the victim and fingered her private part.

The FIR was registered. Statements of witnesses were recorded. Statement of victim was recorded u/s.164 of Cr.PC. Charge sheet was filed.

3. Learned advocate for applicant submitted that applicant is in custody for five years and four months. There is no cogent evidence to establish that accused has committed aggravated penetrative sexual assault. Evidence of witnesses at the most would indicate sexual assault. The aggravated sexual assault is punishable under Section 10 of POCSO Act and maximum punishment prescribed is up to 7 years. It is submitted that evidence of father of victim (PW-1) does not refer to the act of fingering private part of victim. The evidence of victim also does not refer to such act. The evidence of mother of victim (PW-3) has referred to the alleged act of inserting finger. Her version is after thought. Medical evidence does not indicate that there was penetrative sexual assault. The applicant was produced for medical examination after he was arrested. History provided by applicant is not admissible in evidence. The applicant has already undergone substantive sentence of imprisonment.

4. Learned APP submitted that medical evidence and evidence of other witnesses indicate that accused had subjected the victim to penetrative sexual assault. The chemical analyzer report proves that oil was found on the clothes of victim as well as accused.

5. Learned advocate for respondent no.2 submitted that victim was small child. She has narrated the incident to her mother. Evidence of mother refers to penetrative sexual assault.

6. On the basis of evidence adduced, the question which arises for consideration is whether there is aggravated penetrative sexual assault. The appeal is pending for final disposal. Evidence of PW-1, the father of victim refers to the fact that victim had informed her mother that uncle residing as neighbour applied oil on her private part. He disclosed the incident to neighbours and thereafter victim was taken to hospital. There is no reference of penetration by finger. The victim (PW-2) has stated that accused had applied oil to her private part. Evidence of mother (PW-3) stated that victim had disclosed to her and husband that accused had inserted finger in private part. The evidence of victim and father is contrary to the evidence of mother. The doctor's evidence (PW-8) indicate that accused had given history of fingering. The defence has urged that accused was examined by said medical officer while he was in custody of Police and such history is hit by Section 26 of Evidence Act. It is not admissible evidence. Evidence of PW-11 (medical officer) who examined the victim mentions that mother of victim gave history.. After examination no abnormality was detected. Provisional opinion was given that possibility of sexual violence cannot be ruled out. There is no opinion that there was penetrative sexual assault. Statement of victim recorded u/s.164 of Cr.PC also does not refer to any penetrative sexual assault. The applicant is in custody for more than five years.

7. Considering the aforesaid circumstances, sentence of imprisonment can be suspended. Hence, I pass following order :

ORDER

- (i) Interim Application is allowed and disposed of;
- (ii) The sentence of imprisonment imposed by judgment and order

dated 20th December 2018 passed by Special Judge under POCSO Act for Greater Bombay in POCSO Special Case No.478 of 2016 is suspended and applicant is directed to be released 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 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;

(vii) The applicant shall provide his residential address to the Investigating Officer;

(viii) The applicant shall not enter the vicinity of residence of victim.

(PRAKASH D. NAIK, J.)

MST