

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1284 OF 2023
IN APEAL/260/2023 WITH APEAL/260/2023

JAMIL AMIR SHAIKH
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. Satej S. Jadhav
APP for Respondent No.1/State : Mr. S. B. Narwade
Advocate for Respondent No.2/victim : Mr. U. L. Telgaonkar
...

CORAM : S. G. MEHARE, J.

DATE : 25-07-2023

PER COURT :-

1. Heard the learned counsel for the applicant, the learned A.P.P. for respondent No.1/State and the learned counsel for respondent No.2.
2. The applicant is seeking suspension of sentence imposed upon him, in Special (POCSO) Case No.46 of 2021, by the learned Special Judge, Vaijapur, District Aurangabad, on 15.03.2023, to suffer rigorous imprisonment of twenty years for the offence punishable under Section 376 of the Indian Penal Code and Section 4(2) of the Protection of Children from Sexual Offences Act, 2012 and one year for the offence punishable under Section 506(2) of the Indian Penal Code.

3. The learned counsel for the applicant submits that the fine amount has been deposited. The receipt has been taken on record and marked as Annexure- 'A'.

4. The learned counsel for the applicant would submit that the prosecution did not produce the CCTV footage though recovered from the house of the accused. It was withheld for no reason. Hence, the learned trial Court should have drawn adverse inference against the prosecution. The learned Special Court did not assign the reason for withholding such material evidence. He barely observed that the CCTV footage was seized and proven. Barely proving recovery of the material is not sufficient. Such evidence should be on record that may assist the Court in arriving at the proper conclusion, and the accused may also put his better defence.

5. The learned counsel for the applicant would also submit that there is no evidence that any witness saw the victim coming out of the house. On the contrary, she was found standing on the road. The victim was just 13 years old; hence, there is great possibility of tutoring her. He also pointed out that the medical evidence also does not support the prosecution. The medical officer has candidly admitted that the victim had an old hymen tear injury. He would point out that the accused was a fully grown-up male. If really there has been sexual assault for two hours, as the victim narrated

to the Medical Officer, there must be a serious injury to the private part of the victim. The Medical Officer also did not opine that she had sexual intercourse before the alleged incident. He would also point out that the allegations have been levelled against the applicant that the victim was introduced through her sister-in-law, but there is no evidence to believe such allegations. Merely making a phone call would not mean that she was called for sexual assault. Considering the material brought on record, the trial Court has incorrectly inferred that the evidence of the victim inspires confidence. There must be strong circumstantial evidence to believe that the statement of the victim inspires confidence. Only deposing, as narrated to the Police before entering into the witness box, is not sufficient to believe that the statement of the witness inspires confidence. He would also argue that the learned Sessions Judge did not consider the delay in lodging the first information report and, more particularly, the admission of the victim that she had not immediately disclosed the incident. Her evidence reveals that she was forced to say against the accused. It is self-sufficient to raise doubt over the prosecution witnesses. The Investigating Officer has not done the investigation seriously. It was a case of serious offence. Due care ought to have been taken to produce complete evidence before the Court to arrive at the correct conclusion. The CCTV footage was the best evidence. The man may lie, but machines do not. If the applicant has some

relationship with the victim and is admitted for the sake of argument, that may be another offence and certainly not the penetrative assault. The applicant is a young married person running 34 years. Due to incorrect appreciation of the evidence, the applicant has been sentenced to suffer a long conviction of 20 years. On the basis of the above argument, he prayed to suspend the sentence.

6. The learned A.P.P. for the State and the learned counsel for respondent No.2/victim have vehemently opposed the application. They have argued that the victim was the daughter's age of the applicant. It has been proved that the applicant called the victim at odd hours on the telephone, and the accused also did not deny it. The applicant has no specific evidence as to how he has been falsely implicated in the crime, and not a single suggestion has been put to the witnesses on his false implication. On the contrary, his defence reveals that it was a consensual relationship. The victim was around 13 years old and unable to take appropriate decisions. She was just in her menstruation. The applicant took the victim, who could not decide, and did forceful sex. The applicant cannot take advantage of the mistakes committed by the Investigating Officer. Considering the age of the victim, a resistance mark may not be possible. The offence is serious. The evidence has been correctly appreciated. Therefore, the applicant does not deserve suspension of sentence.

7. Perused the impugned judgment and order and the depositions referred to by the learned counsel for the applicant as well as learned A.P.P. and the learned counsel for the victim.

8. It is admitted that the Investigating Officer had collected the CCTV footage from the house of the accused. Its seizure *panchnama* has been proved. Neither the CCTV footage nor its transcription was produced on record. I think it was the best evidence to prove that the applicant took the victim to his house and did sex. Section 114 illustration (g) of the Indian Evidence Act provides that the Court may presume that the evidence which could be and is not produced would, if produced, be unfavourable to the persons who withheld it. It is the settled law of evidence that the best available evidence shall be produced before the Court to prove the facts or points in issue. However, where such evidence is withheld, adverse inference shall be drawn against such person. Besides this, there was no circumstantial evidence to prove the factum of sexual assault. The offence is serious, so there must be strict proof and evidence. The law is well settled that the slightest doubt gives the benefit of the doubt to the accused. Appreciating the evidence cumulatively, the Court is of the view that there are strong points to consider, from the sexual penetrative assault to the presence of the victim in the house of the accused.

9. At the cost of repetition, it would be stated that the CCTV footage recovered from the house of the accused was not produced, which may be a ground to suspend the sentence. The Court is not oblivious to the law that the sole testimony of a raped woman is sufficient to convict the accused, provided it must inspire confidence. However, wherever the circumstances raise doubt, the Court has to search for corroborative evidence. After the hearing, the Court is of the view that there are various legal aspects to be considered. The evidence on record supports the Court to exercise discretion under Section 389 of Cr.P.C. That apart, the appeal may take its time. There is no possibility of hearing the appeal in the near future as numerous appeals of the convicts undergoing sentences are pending. Hence, the order:-

- i) Application is allowed.
- ii) The execution, implementation, effect and operation of the sentence imposed upon the applicant, in Special (POCSO) Case No.46 of 2021, by the learned Special Judge, Vaijapur, District Aurangabad, on 15.03.2023, to suffer rigorous imprisonment of twenty years for the offence punishable under Section 376 of the Indian Penal Code and Section 4(2) of the Protection of Children from Sexual Offences Act, 2012 and one year for the offence punishable under Section 506(2) of the Indian Penal Code, is suspended till conclusion of the trial.

- iii) Applicant Jamil Amir Shaikh be released on bail on furnishing P.B. and S.B. of Rs.50,000/-, with one solvent surety of like amount.
- iv) Bail before the learned Special Judge/Additional Sessions Judge at Vaijapur, District Aurangabad.
- v) List the appeal on 21.08.2023.

**(S. G. MEHARE)
JUDGE**

rrd