

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1422 OF 2023
IN APEAL/313/2023 WITH APEAL/313/2023

Rashid Sardar Baig,
Age 28 years, Occu. Labour,
R/o. Khospuri, Taluka Nagar,
District Ahmednagar

.. Applicant

Versus

1. The State of Maharashtra

2. XYZ (Victim)
Through her Legal Gurdian (Informant)
Mother of the Victim

.. Respondents

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Mr. Shriraj R. Wakale, Advocate for Applicant;
Mr. Y. G. Gujrathi, A.P.P. for Respondent No.1;
Ms. Karishma Sanjay Sarin, Advocate appointed for Respondent
No.2/victim

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CORAM : S. G. MEHARE, J.

DATE : 12-06-2023

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/victim.

2. The applicant is seeking suspension of the sentence to suffer rigorous imprisonment for 20 years imposed upon him by the

learned Additional Sessions Judge, Ahmednagar, in Special Case No.549 of 2020, by judgment and order dated 13.02.2023, for the offences punishable under Sections 376(2)(j), 376(3) of the Indian Penal Code and Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act").

3. The learned counsel for the applicant has vehemently argued that the prosecution has a case of penetration, but there was no evidence with the prosecution. The prosecution alleged that to cause penetration, the applicant has manipulated the body of the child/victim to apply the coconut oil on her private part so as to cause the penetration, but the prosecution did not prove that the body of the applicant and accused and their clothes were stained with oil. The C.A. report also not support such contention. In the absence of corroborative evidence, barely recovery of articles from the house of the applicant is not sufficient to believe that the incident happened. The leading questions were put to the victim about coconut oil bottle. The allegation of finding coconut oil bottle in the house of informant did not prove the charges. A coconut oil bottle is available in the house of most people. The spot panchnama was drawn belatedly i.e. after the alleged incident and arrest of the applicant. The spot panchanama were prepared without notice to his mother who was living with him in the house. Hence, recovery of the so-called articles falls under the shadow of doubt. He harped upon the medical evidence which is

not supporting the prosecution. The vulval redness found on the private part of the victim is possible by itching. The learned Additional Sessions Judge ignored such material aspect. The prosecution did not prove the case beyond reasonable doubt. Therefore, presumption under Section 29 of the POCSO Act would not attract. He is also tried to point out the character of the mother of the victim. This Court does not agree with it as it was an independent case of the sexual assault with a small girl of 8 years. He would submit that in absence of cogent and reliable evidence, the applicant ought not to have been convicted. The prosecution did not have the sufficient material for which the case of applicant has been tried. The prosecution has no case in alternate of attempting to commit the offence of sexual assault with a child. The applicant has a strong case on merit. The evidence needs to be re-appreciated. The statement of the victim cannot be accepted as a gospel truth. She being a minor is amenable to tutoring. The mother has grievance that the applicant did not pay her money when she demanded. Hence she tutored her daughter to lead the evidence against him. The applicant is 28 years unmarried boy. The applicant is well acquainted with the mother of the victim and victim is also known him. Since there are legal aspects involved in the case, the sentence may be suspended.

4. Per contra, the learned A.P.P. for respondent No.1/State and the learned counsel for respondent No.2/victim have argued that there were injuries on the right cheek of the victim and the back of the accused. The first information report was lodged immediately. So, there is no possibility of implicating the applicant falsely in the crime. The defence of the accused is improbable. No mother would put the life of her child at stake merely for non-paying the money by the accused. The evidence of the victim inspires confidence. The redness to the vulva supports the contention of the prosecution. The applicant has manipulated the private part of the child, so as to cause penetration into her private part, but that attempt was failed. However, ingredients of Section 3 of the POCSO Act and Sections 376(2)(j), 375(c) have been proved against the applicant. The victim was 8 years old. She had no reason to lie against the applicant. The learned Additional Sessions Judge has correctly applied presumption under Section 29 of the POCSO Act. They have strongly opposed the application for suspension of the sentence and prayed to dismiss the same.

5. Perused the papers. It is not in dispute that there was redness on vulva of the victim. However, the Doctor opined that it is possible by itching. The statement of the victim as regards the manipulation of her private part is not corroborated by C.A. report. The medical expert who examined the victim did not take pains to form his final opinion by referring the C.A. report. No doubt the

alleged offence against the accused is serious. Hence, the strict proof was required.

6. After having gone through the papers and the impugned judgment and order, the Court is of the view that various points need to be considered on law and facts. The prosecution had no case of manipulating the body of the victim or it was an attempt to commit the sexual assault on the victim. However, the conviction was imposed on manipulating the body of the victim so as to cause the penetration into the private part of the victim. That needs a detail hearing and examination of the evidence.

7. Considering the evidence available on record and little bit discrepancy about the manipulation of the private part of the victim by applying oil, the Court is of the view that discretion under Section 389 of the Code of Criminal Procedure, may be exercised in this case, though the offence is allegedly serious. Hence, the order:-

- i. The execution, implementation and effect of the sentence to suffer rigorous imprisonment of twenty years imposed upon the applicant by the learned Additional Sessions Judge, Ahmednagar, in Special Case No.549 of 2020, by its judgment and order dated 13.02.2023, is suspended till the conclusion of the appeal.

- ii. The applicant be released on bail on executing P.B. and S.B. of Rs.50,000/- with one solvent surety of the like amount, on the conditions that,
 - (a) He shall not contact the victim or her mother till the conclusion of appeal.
 - (b) He shall not involve in the similar crime.
 - (c) He shall not protract the appeal.
- iii. Bail before the learned Additional Sessions Judge, Ahmednagar.
- iv. The Secretary, High Court Legal Services Sub-Committee, Aurangabad, do pay the fee to the learned counsel appointed for respondent No.2/victim as per the schedule.
- v. List the appeal in due course.

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

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