

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3571 OF 2022

IN

CRIMINAL APPEAL NO. 802 OF 2022

PRAVIN POPAT KHARAT

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Appellant : Mr. Shirsat Sanjay Bhaskar

APP for Respondent No.1/State : Smt. D. S. Jape

Advocate for Respondent No.2 : Mr. Kulkarni Govind A. (appointed)

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CORAM : KISHORE C. SANT, J.

DATE : 6th JANUARY 2023.

Per Court :

1. This is an application in the appeal praying for suspension of sentence imposed vide judgment and order dated 13.19.2022 passed by the learned Special Judge under POCSO Act, Ahmednagar in Special Case No. 109/2019. The applicant is convicted for the offences punishable under Section 376(1) of the Indian Penal Code, 1860 and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO for short) and acquitted for the offence punishable under

Sections 376(2) and 506 of the IPC. He is directed to suffer rigorous imprisonment for ten years and to pay fine of Rs.20,000/- in default to suffer R.I. for three months for the offence punishable under Section 376(1) of the IPC. No separate sentence is awarded for the offence punishable under Section 4 in view of provision of Section 42 of the POCSO. The learned Advocate for the appellant has vehemently argued that the spot of the incident and age of prosecutrix is not sufficiently proved by the prosecution. He submits that there is doubt about person, who has given information about birth of the prosecutrix in the office of Gram Panchayat. The person, who has given information and the doctor, who conducted delivery, are not examined and therefore the birth certificate becomes doubtful. He further submitted that on the point no.2, which was in respect of spot where rape was committed, is also not proved as there is no entry in the register of the hotel showing that the prosecutrix and the accused had stayed in the hotel. He submitted that in view of section 9 of the Evidence Act, it was necessary for the prosecution to prove the spot and as on today there is nothing except statement of the prosecutrix and that thus the fact in issue still in question.

2. About the conduct of the informant that is father of prosecutrix, he submits that it is clear that he has not taken the name of appellant in FIR and he has kept silence over the incident. For the first time, the statement of the victim came to be recorded after a long gap of three and half month. He submits that this is the only statement on which the prosecution is moved in the direction against the appellant. The incident allegedly is of 21.11.2018, whereas the first statement of informant is recorded on 29.02.2019. He further submitted that the DNA report was also placed on record. However the Court has clearly observed that the said report cannot be admitted. The entire evidence was completed, when the prosecutrix was unconscious. He pointed out that the statement of API and the part of cross-examination of API i.e. Investigation Officer, there is no statement of any person, who has given details any of the incident. Even about the fact that the victim tried to commit suicide is not proved by the prosecution. In his submission, there is allegation that the prosecutrix had consumed a thimet (insecticide). However no smell of the same was noticed by anyone. The conviction is solely on the statement of the prosecutrix and it is highly unsafe to record a conviction solely on the basis of

statement of prosecutrix.

3. As against this, the learned advocate appointed for the informant submits that the prosecution has proved the age of the victim by producing a birth certificate and leaving certificate on record. There is further corroboration in the evidence about the age of the prosecutrix. It has already come on record that there was a marriage proposal from the side of the accused for the prosecutrix. However the said proposal was specifically rejected as the prosecutrix was minor at the time. It is the specific story of the prosecution that though the marriage proposal was rejected still the accused was following the prosecutrix and was talking to her, under the pretext that he wanted to marry the prosecutrix. He further pointed out that she was so much afraid and under pressure of the accused that she had even tried to commit suicide but she did not disclose about the incident to anyone. He pointed out that the DNA report though is not accepted by the Court on the technical ground as the custody of the semen of the DNA test sample was not proved, clearly proved that the fetus aborted was from the accused. The entire chain of the custody is not proved by the

prosecution, however that cannot be gone into at this stage. At this stage, it is necessary for the accused to show infirmity in the judgment of the trial Court, which is not pointed out by the accused. He submitted that in POCSO cases, the sole testimony of the victim is sufficient to prove the guilt of the accused and at this stage, this Court need not disbelieve the judgment delivered by the trial Court. He submits that the judgment relied upon by the learned Advocate for the appellant that is in the case of Rahul Vs. State of Delhi Ministry of Home Affairs and Anr., is distinguishable on facts as in that case, the accused was not identified and there was no identification parade held. Here in this case, the prosecutrix was very well knowing the accused person and there is no question of mistaken identity.

4. The learned APP also opposed the application stating that it has sufficiently come on record that the prosecutrix was minor on the date of incident. She has also pointed out that the marriage proposal from the accused was denied on the count of minority of the girl. She pointed out that there are specific allegations against the appellant. She further submitted that this is not the stage to outright reject the

theory of the prosecution. She further pointed out that there is already a medical report, which shows that the prosecutrix was pregnant of 20 weeks and that she had conceived in alleged incident.

5. The learned Advocate for the appellant in rebuttal submitted that considering the gap between the lodging of the FIR and the recording of the statement of the prosecutrix, there is every possibility that she was tutored. He again emphatically made a submission that the spot of the incident is not proved.

6. Having considered the submission and the material on record, this Court finds that the learned trial Court has discussed the entire evidence in detail. At this stage there is nothing to show that the findings recorded and the conclusion arrived at by the trial Court is totally perverse or illegal. There is nothing on record to show that as to why the prosecutrix deposed against the accused. It is now well settled that if the testimony of the prosecutrix is reliable the same can form sole basis of conviction. At this stage, this Court finds that it would not be proper to allow the application specially looking to traumatic

condition of the prosecutrix who had even went to the extent of consuming a poison and attempted to commit suicide. This fact shows that she was under tremendous pressure and fear of the accused. If the accused is released on bail, it would certainly again create a fear in the mind of the prosecutrix.

7. Considering all the above aspects, the Criminal Application is rejected.

8. Looking to the efforts of learned Advocate for Respondent No.2 who has appeared through Legal-aid, he is entitled to fees of Rs.5000/- towards fee for assisting the Court by arguing this application.

[KISHORE C. SANT, J.]

Najeeb.