

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.1547 OF 2022
IN
CRIMINAL APPEAL NO.519 OF 2022

Rashid Gafar Khan
versus

Applicant

Union Territory of Daman and Diu and anr.

Respondents

Mr.Majeed Menon with Mr.Mateen Qureshi and Khalil Girkar for Applicant.

Mr.H.S.Venegavkar with Mr.Shantanu Thorat, Advocate for Respondent no.1 U.T.

Ms.PN.Dabholkar, APP, for State.

Mr.Mohd,Shine, Advocate for Respondent no.3.

CORAM : PRAKASH D. NAIK, J.

DATE : 12th June 2023

PC :

1. This is an application for suspension of sentence and grant of bail during pendency of appeal preferred by applicant challenging conviction.

2. Applicant has been convicted vide Judgment and Order dated 15th March 2022 passed by Sessions Judge and Judge of Special Court, Daman in Special Case No.2 of 2021 for offence u/s.6 of Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo imprisonment of 20 years. Applicant is also convicted for the offence u/s.376 of IPC, however, no separate sentence has been imposed.

3. The case of prosecution is that the accused was the neighbour

of victim. The victim was minor. She was subjected to sexual assault. The victim then complained of abdominal pain and it was diagnosed that she was pregnant. The pregnancy was terminated. The FIR was registered and on completing investigation charge sheet was filed.

4. Learned counsel for Applicant submitted that evidence on record would indicate that victim and accused were having love affair. The age of victim has not been proved. The prosecution has relied upon bona fide certificate allegedly collected from school. Her birth certificate was not produced. The victim has provided the history to medical officer stating that she was in relationship with the accused. The version of victim in the Court was contradictory. Statement recorded u/s.164 was different than history provided to the the medical officer. Applicant was aged around 22 years at the time of incident. The mother of victim has filed an affidavit on her behalf as well as on behalf of victim wherein it is contended that lenient view may be taken against applicant. They have no objection for granting bail to the applicant.

5. Learned counsel for Respondent no.1 submitted that victim was minor at the time of incident. Assuming that incident had occurred out of consensual relationship, such consent is immaterial. Victim has supported the prosecution case. Offence is of serious nature. Victim was pregnant. She had complained to her mother after suffering from abdominal pain. On diagnosis it was found that she was pregnant. The prosecution has proved the offence. Age of the victim has been proved through bona fide certificate issued by school where she was studying.

6. Learned advocate for respondent no.3 has submitted that mother has filed affidavits and contended that lenient view may be adopted. On instructions from the victim and her mother, it is submitted that they have no objection for suspending sentence and granting bail to the applicant.

7. The case of prosecution is that age of victim was around 14 years. The alleged incidents of physical relationship had occurred in August-2020 and October-2020. The prosecution has examined about nine witnesses. Although the incidents had occurred in August-2020 and October-2020, the victim did not complain to her mother about the incidents. When she suffered pain in abdomen she had informed about it to her mother and it was diagnosed that she was pregnant for eight weeks. In the evidence the victim had stated that she was subjected to physical relationship on two occasions. It is apparent from record that accused and victim were in relationship. The trial Court in paragraph 20 of the judgment has observed that before the Court the victim had stated that the accused had forcible intercourse with her on two occasions and had threatened her not to disclose the incident to anybody. However, in the report she stated that she had developed love affair with the accused since two years before the incident and by promising to marry her, the accused had sexual intercourse with her in August and in his room in October against her wish. Thereafter she had conceived. The victim gave the history to the medical officer about her love affair with the accused and that there was sexual intercourse between them on two occasions. The evidence reveals that earlier victim had come with story of love affair between her and the accused and she had

changed the version before Court stating that accused had committed forcible sexual intercourse. Looking her consistent version in the report and the history given to the doctor, there is probability that sexual intercourse between victim and accused could be consensual.

8. The Trial Court, however, convicted the applicant primarily considering the fact that victim was minor and consent, if any, is immaterial.

9. On perusal of evidence of PW-1, it can be seen that according to her accused had subjected her to sexual relationship in August-2020 and October-2020. The second incident had occurred in room of accused. PW-2 Dr.Shailesh Arlekar has deposed that victim had told history that accused and victim had sexual intercourse on two occasions. The first incident occurred in August-2020 and second in October-2020. The victim also told him that she had consented for sexual intercourse because he promised her to marry. She further told that after sexual intercourse on second time, the accused had given her some medication with a view that she should not conceive. PW-5 is the mother of victim. She has stated that victim had complained of abdomen pain and hence she was taken to the doctor for treatment. It was disclosed that she was pregnant. She has admitted that the victim was born in Uttar Pradesh. There is no entry of birth of victim in the village register. The prosecution has relied upon evidence of PW-4 in-charge principal of school. Reliance is placed on the bona fide certificate to establish age of victim. However, this witness has stated that the birth certificate was not produced by the father of victim but affidavit disclosing date of birth of victim was filed and on the basis of affidavit entry was made in

the register. Thus, bona fide certificate is based on the information provided in the affidavit of father of victim. The defense has disputed the age of victim.

10. Considering the nature of evidence, sentence of imprisonment can be suspended and bail can be granted to the applicant.

ORDER

- (i) Interim Application No.1547 of 2022 is allowed and disposed off;
- (ii) The substantive sentence of imprisonment imposed vide Judgment and Order dated 15th March 2022 passed by Sessions Judge and Judge of Special Court, Daman in Special Case No.2 of 2021 is suspended, and applicant is directed to be released on bail on executing P.R bond in the sum of Rs.25,000/- with one or two sureties in the like amount;
- (iii) The applicant shall report Police Station Officer, Coastal Police Station, Tahsil and District Daman once in six months on every first Saturday of the month between 11 am and 1 pm till final disposal of Criminal Appeal.

(PRAKASH D. NAIK, J.)

MST