



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.2264 OF 2023
IN
CRIMINAL APPEAL NO.710 OF 2023

Ms. Lakshmi Raman, Appointed Advocate for Respondent No.2.

ORDER:

1. This is an application seeking suspension of execution of sentence pending the appeal by the applicant who came to be convicted by Special Judge, POCSO, Greater Bombay in POCSO Special Case No.400 of 2017 on 21st April, 2023 for the offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO’) and sentenced him to undergo rigorous imprisonment for ten years and to pay fine of Rs.10,000/-, in default to pay fine, to undergo simple imprisonment for two months.

2. Few facts germane for disposal of this application can be summarized as under.

3. An First Information Report bearing No.202 of 2017 came to be lodged at *Nagpada* Police Station on 24th May, 2017.

4. There was a tailoring shop near the house of the parents of the victim where the applicant was working as a tailor. It is alleged that he used to follow the victim on her way to School and back. After some time, the applicant and the victim started meeting each other. The victim used to go out with the applicant. When her parents came to know about the said fact, the victim was warned not to accompany with the applicant or keep any relations with him. Even the applicant was warned by the parents of the victim. Since the applicant and the victim did not pay any heed to the request of her parents, a non cognizable case had been filed against the applicant with *Nagpada* Police Station.

5. However, even after filing a case, it is alleged that in the month of November, 2016, the applicant took the victim at her friend's house situate at Arab lane, *Nagpada*, Mumbai where he

committed forcible penetrative sexual assault upon her. The victim was scared and, therefore, she did not disclose the incident to her parents.

6. Again after 15 days, applicant took the victim to his friend's house and repeated penetrative sexual assault, *inter alia*, threatening the victim not to disclose the incident to anyone. On 20th May, 2017, the victim had stomach-ache and, therefore, she was taken to a private hospital by her mother. Doctor advised her mother to take the victim to K.E.M. Hospital where it was revealed that the victim was pregnant. A statement of the victim was recorded by P.W.7. On the basis of which, Crime No.202 of 2017 came to be registered against the applicant under sections 376 (2) (i) (n), 366-A of the Indian Penal Code (for short "I.P.C") and sections 4, 8 and 12 of the POCSO Act. After investigation, a charge-sheet came to be filed. After framing a charge, prosecution examined as many as 13 witnesses.

7. The learned Special Judge, after going through the evidence of prosecution witnesses and hearing the respective sides, convicted and sentenced the applicant as above.

8. I heard Ms. Solkar, learned Counsel for the applicant, Ms. Mulekar, learned A.P.P and Ms. Lakshmi Raman, appointed Advocate for respondent No.2.

9. Undisputedly, date of birth of the victim is 3rd December, 2002, meaning thereby, she was below 18 years at the time of the incident. The victim was aged about 13 years at the relevant time and the applicant was aged about 23 years. It is also an undisputed fact that there was aggravated penetrative sexual assault *qua* the victim in view of section 5 (j) (ii) of the POCSO Act which is punishable under section 6 of the POCSO Act.

10. Learned Counsel for the applicant has invited my attention to the evidence of the victim who testified as P.W.1 by emphasizing on the fact that the victim and the applicant were in love and it was the victim who, on her own, volunteered to accompany the applicant knowing fully well the consequences of the act in which they alleged to have indulged into. Counsel further buttressed her point by contending that mother of the victim in her cross-examination admits that she did not report about the relations of the accused-applicant with her daughter and the resultant pregnancy to the

Police. It is also submitted that the statement of the victim was recorded as per the say of her mother P.W.2 and that it was a consensual sexual intercourse between the applicant and the victim. Learned Counsel would contend that since the applicant was on bail during trial who had not misused the liberty, he is required to be released on bail by suspending execution of sentence pending the appeal.

11. Learned A.P.P strongly opposed the application on the ground that the applicant had committed a serious offence of committing aggravated penetrative sexual assault upon the victim who was admittedly 13 years old at the time of the incident. She invited my attention to the fact that the applicant-accused admitted the D.N.A report-Exhibit 37 confirming paternity of the foetus in the womb of the victim who was in fifth month of pregnancy at the time of her examination. The learned A.P.P had also invited my attention to the fact that even the victim had testified in so many words as to how she was enticed by the applicant to the house of one of his friend situate at Khoka Company, Arab lane, Nagpada in the month of November, 2016 where he committed coercive sexual intercourse. The learned A.P.P, therefore, strongly opposed release of the

applicant on bail pending the appeal.

12. Ms. Lakshmi Raman, appointed Advocate to espouse the cause of the victim invited my attention not only to the evidence of the victim but also to the evidence P.W.11 – Ranjit Chavan, Police Sub Inspector, who testified that after committing the offence, accused had absconded to *Uttar Pradesh* who was required to be brought from that State. It is further submitted that despite registration of a non cognizable case, the applicant had committed aggravated penetrative sexual assault upon the victim. It is submitted that the applicant had undergone only five months of sentence. In case of his release, there is every likelihood of threatening the victim or even possibility of his abscondence cannot be ruled out considering his earlier conduct.

13. While entertaining an application under section 389 of the Code of Criminal Procedure (for short “Cr. P.C”), merits and demerits cannot be gone into. However, from the evidence of the victim, her mother as well as from other evidence on record, it has been *prima facie* shown that there was an act of aggravated penetrative sexual assault by the applicant in light of evidence of

the victim wherein she has clearly testified that in the month of November, 2016, the applicant started talking with her and after a few days, he took her to the house of his friend situate at Khoka Company, Arab lane, Nagpada. There was nobody in that house. The applicant bolted the door from inside. He disrobed her and made her lie. He removed his clothes and committed coercive sexual intercourse. After sexual intercourse, he asked her not to disclose about it and then dropped her at her house. She testified that since she was scared, she did not disclose the incident to anyone.

14. Again after 15 days, the applicant persuaded her to accompany him in a lane of *Kamathipura* at his friend's house where he repeated the said act of sexual intercourse. When she had pain in her abdomen some time in the month of May, 2017, her mother took her to a Doctor then it was revealed that she was impregnated by the applicant. It is a matter of record, as elicited in the cross-examination of the victim, the incident of November, 2016 had occurred even after registration of non cognizable case against the applicant at the behest of parents of the victim. *Prima facie*, relations between the applicant and the victim though appears

to be consensual, it would be insignificant and irrelevant in light of the fact that the victim was only 13 years of age at the time of the incident. Learned Counsel for the applicant made a futile attempt to point out certain omissions and discrepancies which are not material in the given set of facts and circumstances and shall be considered at the time of hearing the appeal finally on merits.

15. Evidence of P.W.2-mother of the victim corroborates testimony of her daughter in material particulars. It is not the case of the applicant that he was not responsible for impregnating the victim in light of the nature of relationship between him and the victim as well as the fact of admission of D.N.A report **Exhibit 37** which has been proved through the evidence of P.W.10 – Neha Bhale, Chemical Analyzer.

16. P.W.6- Dr. Rahi Pedhnekar who is a Gynecologist attached to K.E.M. Hospital at the relevant time examined the victim and found her carrying pregnancy of 19 weeks 3 days. A Sonography was conducted by Dr. Vishal who was a Radiologist. After termination of pregnancy of the victim, she was discharged on 18th June, 2017 i.e on 23rd day of her abortion.

17. Merely because P.W.7- Manisha Pawar who was attached to the Crime Branch Unit as a woman Police Constable at the relevant time in her cross-examination gave an admission that victim and her mother were reluctant to report the incident, however, due to the pressure of the Medical Officer and the SHO, a report was lodged, would not be of any assistance to the applicant for the simple reasons that in such cases, no one would like to have a social stigma upon them, which is quite natural.

18. Evidence of P.W.11 – Ranjeet Chavan- Police Sub Inspector who was attached to *Nagpada* Police Station at the relevant time testified that after the First Information Report, he along with his staff was required to go to District *Ambedkar Nagar* in the State of *Uttar Pradesh* to bring the applicant. The applicant was arrested from *Uttar Pradesh* and thereafter he was brought to Mumbai. This speaks volumes about the conduct of the applicant.

19. Learned trial Court had rightly appreciated all the facts, evidence and attending circumstances while convicting the applicant of the offence with which he has been charged.

20. Having considered nature of evidence, gravity of offence as well as the fact that the applicant is a next door neighbour of the victim, it would not be safe even in the interest of the victim to release the applicant on bail which would tantamount to re-traumatize the victim. Merely because, the applicant did not misuse the liberty of his release on bail during trial would not in itself a ground to suspend execution of the sentence. There is no rebuttal of presumption under section 29 of the POCSO Act. This is a case where dignity as well as physical and mental integrity of the victim appears to have been violated. Releasing the applicant, pending the appeal, would tantamount to incurring risk of repeating such offence in light of the facts and evidence on record. Emotional wound leading to psychological injury of the victim needs to be healed and not aggravated. Therefore, this is not at all a fit case for suspension of execution of sentence pending the appeal.

21. For the aforesaid reasons, application is rejected.

22. Application stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]