



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.3280 OF 2022
IN
CRIMINAL APPEAL NO.807 OF 2022

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Mr. Sachin Gite, for Respondent No.2.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 13th SEPTEMBER, 2023.
PRONOUNCED ON : 15th SEPTEMBER, 2023.

1. The applicant has prayed for his release on bail pending the appeal who has been convicted on 24th June, 2022 by the Special Judge, POCSO in Special Case (POCSO) No.77 of 2019 of an offence punishable under section 376 (3) of the Indian Penal Code, 1860 (for short “I.P.C”) and under section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO’). He has been sentenced to undergo rigorous imprisonment for 20 years with fine of Rs.10,000/-, in default to pay fine, to undergo rigorous imprisonment for one year.

2. Briefly stated, facts are as follows.

3. Complainant is the real sister of the victim. Applicant is the step brother of the victim and the complainant. At the time of the incident, victim was aged about 14 years and the applicant was 29 years of age. Parents of the victim were died 9 years ago. The victim, complainant and the applicant were residing together. Victim was in 8th standard at the relevant time. The complainant was in 12th standard.

4. On 3rd May, 2019, the complainant had been to her maternal uncle's house as his wife had delivered a premature baby and was admitted in the Hospital at *Sangli*. Only victim and the applicant remained in the house at *Dahiwadi, Taluka Tasgaon, District – Sangli*. On 30th May, 2019, the complainant received a phone call of the victim complaining of pain in her abdomen. She told the complainant that the applicant had committed forcible intercourse with her on the earlier night, due to which, she had pain. The complainant came to *Dahiwadi*. The victim was taken to *Amrutwadi* by the complainant at the house of her maternal uncle. Maternal aunt of the victim was also confided about the incident.

Since the husband of maternal aunt was admitted in the hospital due to the accident and thereafter the complainant, victim and maternal uncle had been to Chennai for some work, report could not be lodged with the Police. The same was lodged on 11th June, 2019.

5. An F.I.R bearing No.332 of 2019 came to be registered with *Tasgaon* Police Station. Investigating Officer had recorded statements of the witnesses, collected evidence and filed a charge-sheet.

6. After framing a charge and recording evidence of the prosecution witnesses, the Special Court by the impugned judgment and order convicted and sentenced the applicant.

7. I heard Mr. Joshi, learned Counsel for the applicant at a considerable length, Ms. Mulekar, A.P.P on behalf of respondent No.1-State and Mr. Gite, appointed Counsel for respondent No.2.

8. Mr. Joshi would argue that this is a fit case in which the applicant needs to be released on bail, pending the appeal in view of the fact that the victim had turned hostile. Even during her re-

examination by the learned A.P.P, nothing could be brought out and, therefore, cross-examination was intact. He invited my attention to the testimony of P.W.2-complainant-sister of the victim. According to him, even F.I.R does not support the prosecution story. The incident alleged to have occurred on 30th May, 2019, whereas the victim was examined by the Doctor on 11th June, 2019. Admittedly, the applicant was not on bail during trial. Mr. Joshi has invited my attention that there was a huge gap in recording examination-in-chief and cross-examination of the victim. Examination-in-chief of the victim was recorded on 6th February, 2021, while cross-examination was recorded on 18th November, 2021. The Counsel has tendered copies of *Roznama* of the trial Court to that end.

9. On the other hand, the learned A.P.P strongly opposed the application by contending that several adjournments were sought by the applicant between the date when the examination-in-chief of the victim was recorded and the date of cross-examination only to pressurize and win over the victim. Learned A.P.P has invited my attention to the observations made by the Special Court in the impugned judgment that the accused had tampered the evidence of the victim by seeking adjournments. The learned A.P.P has further

invited my attention to the statement of the victim recorded under section 164 of the Code of Criminal Procedure.

10. Counsel appointed to represent respondent No.2 argued in tune with the learned A.P.P by contending that the victim was pressurized by the applicant during trial by literally forcing her to change her version during cross-examination after nine months.

11. I have meticulously gone through the record as well as the impugned judgment. There is no dispute that the victim was below 18 years of age at the time of the incident. Her date of birth is proved to be 10th April, 2005. The said facts have been substantiated on the basis of extract of school general register as well as the *bona fide* certificate which are at **Exhibit 65, Exhibit 66 and Exhibit-67.**

12. The victim in her evidence, in unequivocal terms, deposed about the incident before the Special Court. According to her, when she was in sleep on the night of 29th May, 2019, the applicant came and slept by her side. She awoke only to notice that the applicant was lying on her body. She tried to shout but he gauged

her mouth. Thereafter, he removed her leggings and pant as well as his pant. He thereafter spread her legs. Initially, he put his fingers in her private part. Thereafter, he inserted his penis in her vagina. She suffered severe pain. She tried to shout, however, the applicant again spread her legs and inserted penis by force into her vagina. He continued with the said act. She suffered abdominal pain and there was profused bleeding from her private part. She had informed about the incident to her elder sister on the next date. The said evidence is corroborated by P.W-2- complainant-sister of the victim to whom the victim narrated the incident immediately on the next morning. The applicant did not deny that since 3rd May, 2019 till 29th May, 2019, only he and victim were staying in the house at *Dahiwadi*. Nothing could be elicited from the cross-examination of P.W.2 by the defence. Spot of incident has been admitted by the applicant vide *panchanama* **Exhibit – 46.**

13. Prosecution examined three Doctors. P.W.5-Dr. Nilesh Mohan Mahabare examined the victim on 11th June, 2019. After recording history, he collected pubic hair, nail clipping and blood samples of the victim. He referred the victim to Civil Hospital, *Sangli* for an experts opinion.

14. P.W.4 – Dr. Sunil Tukaram Patil, who was a Casualty Medical officer at Civil Hospital at Sangli at the relevant time, examined the victim. P.W.4- Dr. Sunil Patil referred the victim to Gynecology Department. He received reports of Gynecologist, dental opinion, radiological opinion, USD abdomen, pelvis and blood report. P.W. 4 – Dr. Patil was not cross-examined by the defence. Only question asked to P.W.3 – Dr. Vikas Harishchandra Devakare in cross is that there was old healed hymen tear which was denied by the said witness. Learned Special Court while accepting evidence of Dr. Vikas Devakare and Dr. Sunil Patil in view of section 29 of the POCSO Act observed that hymen tear of the victim could be by forcible sexual assault. None of the medical officers were suggested that hymen tear could be due to some other reasons than a rape. Since there is no suggestion by the defence, it can be, *prima facie*, held that it was due to the act of the applicant.

15. It is argued by Mr. Joshi that the victim and the complainant were demanding accounts of the income from the agricultural land and, therefore, there was a dispute between them. Victim and the complainant were demanding equal share in the properties to which the applicant was not ready. It is, therefore, submitted that due to

the property dispute, a false case has been filed against the applicant by the complainant.

16. Mr. Joshi tried to impress upon me that since the victim had turned hostile during her cross-examination wherein she did not utter a single word against the applicant and, therefore, the applicant ought to have been acquitted by the special Court. By no stretch of imagination, the victim is said to have turned hostile. Rather, the victim had categorically testified about alleged incident in her examination-in-chief recorded in the first week of February, 2021. Thereafter, the case was adjourned for more than nine months which is something unusual and then the victim was cross-examined on behalf of the applicant on 18th November, 2021. Statement of the victim under section 164 of the Cr. P.C by J.M.F.C, *Tasgaon* on 11th June, 2019 substantiates the case of the prosecution and is in consonance with the evidence of the victim recorded on 6th February, 2021.

17. The Special Court has placed reliance on a judgment in the case of **Khujji @ Surandra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853**. The law is well settled that the part of the evidence

of hostile witnesses which is reliable and acceptable as an evidence can be utilized as an evidence.

18. It is pertinent to note that the learned Special Court in the impugned judgment has rightly considered as to how the victim was not cross-examined by the defence from 6th February, 2021 till 18th November, 2021 by putting forth one or the other reason for seeking adjournments after adjournments. It can definitely be inferred that the defence had made all efforts to ensure that the victim during her cross-examination takes “U” turn and deposes what was expected of her by the defence. It has been observed by the Special Judge that subsequent tutoring of the victim by the defence has resulted in stating an altogether different story than what has been stated by her in her examination-in-chief. It is observed by the Special Judge that the victim might have been pressurized and coerced by the other side. Of course, without considering the merits and demerits of the case, as already stated, even *prima facie*, findings of the Special Judge cannot be said to be incorrect or perverse in the given set of facts and circumstances of the case. The learned Special Judge has, therefore, rightly accepted the evidence of the victim in her examination-in-chief to be reliable,

trustworthy and acceptable. It is also noteworthy that spot *panchanama*, seizure of clothes of victim, as well as ossification test and dental age etc have already been admitted on behalf of the applicant. Once the aforesaid facts have been admitted, defence cannot subsequently dispute the aforesaid documentary evidence which has already been admitted. Secondly, if the victim testified about her cordial relations with the applicant and that she and the complainant were being looked after by him in her cross-examination then why there should be any dispute on account of agricultural land or the property?

19. Taking into account the aforesaid facts on record, it would not at all be just and proper or even safe to release the applicant on bail pending the appeal by suspending execution of the sentence, more so, in light of the fact that in case of his release, the victim might suffer a trauma in view of the fact that the applicant would stay in the same village. Possibility of an untoward incident or repeating the same offence cannot be ruled out.

20. As such, application stands rejected.

21. Application stands disposed of

[PRITHVIRAJ K. CHAVAN, J.]