



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO.502/2023 IN
CRIMINAL APPEAL NO.315/2023

Sattya alias Shubham alias Satyanarayan s/o Ramlal Bhandari (In jail) .Vs. State of
Maharashtra and another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. Anil Mardikar, Senior Advocate assisted by
Mr.Khergade, Advocate for applicant.
Mrs. M. H. Deshmukh, A.P.P. for non applicant no.1-State.
Mrs. A. S. Mishrikotkar, Advocate appointed for non
applicant no.2 – informant.

CORAM : ANIL L. PANSARE, J.
DATE : 05.10.2023

Heard.

2. The applicant has filed the present application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of sentence and for grant of bail.

3. The applicant has been convicted by the learned Additional Sessions Judge -12 and Special Judge under POCSO Act, Nagpur by judgment and order dated 19.04.2023 in Special POCSO Case No.271/2019, for the offences punishable under Sections 366, 354-A, 376(2) (j) and 506 of the Indian Penal Code, 1860 and Sections 4 and 12 of the Protection of Children From Sexual Offences Act, 2012. The maximum punishment awarded is Ten years and fine.

4. Having heard Mr. Mardikar, learned Senior Counsel for the applicant, Mrs. Deshmukh, learned A.P.P. for non applicant no.1-State and Mrs. Mishrikotkar,

learned appointed counsel for non applicant no.2, it transpires that the essence of the charge is that on 23.08.2018 at 05:30 p.m., the applicant has taken away the victim ABC, who was under the age of 17 years, out of the keeping of her lawful guardian, without consent of such guardian, and, secondly, that the applicant has demanded sexual favour with the victim, and, thirdly, that he has committed rape on the victim.

5. Broadly speaking, the evidence led before the trial Court indicates that the entire prosecution story is based on the hearsay evidence. Unfortunately, the victim has expired on 06.12.2019 and, therefore, her evidence could not be recorded.

6. PW1 is uncle of the victim and narrated the incident as stated to him by the victim. He states that the victim was missing from her house. A chit was left by the victim which, PW1 collected and approached the police station and then lodged the report. The said chit, however, has not been made part of the charge-sheet for the reasons best known to the prosecution. The chit would definitely be an important document to find out the truth and, therefore, for withholding the best evidence, an adverse inference will have to be drawn against the prosecution.

7. As regards the incident, PW1 states that after 2-3 days of lodging the report, he learnt that the victim is in the custody of Aligarh police. Accordingly, he

approached the Police Station Nandanvan, Nagpur and informed about the said status. Thereafter, police attached to Police Station, Nandanvan and the mother of the victim went to Aligarh. The victim and the accused were brought to Nagpur. The victim informed PW1 and other relatives that the applicant was about to take her to Nepal. During the travel, there occurred dispute between the two in the train and the applicant assaulted her. The passengers in the train learnt about the said dispute and, therefore, they have informed the said fact to the police. The victim has further stated to her relative that the applicant has taken her to the house of a friend and committed sexual intercourse with her. The friend, however, has not been examined by the prosecution.

8. The defence of the applicant is of consensual relationship and of false implication. The accused has denied the incident and, therefore, the burden was upon the prosecution to prove that on or about 23.08.2019, the applicant has committed penetrative sexual assault upon the victim.

9. Having gone through the evidence of material witnesses and the doctor, there appears an arguable case in favour of the applicant, which would require detailed scrutiny of the evidence on the point of allegations made against the applicant.

10. The doctor's evidence indicates that hymen was torn at 7 O'clock position. However, this

evidence, by itself, would not be sufficient to hold that the accused is guilty of committing penetrative sexual assault on a particular date.

11. The trial Court has relied upon Sections 6 and 8 of the POCSO Act. However, the learned Senior Counsel has rightly argued, by relying upon the judgment of the Apex Court in the cases of *Kappinaiah and anr. Vs. Emperor*, reported in *1930 SCC OnLine Mad 24* and *Gentela Vijayavaradhan Rao and another Vs. State of A.P.*, reported in *(1996) 6 SCC 241*, that these provisions may not be helpful in the present case inasmuch as the narration of the incident by the victim to her relatives is not immediately or spontaneous of the occurrence of the incident but is after about six days of the alleged incident. It is nobody's case that the victim has narrated the incident to any person on the date of incident or immediately after happening of the incident. It further appears that the victim has not narrated the incident to any police officer of Aligarh police station.

12. On the point of assault, except for medical evidence that there is mark of assault on the face of the victim, there is no evidence to show that the said mark has any nexus with the act of the applicant.

13. The applicant and victim were taking tuition together, which indicates that they were of same age. The applicant was on bail pending trial. No allegations of misuse of liberty are made. When inquired, learned

Senior Counsel for the applicant submits that there are no criminal antecedents against the applicant.

14. In the light of the above and considering the nature of evidence, the applicant has made out a case for suspension of sentence. Hence, following order is passed.

ORDER

(i) The application is allowed.

(ii) The execution of sentence imposed upon the applicant by learned Additional Sessions Judge -12 and Special Judge under POCSO Act, Nagpur by judgment and order dated 19.04.2023 in Special POCSO Case No.271/2019, for the offences punishable under Sections 366, 354-A, 376(2)(j) and 506 of the Indian Penal Code, 1860 and Sections 4 and 12 of the Protection of Children From Sexual Offences Act, 2012, is hereby suspended.

(iii) Applicant – Satya alias Shubham alias Satyanarayan Bhandari, shall be released on bail on he furnishing P.R. bond in the sum of Rs.50,000/- with one or two sureties in the like amount before the trial Court.

(iv) The applicant shall remain present before this Court at the time of final hearing of the appeal.

The application is disposed of.

Registry to process the appeal for final hearing as per the rules.

(Anil L. Pansare, J.)