

Shambhavi
N. Shivgan

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**Criminal Appeal No. 332 / 2020
with
Interim Application No. 1129 / 2020**

Arhant Janardan Sunatkari
Age : 19 years, Occ: Student,
R/a. F/18/02/02, Vrundavan Society,
Sector No.4, Sanpada, Navi Mumbai. .. Appellant

Versus

The State of Maharashtra
(Through Sanpada Police Station). .. Respondent

Mr. M.S. Mohite Sr. Advocate i/by Mr. Shantanu R. Phanse,
Advocate for the Appellant.
Mr. R.M. Pethe, APP for State/ Respondent.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : 3rd FEBRUARY, 2021.
PRONOUNCED ON : 4th FEBRUARY, 2021.

JUDGMENT :-

1. Appellant (Original Accused), a student of 19 year old, has been convicted for committing rape repeatedly on same woman, an offence under Section 376 (2) (n) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and fine of Rs. 5000/- with default stipulation;

. The victim being minor, appellant has been convicted also under Section 3 (a) (c) an offence punishable under Section 4 of Protection of Children from Sexual Offence Act, 2012 (POCSO) and sentenced to suffer rigorous imprisonment for seven years and fine of Rs. 5000/- with default stipulation;

. Also has been convicted for the offences punishable under Sections 5 (1) (n), 6 of POCSO and sentenced to suffer rigorous imprisonment for ten years and fine of Rs. 5000/- with default stipulation;

. Also convicted under Section 354 of the IPC and sentenced to suffer rigorous imprisonment for five years and fine of Rs. 5000/- with default stipulation.

2. All sentences were directed to run concurrently.
3. Pending trial, appellant was enlarged on bail, which he had not misused.
4. Appellant in these proceedings, seeks suspension of impugned sentence and enlargement on bail.
5. Facts of this case are distinctive. That to say victim is first cousin sister of the appellant. At the relevant time i.e. in September, 2017 she was 15 year old, 8th Standard Student and was living in the house of her paternal uncle, since two years.

Victim's friend / classmate was examined as prosecution witness no.6. Her evidence leads to belief, that in September, 2017, victim told that her first cousin brother had touched her inappropriately and had stomach pain. This witness apparently found and had noticed the victim was depressed. She told this fact to her class teacher. Whereupon class teacher enquired with the victim. Evidence of Class Teacher (PW-7) reveals, that victim told her about sexual harassment, meted out to her by cousin brother.

Apparently that victim told to the Class Teacher, that she was residing in the house of her uncle with his two cousins and also disclosed as to when, how, and where she was subjected to penetrative assault by one of the cousins. His ordeal was informed to Principal of the School and thereafter, the F.I.R. was registered by teacher, on 3rd March, 2018 against the appellant.

6. On the same day, Medical Officer (PW-5) examined victim. His evidence indicates that victim told him, that she was sexually assaulted in September, October 2017 and again in February, 2018. However on general examination, doctor did not notice any external injury on her person, suggesting forcible assault. Her urine pregnancy test was turned negative. Medical Officer opined, over all clinical findings were consistent with the sexual assault, subject, to final report of Forensic Science Lab (FSL).

7. Indisputably, the FSL report was not received till the conclusion of trial. Thus to be stated that opinion of the doctor was provisional / indefinite and not final.

8. In the course of investigation, statement of victim was recorded under Section 164 of the Code of Criminal Procedure, 1973, wherein the victim would disclose and say, that it was a consensual act; not once but at least for 4-5 times.

9. Be that as it may, victim in her evidence did not support the prosecution and would say that her narrative under Section 164 of Cr.P.C., was at the instance of Class Teacher. She disowned the contents of portion marked 'B' of her statement recorded under 164. In the cross-examination, the victim would say that "It is true to say that I had given my statement to police at the instance of Class Teacher. It is true to say that portion marked 'A' in statement recorded under Section 164 of Cr.P.C. is stated by me at the instance of Class Teacher."

10. I have perused the impugned judgment; evidence of victim, mother of victim and of PW-6 (Classmate of the victim) as well the evidence of Medical Officer.

11. I am conscious of the fact that the passing of POCSO has been significant and progressive step in securing children's rights and furthering the cause of protecting children against sexual abuse. The letter and spirit of the law, which defines a child as anyone less than 18 years of age, is to protect children from sexual abuse.

12. I am also conscious of the fact that consensual sex between minors has been in a legal grey area because the consent given by minor is not considered to be a valid consent in eyes of law.

13. In the case at hand, facts are distinctive in the sense, victim is first cousin sister of the appellant. At the relevant time, she was 15 year old and appellant was 19 year old. Both were students and living in one house. A fact cannot be overlooked that the victim had resiled from her statement and further disowned the contents of portion marked B of her statement recorded under Section 164. Even her mother was unfriendly to prosecution. Opinions of doctor that victim was subjected to sexual assault was subject to FSL report. The FSL report was not obtained till the conclusion of

the trial. Victim said, her statement to the police and narrative in statement under Section 164 was at the instance of Class teacher. Therefore, in the proceedings, wherein suspension of sentence is sought, this Court cannot ignore the 'evidence of victim' and 'her mother'. At the same time, the age of the victim and of appellant their relations also cannot be overlooked. Though the prosecution vehemently argued and relied on Section 29 and 30, which provides for presumption of culpable, mental state as to certain offences, in my considered opinion, this submission and argument of the prosecution is to be gone into, when appeal is to heard finally.

14. Thus in consideration of the distinctive facts of the case, evidence on record the impugned sentence is suspended and appellant is directed to be released on bail on the following conditions.

- (i) The appellant be released on bail on executing P.R. Bond of Rs. 25,000/- with one or two sureties in the like amount;
- (ii) The appellant shall report to the trial Court as and when

called, till his appeal is finally disposed of;

(iii) The appellant shall keep the trial Court informed of his current address and mobile contact number and/ or change of residence or mobile details, if any, from time to time;

15. The application is allowed in the aforesaid terms and is accordingly disposed of.

(SANDEEP K.SHINDE, J.)

N A J E E B..