

(2018) 09 RAJ CK 0116

In the Rajasthan High Court

Case No : Suspension Of Sentence(Appeal) No. 615 of 2018, Criminal Appeal
No.622 of 2018

Sanchita, Shilpi @APPELLANT@Hash State of Rajasthan & Ors

Date of Decision : 29-09-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 120, 120B, 340(4), 342, 354A, 370(4),
374, 376(2)(f), 376D, 506

Protection of Children from Sexual Offences Act, 2012 — Section 5(f), 5(g), 6, 7, 8, 17

Code of Criminal Procedure, 1973 — Section 164, 389

Juvenile Justice (Care and Protection of Children) Act, 2015 — Section 23, 26

Citation : (2018) 09 RAJ CK 0116

Hon'ble Judges : Vijay Bishnoi

Bench : Single Bench

Advocate : Mahesh Bora, Nishant Bora, S.K.Vyas, P.C. Solanki

Final Decision : Disposed Off

Judgement

This application for suspension of sentence has been preferred on behalf of the applicant-appellant for suspending the sentence awarded to her by

Special Judge, POCSO Act, 2012, Jodhpur (hereinafter to be referred as "the trial court") vide its judgment dated 25.04.2018 passed in Sessions

Case No.116/2016 (152/2013), whereby the trial court has convicted the applicant-appellant for the offences punishable under Sections 370(4) read

with Section 120-B IPC, 376D IPC, "Section 5(g)/6 and Section 17 of Protection of Children from Sexual Offences Act, 2012 (hereinafter to be

referred as "the POCSO Act"), however, sentenced her as under:

Under Section 370(4)/120-B IPC : "10 years" rigorous imprisonment and to pay a fine of Rs.50,000/-, in default of payment of fine, further to

undergo one year"s rigorous imprisonment

Under Section 376D IPC : 20 years" rigorous imprisonment and to pay a fine

of Rs.50,000/-, in default of payment of fine, further to undergo 2 yearsâ?? rigorous imprisonment.

As per the prosecution story, the prosecutrix, a 12th Standard student, who was studying and residing in Asharam Gurukul, Chhindwara, Madhya

Pradesh fell ill in first week of August, 2013. The applicant-appellant, who was working as Warden of the hostel, where the prosecutrix was residing,

came to know about the illness of the prosecutrix and thereafter told her that she is under the influence of evil spirits.Â On 07.08.2013, the applicant-

appellant informed the family members of the prosecutrix that she is not feeling well, so they should take her to Gurukul at Chhindwara, upon which

the parents of the prosecutrix reached Chhindwara on 08.08.2013 and thereafter on 09.08.2013, visited the Girls Hostel, Gurukul, Chhindwara, where

the prosecutrix was residing and met the applicant-apellant, where she told her parents that the prosecutrix is under the influence of evil spirits and she

also informed about her condition to Asharam Bapu, so they should meet him wherever he is. On 09.08.2013 itself, the prosecutrix left the hostel for

Shahjahanpur, U.P.Â with her parents, where they contacted with Shiva, one of the accused, who informed them that Asharam will be in Delhi on

12.08.2013, then the prosecutrix along with her parents reached Delhi on 13.08.2013, then they came to know that Asharam is in Jodhpur and when

they again called Shiva, he asked them to come to Jodhpur. Thereafter, the prosecutrix along with her family members reached Jodhpur at Manai

village, where Asharam was staying in a farm house.Â The prosecutrix along with her parents stayed there and met with Asharam. On 15.08.2013,

the prosecutrix was sexually assaulted by Asharam in a KutiaÂ of farm house.Â Thereafter, the prosecutrix and the family members left Jodhpur

and reached Shahjapur, where the prosecutrix narrated entire incident of sexual assault by Asharam to her family members on 19.08.2013. Then the

prosecutrix and her family members went to Delhi, where a zero number FIR was lodged at Police Station, Kamla Market, New Delhi and statements

of the prosecutrix were recorded under Section 164 CrpC and thereafter, FIR No.122/2013 was registered at Police Station, Mahila West, Jodhpur on

21.08.2013.Â

After investigation, the police filed charge-sheet against the applicant-appellant for the offences punishable under Sections 342, 354-A, 370(4), 376(2)

(f), 376D, 506, 509/34, 109/120-B IPC and Sections 23 and 26 of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter to be referred as "the Juvenile Justice Act") and Sections 5(f)/6, 5(g)/6, 7/8 read with Section 17 of POCSO Act.

The trial court framed charges against the applicant- appellant for the offences punishable under Sections 342/34, 354A/34, 370(4), 376(2)(f) read with Section 120-B/109, 376D, 506/34, 509/34 read with Section 109/120 IPC and Section 23 of the Juvenile Justice Act and Section 5(f)/6 read with Section 17, 5(g)/6, 7/8 of the POCSO Act.

After recording of the prosecution evidence as well as the defence evidence, the trial court has convicted and sentenced the applicant-appellant as aforesaid.

Learned counsel for the applicant-appellant has argued that the trial court has grossly erred in convicting and sentencing the applicant-appellant for the offence punishable under Section 376D IPC, "Sections 5(g)/6 and 17 of POCSO Act." It is argued that "a woman cannot commit rape and therefore, she certainly cannot be convicted for commission of gang rape because woman cannot be said to have an intention to commit rape.

It is also submitted that the trial court in para 458 of its judgment dated 25.04.2018 has categorically concluded that there is no direct evidence available on record to suggest that the applicant-appellant sent the prosecutrix to Asharam, so that he could sexually assault her, however, at the same time, the trial court has concluded that on the basis of ocular and circumstantial evidence, it is proved that the applicant-appellant hatched a criminal conspiracy with accused-Asharam and sent the prosecutrix to him, so that he could sexually assault her." Learned counsel for the applicant-appellant has submitted that as a matter of fact no such ocular or circumstantial evidence is available on record, which suggests that applicant-appellant had sent the prosecutrix to Asharam, so that he could sexually assault her.

Learned counsel for the applicant-appellant has placed reliance on decisions of Hon'ble Supreme Court rendered in Priya Patel vs. State of M.P.

& Anr., (2006) 6 SCC 263 and in State of Rajasgthan vs. Hemraj & Anr., (2009) 12 SCC 403 and has argued that the Hon'ble Supreme Court in

the above referred cases has categorically held that a woman cannot be prosecuted for commission of gang rape.

Learned counsel for the applicant-appellant has, therefore, argued that challenge of the applicant-appellant to her conviction under Section 376D IPC,

Sections 5(g)/6 and 17 of POCSO Act, and sentence of her under Section 376D IPC is based on strong grounds.

Learned counsel for the applicant-appellant has further argued that the trial court has grossly erred in convicting and sentencing the applicant-appellant

for the offences punishable under Sections 374/120-B IPC.Â It is submitted that the applicant-appellant was employed as Warden of Gurukul Ashram

Hostel, just four months before the incident. The said hostel was running prior to the joining of the applicant-appellant and in no manner it can be said

that the applicant-appellant is involved in recruiting, transporting, harboring, transferring or receiving any girl of the hostel for the purpose of her

exploitation.Â It is submitted that from the statement of the prosecutrix and her parents, only it can be gathered that she had suggested them to

approach accused-Asharam for treatment of so called illness of the prosecution.Â It is further argued that it is not the case of the prosecution that the

applicant-appellant had transported the prosecutrix to the place, where the accused-Asharam was staying.Â It is submitted that as a matter of fact

from the evidence of the prosecutrix and her parents, it is clear that after leaving the hostel of Chhindwara on 09.08.2013, they first went to

Shahjahanpur and therefrom they went to Delhi and from Delhi they came to Jodhpur after talking to co-accused Shiva and as such applicant-

appellant was in no manner involved in sending the prosecutrix or her parents to the place, where Asharam was staying.Â

Learned counsel for the applicant-appellant has further argued that there is no evidence available on record to suggest that the applicant-appellant had

hatched a criminal conspiracy with other accused-persons particularly the accused-Asharam. It is submitted that for the purpose of proving the charge

of criminal conspiracy, there must be an evidence to the effect that prior to the commission of offence, there was a meeting of minds of the accused-

persons or the applicant-appellant had knowledge that accused-Asharam is going to sexually assault the prosecutrix, if she goes at the place where he

was staying.

Learned counsel for the applicant-appellant has further submitted that the trial court has held that when the prosecutrix and her father met Asharam,

they told him about the illness of the prosecutrix, he immediately asked that is she â??BHOOT WALI LADKIâ? from Chhindwara and this fact is

sufficient to prove that the applicant-appellant and Asharam were in league to commit the offence.Â Learned counsel for the applicant-appellant has

argued that as a matter of fact the prosecutrix and her parents have made a significant improvement in their statements recorded before the court and

have deliberately stated that accused â?" Ashram had addressed her as â?? BHOOT WALI LADKIâ? from Chhindwara, though such fact was not

revealed by the prosecutrix or her parents during the course of investigation.

Learned counsel for the applicant-appellant has, therefore, submitted that the challenge of the applicant-appellant to her conviction for the offence

punishable under Section 370(4) read with Section 120-B IPC is also based on strong ground and, therefore, the sentence awarded under the said

offence is also liable to be suspended.

It is also submitted by the learned counsel for the applicant-appellant that the applicant-appellant is a young lady and was granted bail during the

course of trial by the High Court, which she did not misuse and taking into consideration the said fact also, the sentence awarded to her by the trial

court vide impugned judgment is liable to be suspended.

Per contra, learned Additional Advocate General-cumG.A. and the counsel appearing for the complainant have vehemently opposed the application

for suspension of sentence. It is submitted that from the statement of PW.5 â?" prosecutrix, PW.12 Sumitra Singh and PW.21 Karmveer Singh,

parents of the prosecutrix, it is clear that the applicant â?" appellant convinced the prosecutrix and her parents by falsely creating an impression that

the prosecutrix is under the influence of evil spirits and then induced them only to approach accused-Asharam, where the prosecutrix, a minor girl,

was sexually assaulted by him.

It is also argued that the prosecution proved by producing cogent and reliable evidence that at the time of incident, the prosecutrix was minor and she

was subjected to sexual assault by the accused-Asharam with the aid of applicantappellant.

It is further argued that the evidence of hatching criminal conspiracy is available on record and the trial court after taking into consideration the said

evidence has rightly convicted and sentenced the applicant-appellant as

aforesaid.

Learned Additional Advocate General-cum-G.A. and the counsel appearing on behalf of the complainant have also argued that the trial court has not

committed any illegality in convicting and sentencing the applicant-appellant for the offence punishable under Section 376-D IPC as ample evidence is

available on record to prove that the applicant-appellant had common intention with Asharam of committing rape upon the prosecutrix.

It is also contended that simply because the applicant- appellant was granted bail by this Court during the course of trial and she did not misuse the

conditions of bail, the sentence awarded to her cannot be suspended.

In support of the above contentions, reliance is placed on a decision of Honâ??ble Supreme Court rendered in Anil Ari vs. State of West Bengal,

(2009) AIR (SC) 1564.

It is, therefore, prayed by the Additional Advocate General-cum-G.A. and the counsel for the complainant that the application for suspension of

sentence may be dismissed.

Heard learned counsel for the parties and scrutinized the record of the case.

The trial court has convicted the applicant-appellant for the offences punishable under Section 376D IPC, Section 5(g)/6 and 17 of the POCSO Act

and sentenced her for twenty yearsâ?? rigorous imprisonment for the offence punishable under Section 376D IPC. She has also been convicted for

the offence punishable under Section 370(4) read with Section 120-B IPC and sentenced forÂ tenÂ yearsâ?? rigorous imprisonment.

The prosecution has not disputed this fact that the applicant-appellant was appointed as Warden of Asharam Gurukul Hostel on 01.04.2013 vide

Ex.P/67.Â It is not the case of the prosecution that the applicant-appellant was present at Jodhpur when accused-Asharam allegedly sexually

assaulted the prosecutrix.

The prosecution has also not come out with a case that the prosecutrix or her parents were in contact with the applicantappellant after 09.08.2013

when they left Ashram Gurukul Hostel, Chhindwara. PW.5 â?" prosecutrix, PW.12 Sumitra Singh and PW.21 Karamveer Singh have also not stated

in their statements that after 09.08.2013 the applicant-appellant made any contact with them by whatsoever means.

The prosecution story is that the applicant-appellant was in regular contact with accused "Asharam through mobile phones possessed by accused -

Shiva and Prakash, however, the trial court acquitted both the above mentioned accused while concluding that the prosecution has failed to establish

their link with the commission of crime on the basis of mobile phones possessed by them.

Â The trial court in para No.458 of the impugned judgment has also observed that there is no direct evidence available on record, which suggests that

the applicant-appellant sent the prosecutrix to Asharam, so that he could sexually assault her but has held that on the basis of ocular and the

circumstantial evidence, it can be inferred that the applicant-appellant had sent the prosecutrix to Asharam, so that he could assault her sexually.

However, the ocular and circumstantial evidence, on which the trial court has placed reliance require consideration in detail.

Taking into consideration the above facts and circumstances of the case, this Court feels that the challenge of the applicant-appellant to her conviction

for the offence punishable under Section 376D IPC, Section 5(g) and 17 of the POCSOÂ Act and under Section 370(4)/120 IPC is based on strong

grounds.

Having regard to the fact and circumstances of the case and the fact that the applicant-appellant is a young lady, she was granted bail during trial and

it is not reported that she misused the conditions of the bail,Â I consider it just and proper to suspend the substantive sentence awarded to the

applicant-appellant.

Accordingly, this application for suspension of sentence filed under Sec.389 Cr.P.C. is allowed and it is ordered that the substantive sentence passed

by the trial court vide judgment dated 25.04.2018 passed in Sessions Case No.116/2016 (152/2013) against applicant-appellant Sanchita @ Shilpi

daughter of Mahendra Kumar Gupta shall remain suspended till final disposal of S.B.Cr. Appeal No.622/2018, provided she executes a personal bond

in the sum of Rs.2,00,000/- (Rupees two lac) with two sureties of Rs.1,00,000/- (Rupees one lac) each to the satisfaction of the learned trial Judge for

her appearance in this Court on 29.10.2018 and whenever ordered to do so, till the disposal of the aforesaid appeal on the conditions indicated below:-

1. That she will appear before the trial Court in the month of January of every

year till the appeal is decided.

2. That if the applicant-appellant changes the place of residence, she will give in writing her changed address to the trial Court as well as to the

counsel in the High Court.

3. Similarly, if the sureties change their address, they will give in writing their changed address to the trial Court.

4. That the amount of fine awarded by the trial court shall be deposited by the applicant-appellant in the trial court by 29.10.2018.

The trial Court shall keep the record of attendance of the applicant-appellant in a separate file. Such file be registered as Criminal Misc. Case related

to original case in which the applicant-appellant was tried and convicted. A copy of this order shall also be placed in that file for ready reference.

Criminal Misc. file shall not be taken into account for statistical purpose relating to pendency and disposal of cases in the trial court. In case the

applicant-appellant does not appear before the trial court, the learned trial Judge shall report the matter to the High Court for cancellation of bail.

The trial court is directed to disburse the fine amount, so deposited by the applicant-appellant, to the complainant.