


HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Misc Suspension Of Sentence Application
(Appeal) No.1837/2023

In

S.B. Criminal Appeal No.3420/2023

Rohit Bairwa Son Of Latoor Lal

----Petitioner

Versus

1. State Of Rajasthan, Through P.p
2. Victim
3. Ramavtar S/o Bajrang Lal

----Respondents

For Petitioner(s) : Mr. Abdul Kalam Khan with
Ms. Simran Bharti &
Mr. Ritesh Kumawat

For Respondent(s) : Mr. Atul Sharma, PP
Mr. Neeraj Sharma

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Order

08/04/2024

1. Having regard to the sensitivity of the allegations levelled in the matter and the nature of the offence complained of, it is imperative to protect the identity of the prosecutrix. Therefore, she has been denoted as "A" in the incident.

2. Counsel for the appellant submits that though in the Examination-in-Chief, the victim PW-1 "A" has levelled allegation of rape against the appellant, but when she was cross-examined, she denied the allegations of rape against the appellant. Counsel submits that even parents of the victim i.e. PW-2 Ramavtar and PW-3 Gayatri have not supported the allegation of sexual assault against the appellant. Counsel submits that only on the basis of DNA report, the appellant has been convicted. Counsel submits that an accused cannot be convicted solely on the basis of DNA report. In support of his contentions, he has placed reliance upon the judgment passed by the Division Bench of this Court in the case of **Ganesh vs. State of Rajasthan (D.B. Criminal Appeal No.255/2022)** decided on 18.07.2023. Counsel submits that the appellant is in custody since the date of his arrest and disposal of the appeal is bound to take time, therefore, the sentence of the appellant be suspended till disposal of the appeal.

3. Per contra, learned Public Prosecutor as well as the counsel for the complainant opposed the suspension of sentence application.

4. Heard learned counsel for the appellant, learned Public Prosecutor and counsel for the complainant and perused the material available on record.

5. Considering the arguments put forward by counsel for the appellant and looking to the fact that in the cross-examination victim PW-1 "A" has denied the allegation of sexual assault against the appellant and the parents of the

victim have not alleged the allegation of rape against the appellant and solely on the basis of DNA report, the appellant has been found to be guilty of the offences and considering the fact that the appellant is in custody since the date of his arrest and looking to the fact that the disposal of the appeal is likely to take time, therefore, this Court is of the opinion that it is a fit case for suspending the substantive sentence awarded to the accused-appellant.

6. Accordingly, the application for suspension of sentence filed by the applicant under Section 389 Cr.P.C. is allowed and the sentence awarded by the Court of Special Judge POCSO Act Cases No.3, Kota vide judgment dated 27.10.2023 in Sessions Case No.68/2023 against the appellant **Rohit Bairwa son of Latoor Lal** shall remain suspended till final disposal of the aforesaid appeal, subject to the condition that the appellant shall deposit the fine amount, as imposed by the Trial Court and he shall be released on bail provided he executes a personal bond in the sum of Rs.1,00,000/- with two sureties of Rs.50,000/- each to the satisfaction of the learned trial Court for appearance before this Court on 15.05.2024 and whenever ordered to do so, till the disposal of the appeal on the conditions indicated below:-

1. That he shall appear before the trial Court in the month of January of every year till the appeal is decided.
2. That if the applicant changes the place of residence and mobile number, he will give in writing his changed address and mobile number to the trial Court as well as to the counsel in the High Court.

3. Similarly, if the sureties change their address(s), they will give in writing their changed address to the trial Court.
4. Appellant shall deposit a fine amount as imposed by the learned trial Court.

7. The learned trial Court shall keep the record of attendance of the accused-appellant in a separate file. Such file be registered as Criminal Misc. Case related to original case in which the accused-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 said accused-appellant does not appear before the trial court, the learned trial Judge shall report the matter to the High Court for cancellation of bail.

8. Before parting with the order, this Court feels pain to observe that in dozens of cases the mandatory requirement of Section 24(5), 33(7) of the Protection of Children from Sexual Offences (for short 'POCSO Act') and Section 228-A of the Indian Penal Code (for short 'IPC') are not being followed. In the present matter while recording the statements of the victim under Sections 161 and 164 Cr.P.C. and even during the course of trial her name is mentioned everywhere and her identity has been disclosed. The Investigating Officer as well as the Judicial Magistrate have failed to follow the mandatory provisions contained under the above provisions of law.

9. Section 24 of the POCSO Act deals with the process of recording the statements of a child. Section 24(5) says that

the Police Officer shall ensure that the identity of the child is protected from public media, unless and otherwise directed by the Special Court in the interest of the child.

10. Section 33 of the POCSO Act deals with the procedure and powers of the Special Court. Section 33 (7) of the POCSO Act lays down that the Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial.

11. Likewise, Section 228-A IPC provides for upto two years imprisonment, with or without fine, for those who reveal the identity of victims of sexual abuse in public.

12. Dealing with the situation where the identity of the victims was disclosed, during the course of investigation and during the course of trial, the Hon'ble Apex Court in the case of **Nipun Saxena and Another vs. Union of India and Others** reported in **2019 (2) SCC 703** has held in para 11 and 34 as under:

"11. Neither the IPC nor the Cr.P.C. define the phrase "identity of any person". Section 228-A IPC clearly prohibits the printing or publishing "the name or any matter which may make known the identity of the person". It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase "matter which may make known the identity of the person" does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law makers was that the victim of such offences should not be

identifiable so that they do not face any hostile discrimination or harassment in the future.

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34.A bare reading of Section 24(5) and Section 33(7) makes it amply clear that the name and identity of the child is not to be disclosed at any time during the course of investigation or trial and the identity of the child is protected from the public or media. Furthermore, Section 37 provides that the trial is to be conducted in camera which means that the media cannot be present. The entire purpose of the POCSO is to ensure that the identity of the child is not disclosed unless the Special Court for reasons to be recorded in writing permits such disclosure. This disclosure can only be made if it is in the interest of the child and not otherwise. One such case where disclosure of the identity of the child may be necessary can be where a child is found who has been subjected to a sexual offence and the identity of the child cannot be established even by the investigating team. In such a case, the Investigating Officer or the Special Court may allow the photograph of the child to be published to establish the identity. It is absolutely clear that the disclosure of the identity can be permitted by the Special Court only when the same is in the interest of the child and in no other circumstances. We are of the view that the disclosure of the name of the child to make the child a symbol of protest cannot normally be treated to be in the interest of the child."

13. In the instant case all the above mandatory provisions have been violated and the principle of law laid down by the Hon'ble Supreme Court has been flouted and not followed by the Police and the Magistrate inasmuch as, while conducting the investigation and enquiry in the present

matter, the name of the victim has been mentioned everywhere.

14. In this background, this Court feels that an exercise of sensitization of the Police Officers and Judicial Officers is required to be undertaken so as to ensure strict compliance of these mandatory provisions of law and its requirements.

15. A copy of the order be forwarded to the Registrar General for keeping the matter before the Hon'ble Chief Justice for passing appropriate orders.

16. Let a copy of this order be sent to the Additional Chief Secretary, Department of Home, Government of Rajasthan and Director General of Police with direction to get sensitization programmes conducted through the Police Academy for Police Officers from time to time for keeping the identity of the rape victims protected while conducting investigation.

(ANOOP KUMAR DHAND),J