

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO. 575 OF 2016
IN
CRIMINAL APPEAL NO. 328 OF 2016**

Rajesh Mulchand Jain. ... Applicant.
Versus
The State of Maharashtra & anr. ... Respondents.

Mr. Aabad H. Ponda a/w. Mr. Chandan Singh Shekhawat a/w. Mr.
Haresh B. Buch i/b. ALMT Legal, advocate for Applicant.

Mr. S.S. Pednekar, APP for State.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : MAY 6, 2016**

P.C.:

1 Heard the learned Counsel for the applicant and the learned
APP for State. Perused the papers. Leave to add the victim as party
respondent. The amendment to be carried out forthwith.

2 This is an application under Section 389 of the Code of Criminal
Procedure, 1973 seeking suspension of substantive sentence imposed
upon the applicant. The applicant herein is convicted for the offence
punishable under Section 8, 10 and 12 of the Protection of Children

from Sexual Offences Act, 2012 and under Section 354 and 506 of the Indian Penal Code and under Section 67 of the Information Technology Act, 2000. The applicant is sentenced to suffer R.I. for 6 years and fine of Rs. 30,000/- I.d. further R.I. for 3 months for the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012. The applicant is sentenced to suffer R.I. for one year and to pay fine of Rs. 3,000/- in default to suffer R.I. for one month for offence punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012. The accused is further sentence to suffer R.I. for one year and to pay a fine of Rs. 3,000/- in default to suffer R.I. for one month for offence punishable under Section 354 of the Indian Penal Code. The applicant is also sentenced to suffer R.I. for one year and to pay fine of Rs. 3000/- in default to suffer R.I. for one month for offence punishable under Section 506 of the Indian Penal Code. The applicant is sentenced to suffer R.I. for 2 years and to pay fine of Rs. 1,00,000/- in default to suffer R.I. for 6 months for offence punishable under Section 67 of the Information Technology Act, 2000 by the Designated Judge under Protection of Children from Sexual Offences Act, 2012, for

Greater Bombay in POCSO Special Case No. 1038 of 2013 vide Judgment and Order dated 29th March, 2016.

3 Perused the evidence. It appears from the record that the applicant happens to be the Jeweller residing in the same area as that of the victim. The principal allegation against the accused applicant is that he used to call upon the victim who is hardly 8 years old alongwith her friends and used to show her pornographic clips on his cell phone and sexually abused the girls. It appears from the evidence that one of the victim had informed about this incident to one teacher namely Sunita. The said teacher had passed on the information to one Rajendra who happens to be the member Aasara organisation. The said information was passed on to one person namely Melissa who happens to be the member of International Justice Mission (IJM).

4 On receipt of the said information P.W. 1 Amrit Kaur had approached to the Assistant Commissioner of Police and informed about the alleged acts meted out to the complainant. The Additional

Commissioner of Police by oral orders had nominated a woman police officer Ms. Rashmi Jadhav from L.T. Marg Police Station, API Kalyan Phulari from South Control Room and PSI Bhalerao from J.J. Marg Police Station. The Additional Commissioner of Police had not stopped at that, but had also directed the Liaison officer of IJM Amrit Kaur to take 3 girls to Hanging Garden and had facilitated meeting of alleged victim with all the police officers.

5 Upon perusal of the record it further appears that Sunita whose full name is not known had brought 3 girls to meet the police officers and representative and office bearers of IJM. It appears that the girls had disclosed about the pervert acts of the applicant to the members of IJM as well as to WPI Ms. Jadhav. Thereafter, they proceeded to V.P. Road Police Station. On the way, the girl had shown shop of the accused to the police. The police officers were doubtful about the act committed by the accused and therefore, had sent the girls for medical examination and then it was decided that on the basis of the report of the medical examination, they would take further action.

6 It is pertinent to note that the evidence on record would show that the victim was taken to hospital where she had disclosed to the doctor as follows : “alleged history of inappropriate touch around 4 times by a known person one week back under threat.” It is a sorry state of affairs that although the victim girl had complained only of inappropriate touch, the victim was referred to gynecological department and her vaginal swab was taken. There were no complaints at the relevant time. It is a matter of record that prior to registration of offence, the victim had been sent for medical examination. It is pertinent to note that the other two victims were also medically examined but their substantive sentence was not recorded. The offence was registered against the accused as Crime No. 230 of 2013 at V.P. Road Police Station and the applicant was charge-sheeted for the offence punishable under Section 376, 292, 506, 354A of the Indian Penal Code and Section 4,8, and 12 of the POCSO Act and under Section 67 of the I.T. Act on 12/10/2013.

7 It is revealed from the record that Sunita was working with Aasara Day Care Center and was looking after the small children.

Rajesh is the Manager of the said organisation. It appears that some times in the last week of September, 3 girls studying in the said school namely Sangita, Karishma and Reena, complained to Sunita that present applicant had sexually abused them. She gave the said information to Rajesh Jadhav who had approached IJM for taking advise.

8 On 27/9/2013 Amrit Kaur and Shalini had been to Asara School. On 1/10/2013 Amrit Kaur had informed the school authority that she desires to give gifts to the girls and therefore, they should be brought near Sheetal show room at Grant Road. Office bearers of IJM had taken girls to Hanging Garden, and interviewed them before police. The said statements are not on record. Amrit Kaur had informed Additional Commissioner of Police and that on the oral orders of the Additional Commissioner of Police, the police officers were to record the statement of the victim at Hanging Garden.

9 On 2/10/2013, the police had taken the victim girls into custody and had taken them to V.P. Road Police Station. Girls were

then referred to J.J. Hospital and thereafter, Amrit Kaur had lodged report at V.P. Road Police Station and then 3 girls were sent to Child Correction Home at Dongri and the present applicant was arrested.

10 It is not known as to how IJM or the police authorities could take custody of the victims and send them to children correction home without informing their parents and had withdrawn girls from the lawful custody of their parents. It appears from the record that the victims were detained in children home for almost one month. **The compilation of the paper book of the application for bail contains an application made by Ramzan Mohd. Ali Mulla, who happens to be the maternal uncle of Karishma, to Senior P.I. of the Police Station stating that the girls were detained in children home without their consent and they were directed to take custody of the girls only upon communication by the police. It is further stated in the application that upon enquiry, the victim girls had informed that they were not subjected to any sexual assault. The existence of the said application has not been challenged by the learned APP. The said application is also signed by**

Sofiya Mulla and Tanuja Sagar Yadhav. It is a sorry state of affairs that the victim girls were detained in the children home at the instance of IJM for more than one month. They could not attend school in those days. Moreover, at the time of trial, the prosecution has not examined Sunita, Rajesh Jadhav, Melissa, and also two victims Sangita and Karishma and their parents. Most of the witnesses are either police officers or the representatives of IJM.

11 P.W. 7 Rashmi Jadhav was working as PI at L.T. Marg Police Station. In her substantive evidence, she has deposed that she had disclosed in her 161 statement that the ACP had told her that one person in jewellery shop had misconducted himself. The victim had allegedly shown the accused, but no enquiry was made with him. P.W. 7 had not given any written report to P.I..

12 The sum and substance of the above mentioned observations is that the source of information to IJM by the victim girls has not been proved by adducing substantive evidence of the witnesses, who had informed about the alleged incident. It is not known as to why the

girls had not disclosed about it to their parents. The teacher had also not bothered to inform the parents about the same. The police had jumped into action on the oral report of Amrit Kaur, which was directly given to the Additional Commissioner of Police.

13 It is not known as to why in every matter, the said organisation approaches the office of the Commissioner of Police and only on the basis of oral orders, investigation is set in motion and statements of the alleged victims are recorded even prior to registration of offence. The panchas and witnesses are provided by the organisation.

14 In the present case, the allegation levelled by the victims at the threshold is of inappropriate touching the body of the victim. However, the charge-sheet was filed under Section 376 of the Indian Penal Code. The charge was framed for offence punishable under Section 4, 8 of the POCSO Act, 506 of the Indian Penal Code and under section 12 of the POCSO Act. The charge under Section 506 was not proved. The charge was framed for sexual assault on the victim namely Karishma, but the said victim was not examined. As

far as Reena is concerned, the charge was framed that she alongwith her friends were criminally intimidated with injury to their person, if they disclose the incident to anyone. Therefore, offence under Section 506 of the Indian Penal Code was registered. The prosecution had filed an application No. 59 on the basis of which additional charge under section 354 of the Indian Penal Code and Section 67A of the Information Technology Act was added.

15 We are dealing with the evidence adduced as far as the victim Karishma is concerned. It is clear that besides the allegation of touching inappropriately and showing of the pornography clip, aggravated sexual assault is not proved. The findings recorded by the Special Court needs to be reproduced here :

“in order to rely on the testimony of the child witness as only witness out of the three victim girls had deposed before this court, I need to corroborate her statement with other evidence on record. The statement of the victim girls to the medical officer which was first in point of time does not show that the accused had committed oral sex with them though there is mention of inappropriate touch. Considering the same this raises serious doubt regarding the reliability of the testimony of

the victim (P.W. 1). Though her statement regarding oral sex has been corroborated by other witnesses, namely PI Jadhav(PW-7), PI Kamthe(P.W.8), ASI Pawar(PW-9) and Metropolitan Magistrate, Mahale(PW-10), admittedly the statements of the other supporting witnesses is subsequent in time. There are some latches in the investigation, though I am not inclined to accept those latches to damage the prosecution case in totality, but the lack of consistency regarding oral sex in the statements of victims at various stages of investigation does raise doubt on the prosecution story in this regard.”

The learned Court has held that the prosecution has only proved that the victim was inappropriately touched by the present applicant.

16 The Special Court has convicted the accused under Section 67 of the Information Technology Act, for which punishment contemplated is on first conviction, imprisonment for a term which may extend to 3 years and with fine which may extend to Rs. 5 lakhs. The offence punishable under Section 354 of the Indian Penal Code contemplates punishment which is not less than one year, but which may extend to 5 years and shall also be liable to fine. Section 8

contemplates the punishment which shall not be less than 3 years, but which may extend to 5 years. The punishment contemplated under Section 10 of the POCSO Act is for a term which shall not be less than 5 years but which may extent to 7 years and shall also be liable to fine.

17 Section 77 B of Information Technology Act contemplates as follows : Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence punishable with imprisonment of three years and above shall be cognizable and the offence punishable with imprisonment of three years shall be bailable.

18 In the present case, the manner in which the investigation was initiated and propagated is doubtful. The victim has allegedly stated before the medical officer that she was touched around four times by a known person one week back. The period or time when the incident had occurred has not been disclosed. The parents were kept in dark and the IJM has taken charge of the victims. Section 12 of POCSO Act contemplates imprisonment for a term which may extend

to 3 years. In the present case, the applicant has undergone about 19 months in jail. He was enlarged on bail after recording of the substantive evidence of the victim Karishma and hence, this Court is inclined to enlarge the applicant on bail during the pendency of the appeal.

19 In several cases like the present one this Court had observed that although the State of Maharashtra has set up social service branch as well as other branch for the protection of children and to rescue woman in distress especially victims of human trafficking, the police have not taken any steps on their own. The NGO does not approach the concerned police station but in all cases upon oral orders of the Additional Commissioner of Police, Assistant Commissioner of Police or the Commissioner of Police, police are directed to conduct enquiry. The children like in the present case are taken to rescue homes without intimating their parents. The witnesses are provided by the said organisation. In fact, it is an independent duty of the police department of the State of Maharashtra and the Commissioner of Police, Mumbai as well as all

the responsible officer shall personally see into it that the NGO shall not be taken as a substitute to police department. The faith and trust of the public at large in the police department needs to be restored.

20 Taking into consideration the fact that the applicant has undergone 19 months in jail when the punishment contemplated is 3 years or to be extended up to 5 years, this Court is inclined to grant bail. Hence, the applicant deserves to be enlarged on bail.

21 Hence the following order :

ORDER

- (i) The application is allowed.
- (ii) The substantive sentence imposed upon the applicant is hereby suspended. The applicant be enlarged on bail on furnishing P.R. bond in the sum of Rs. 25,000/- and one or two sureties in the like amount.
- (iii) The applicant shall furnish his residential address and contact numbers such as cell phone numbers, landline numbers etc. to the concerned Court.

(iv) The applicant shall report to the Special Court, Greater Mumbai once in 6 months on the date specified by the concerned court. Upon failure to attend on two consecutive dates by the applicant, the prosecution is at liberty to move for cancellation of bail.

22 The Application is disposed of on the above terms.

Office to forward Copy of this order to the Commissioner of Police, Mumbai

(SMT. SADHANA S. JADHAV,J)