

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1085 of 2015

IN

CRIMINAL APPEAL NO.867 OF 2015

Sohal Faiyyazahamad Patel .. Applicant

Versus

The State of Maharashtra .. Respondent

Mr.Harshad Nimbalkar, Mr.Hrishi Ghorpade i/b Mr.Satyam Nimbalkar, Advocate for the applicant.

Mr.V.B.Konde Deshmukh, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 19th JANUARY, 2016

P.C. :

1 The applicant was prosecuted on the allegation of having committed offences punishable under Section 376IPC, 417 IPC and section 4 of Protection of Children from Sexual Offences Act (**POCSO**). After holding a trial, the learned Special Judge, Pune found him guilty only of the offence punishable under Section 4 of the POCSO, and as such, acquitted him of the other two offences. The Appeal filed by the applicant challenging his conviction and the sentence imposed upon him – which is of Rigorous Imprisonment for 5 years and a fine of Rs.10,000/- – has already been admitted. By the present application, the applicant

prays that pending the hearing and final disposal of the Appeal, the substantive sentence imposed upon him, be suspended and he be released on bail.

2 I have heard Mr.Harshad Nimbalkar, learned counsel for the applicant. I have heard Mr.V.B.Konde Deshmukh, Advocate for the respondent no.1. With their assistance, I have gone through the impugned judgment and the relevant evidence. I have gone through the evidence of the victim and that of her mother, fully.

3 The prosecution case itself was that there was love between the victim and the applicant. The mother of the victim was planning the marriage of the victim and the applicant, and for that purpose, even the parents of the applicant were contacted. The applicant had been invited by the mother of the victim to reside in their house and he was residing there. While residing there, he had sexual relations with the victim.

4 That the sexual relations between the victim and the accused were consensual, cannot be doubted even on taking a *prima facie* view of the matter. As a matter of fact, it is not in dispute.

5 The applicant has been held guilty of an offence punishable under Section 4 of the POCSO on the basis that the victim was, at the material time, below 18 years of age. The age of the victim at the material time is said to be about 17 years.

6 The learned counsel for the applicant submitted that the aspect of the age of the victim, which is the only basis for holding the appellant guilty, was not satisfactorily proved during the trial.

7 I find that the victim had given her date of birth as '25/10/1996'. The alleged incidents are said to have taken place on 23/12/2012 and thereafter. Thus, going by the date of birth of the victim, as given by the victim and her mother, the victim was below 18 years of age at the material time.

8 No document to support the claim about the date of birth of the victim, was produced during the trial. The mother of the victim, in her evidence said that the victim was born in an hospital, and that the date of her birth was registered with the Solapur Municipal Corporation. The birth certificate, or any other record, which would have supported the claim of the date of birth of the victim being 25th October 1996, was not produced.

9 The ossification test was carried out on the victim. The Medical Officer has given the following opinion about the age of the victim.

“Above 16 years, but below 18 years.”

There is substance in the contention of the learned counsel for the applicant that while accepting such opinion, the 'margin of error' is required to be kept in mind.

10 The applicant was on bail during the trial. He has been working as a 'trainee engineer'.

11 Arguable points, needing serious consideration have been raised. In the ordinary course, the Appeal cannot be taken up for final hearing within a short time.

12 Application is allowed.

13 Pending the hearing and final disposal of the Appeal, the substantive sentence imposed upon the applicant, shall stand suspended, and the applicant be released on bail in the sum of Rs.30,000/- with one surety in like amount, or two sureties in the sum of Rs.15,000/- each, on the condition that the applicant shall report to the trial court on the first Monday of each calendar month till the disposal of the Appeal.

14 Should the trial Court be closed on any given Monday on account of holiday, the applicant shall report to the trial Court on the next working day.

15 Any default on the part of the applicant in reporting to the trial Court, as directed above, shall forthwith be brought to the notice of this Court by the trial Court for further appropriate action.

(ABHAY M.THIPSAY, J)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment/Order.**