

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.444 OF 2017
IN
CRIMINAL APPEAL NO.242 OF 2017**

Mohd. Farukh Inamullah Pathan	...	Applicant / Appellant
V/s. The State of Maharashtra	...	Respondent

.....
Mr.Abdul Rab Shaikh for the applicant.
Mr.S.V. Gavand, APP for the respondent/State.
....

CORAM : A.M.BADAR J.

DATED : 27th FEBRUARY 2018.

P.C. :

1. This is an application for suspension of sentence and releasing applicant/accused on bail during the pendency of the appeal filed by him.

2. The applicant/accused is convicted of offence punishable under section 342, 354 and 506 of IPC as well as under section 8 and 10 of the Protection of Children from Sexual Offences Act, 2012. (POCSO for the sake of brevity.)

3. He has been sentenced to suffer simple imprisonment for

five years apart from imposing of some fine and default payment of fine for offence punishable under section 10 of POCSO. On other count, lesser sentence is imposed on her and all sentences are directed to run concurrently. Hence, there is no need to reproduce other sentences imposed on the present applicant.

4. Heard learned advocate appearing for the applicant/accused. He drew my attention to the deposition of PW1 – female child who is alleged victim of crime in question and argued that no opportunity of cross examination of this victim is granted to the present applicant thereby rendering conviction and the resultant sentence illegal. The applicant was on bail during trial and therefore he is entitled for bail. The learned APP opposed the application by supporting the impugned judgment and order of conviction and resultant sentence.

6. I have carefully considered the rival submissions and also perused copies of deposition of the prosecution witnesses. PW1 is the victim child. She was examined by the prosecution and her cross examination was deferred. Photocopy of the Roznama maintained by the learned Trial Court shows that on 7th February, 2015, the learned Advocate for the appellant/applicant/accused was absent and even PW1 victim female child was absent. The appellant/applicant/accused applied for adjournment. The learned Trial Court refused to adjourn the matter and insisted the

appellant/applicant/accused to cross examine the victim in person. As the appellant/applicant/accused could not cross-examine the victim, evidence of PW1 came to be closed. This happened when even the PW1 was absent as seen from the Roznama.

7. *Prima facie* the procedure adopted by the learned Trial Court in closing evidence of the victim without cross examining and that too in absence of PW1 is *per se* illegal. Liberty of the subject cannot be taken without following due process of law. Mandate of Article 21 of the Constitution of India is totally missed by the learned Trial Judge by closing evidence of the PW1 without according opportunity to the appellant/applicant/accused to cross examine the PW1 and that too when the PW1 was absent. The appropriate course would have been to appoint Advocate at the costs of the State to represent applicant / accused, then getting PW1 victim cross-examined by such an appointed Advocate.

8. In this view of the matter, as the applicant/appellant/accused was on bail during the pendency of the trial and he has not mis-used his liberty, the application deserves to be allowed. Therefore, the following order:

::ORDER:

- (i) Application is allowed.
- (ii) Substantial sentence of imprisonment imposed on the

applicant/accused is suspended and he is directed to be released on bail on his executing P.R. Bond in the sum of Rs.15,000/- and on furnishing surety in the like amount.

- (iii) As a condition of this order, the applicant should not contact the alleged victim of crime in question as well as her relatives in any manner.
- (iv) He should not indulge in commission of similar offences in future.
- (v) The application is disposed of.

(A.M.BADAR J.)