

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO. 495 OF 2018
IN
CRIMINAL APPEAL NO.332 OF 2018**

Nasir Hussain Shamsher Ali Hashmi ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

Mr.Shyam B. Rajbhar for the applicant.

Mr.S.V. Gavand, APP for the respondent/State.

CORAM : A.M.BADAR J.

DATED : 24th AUGUST 2018.

P.C. :

1. By this application, the applicant / convicted accused is seeking an his enlargement on bail during pendency of the appeal filed by him. The applicant / accused has been convicted of offences punishable under Section 377, 354, 354(A), 352 of the Indian Penal Code read with Section 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for Short “POCSO Act).

For the offences punishable under Section 377 of the Indian Penal Code and Section 6 of the POCSO Act, the learned Trial Court was pleased to sentence the applicant/accused for rigorous imprisonment for 20 years apart from direction to pay fine of Rs.50,000/- in default to undergo further rigorous imprisonment for six months. For the offence punishable under Section 354 of the Indian Penal Code and under Sections 10 of the POCSO Act, the applicant/accused is sentenced to suffer rigorous imprisonment for five years apart from payment of fine of Rs.25,000/- and default sentence of imprisonment for three months.

2. Heard the learned Counsel appearing for the applicant/accused. He argued that medical evidence is not corroborating the version of the victim. The prosecution has not procured the report of DNA test. It is further argued that the charge has been altered during the course of delivering the Judgment and witnesses were not recalled thereafter. It is further argued that mentioned of Section 377 of the Indian Penal Code is not finding its place in Section 42 of the POCSO Act and therefore

the learned Trial Court ought not to have sentenced the applicant for 20 years rigorous imprisonment. The learned Advocate appearing for the applicant further argued that father of the victim children was not examined by the prosecution and about 13 witnesses were dropped by the prosecution. The trial was conducted by video conference. The defence Advocate was not present at least on three occasions and therefore the applicant entitled for bail.

3. The learned Additional Public Prosecutor drew my attention to the evidence of PW1 Sufiyan victim male child and PW2 Farhad victim female child and argued that their evidence is supported by evidence of PW7 Dr.Sachin Sudarshan Patil. Therefore, the applicant is not entitled for bail.

4. I have considered the rival submission also perused the material placed on record including the impugned Judgment and Order of conviction and copies of deposition witnesses.

5. PW3 Shabana had lodged a report which has resulted in registration of the crime in question. She disclosed that her two

minor children viz. PW1 Sufiyan victim male child and PW2 Farhad victim female child used to go to Madarsa Mehfil-e-Jahangiriya where the applicant used to work as teacher. She reported that her children were used to be sexually exploited by the applicant who was working as teacher in that Madarsa.

6. It is seen from the record that the learned Trial Court has framed charges for offences punishable under Sections 377, 354(A), 342 of the Indian Penal Code as well as under Sections 4, 8 and 12 of the POCSO Act. The charge at Exh.6 discloses that almost the entire prosecution case including penetrative sexual assault on PW2 victim female child as well as carnal intercourse against the order of nature / penetrative sexual assault on PW1 victim male child. The charge contains an averment that female victim child was below 12 years of age at the time of commission of alleged offence.

7. Section 215 of the Criminal Procedure Code deals with effect of error in framing charge. Section 216 of the Criminal Procedure Code deals with alteration of charge. Section 464 of the Criminal

Procedure Code deals with effect of omission or absence or error in charge. It is well settled that error in framing charge is of no consequence unless accused was in fact misled by such error or omission. Similarly, no finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on ground of any error or omission or irregularity in the charge unless failure of justice occasions thereby. Charge at Exh.6 in case in hand is descriptive mentioning the allegations levelled against the applicant and therefore at this stage, alteration of charge at the time of passing of Judgment is of no consequence.

8. PW1 male victim child in his deposition has stated that Maulana named Nasir Hussain Shamsherali Hashmi / the applicant herein used to teach him at Madarsa Mehfil-e-Jahangiriya at Wadala. He further deposed that when all children used to go to their houses, the applicant/accused used to show him obscene video clips on the laptop. Then he used to move his hands on the penis of the victim male child. This witness had also

deposed about penetrative sexual assault on him by the applicant/accused by indulging in carnal intercourse against the order of nature.

9. PW1 male victim child was examined by PW7 Dr.Sachin Sudarshan Patil and evidence of this medical officer shows that he found tear of 6 O'clock position with erosion at the anus of the PW1 male victim child.

10. PW2 is the female victim child. It has come in her evidence that she used to attend Madarsa Mehfil-e-Jahangiriya where the applicant/accused used to teach her. The minor victim female child also used to sweep in Madarsa and to serve tea thereat. The applicant, as per her version used to teach her Arbi language. She deposed that the applicant/accused used to caught her from behind. He used to utter words "I love you" in her year. He used to show her obscene films on the laptop. She stated that on one occasion, when she was at the end of Eid rally, the applicant/accused inserted his hand in her private part.

11. PW7 Dr.Sachin Sudarshan Patil did not find any injury on the person of PW2 female victim child. At this stage, this aspect is not deceived because medical examination was not soon after the incident. Moreover, absence of injuries on part of the body of the victim are of no consequence if evidence of such victim of sexual offence is found trustworthy and reliable.

12. PW1 male victim child and PW2 female victim child are cross-examined at length by the learned defence Counsel. Similarly, PW3 Shabana, mother of the victim children and the first informant in this case is also cross-examined thoroughly. PW7 Dr.Sachin Sudarshan Patil is also cross-examined by the learned defence Counsel. *Prima facie* it is difficult to record a finding at this stage, to the effect that evidence of these four witnesses which is tested on the tough stone of the cross-examination is untrustworthy or unreliable. Considering the nature of offence and evidence on record, non furnishing of the report of DNA is of no consequence. Similarly, when available evidence is sufficient, non examination of other witnesses though

available is of no assistance to the defence.

13. Evidence produced on record during the trial shows that there was penetrative sexual assault on two victim children, one of which was below 12 years of age by the applicant who was working as Maulana at the madarsa where they used to go for learning. Considering the nature of offence and the manner in which it is committed, no case for grant of bail is made out even though the applicant is behind the bar from 12th September, 2015. The application is therefore rejected.

Vina
Arvind
Khadpe

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(A.M.BADAR J.)