

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.1504 OF 2018
IN**

CRIMINAL APPEAL NO.1096 OF 2018

WITH

**CRIMINAL APPLICATION NO.1505 OF 2018
IN**

CRIMINAL APPEAL NO.1096 OF 2018

Mohammed Salim Mohd. Shamim Khan **...Applicant**

V/s.

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

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Mr. Niranjan Mundargi i/b. J.B. Mishra for the Applicant.

Mr. P.H. Gaikwad Patil, APP for the Respondent/State.

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CORAM : A.M.BADAR, J.

DATED : 9th OCTOBER 2018.

P.C. :

1. These are applications for suspension of sentence and releasing the applicant/accused on bail during pendency of the appeal filed by him.

2. The applicant/accused is convicted for the offences

punishable under Sections 376 and 354 read with 34 of the Indian Penal Code. He is also convicted for the offences punishable under Section 4 read with 8, 12 and 17 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' for the sake of brevity). Different sentences of imprisonment are imposed on the applicant/accused and the learned trial Court directed that all the substantive sentences shall run concurrently. For the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 read with 17 of the POCSO Act, the applicant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from payment of Rs.1000/- as fine, on each count. Other sentences imposed on the applicant/accused are lessor and therefore, it is not necessary to mention the same in this order.

3. Heard the learned counsel appearing for the applicant/accused No.6. He argued that the victim female child left her house on 28th May 2013 and came back on 30th May 2013. In between, her father/PW2 had lodged the FIR on 28th May 2013, in which the applicant/accused was not named. First statement of

the victim female child was recorded on 30th May 2013. She did not implicate the applicant/accused in any manner on that day. Still evidence of the Investigating Officer/PW5 shows that the applicant/accused was arrested on 30th May 2013. The learned Counsel further argued that on 31st May 2013, supplementary statement of the victim female child/PW1 came to be recorded, wherein she alleged that the applicant/accused had raped on her. Her averments according to the learned Counsel for the applicant/accused, are improbable. It is further argued that in the history given to PW9 Dr. Baban Shinde, name of the applicant/accused is not figured.

4. The learned APP opposed the application by arguing that statement of the victim child is important.

5. I have considered the submissions so advanced and perused the material placed on record including copies of deposition of prosecution witnesses.

6. PW1 is the victim female child. PW2 Mangesh Yelve is her father. They alongwith other family members were residing in a small house. In the mezzanine floor of the same house, the

applicant/accused alongwith his wife and two children were residing. That house was in the slum area of Indira Nagar, Khar. Evidence of the Investigating Officer PW5 Reshma Momin shows that house of the applicant/accused admeasuring 10x15 ft. and the ground floor where the victim alongwith her family were residing, was even smaller in size than the room of the applicant/accused.

7. As per version of the female child/PW1, her love affair with one Deepak Shamin was not approved by her family members and they had scolded her. She then decided to commit suicide. She deposed that therefore she left the house in the night intervening 27th and 28th May 2013 and came out of her house. She testified that even the applicant/accused also came out of the house, hugged her, kissed her and took her to his house at the mezzanine floor where his wife and children were sleeping. He then committed raped on her. The victim child/PW1 further deposed that then she again left her house at 3.00 a.m. and joined company of few boys who offered their friendship to her. She claimed some of them committed rape on her.

8. PW5 Reshma Momin, Investigating Officer made it clear that first statement of the victim female child was recorded on 30th May 2013, in which she has not attributed any role to the applicant. This witness further admitted that at about 8.15 p.m. of 30th May 2013, the applicant/accused was arrested by police. Evidence of PW5 Reshma Momin, PSI further shows that on the next date i.e. on 31st May 2013 supplementary statement of the victim female child/PW1 was recorded, wherein she deposed that the applicant/accused committed rape on her.

9. Evidence of PW2 Mangesh Yelve/father of the victim child shows that on 28th and 29th May 2013 wife of the applicant/accused was brought to the police station. This was obviously because this witness had lodged FIR n 28th May 2013 in respect of kidnapping the victim female child. Evidence of PW2 Mangesh Yelve shows that as wife of the applicant was brought to the police station, neighbours came to his house and quarreled with him.

10. The victim female child was medically examined by PW9 Dr.Baban Shinde of the police hospital on 30th May 2013. Though

the victim child had disclosed the history to this medical officer, she did not name the applicant as a person who had committed rape on her.

11. In other words, without there being any averment of rape against the applicant, he was arrested by police on 30th May 2013. First version of the victim child recorded on that day was not naming him. Subsequent to his arrest, supplementary statement of the victim recorded. This was done on the next date of the arrest. Then role of rape is attributed to the applicant/accused.

12. As stated in forgoing para, area of the house of the applicant was 10x15 ft. House of the victim female child was having much lessor area. The applicant was residing in the mezzanine floor of the same house. Family of the victim female child was sleeping in the ground floor whereas wife and children of the applicant/accused were sleeping in the mezzanine floor. Claim of the victim female child is to the effect that the applicant brought her inside the house, took her by a ladder to the mezzanine floor where his family members were sleeping and had committed rape on her in the small area where his wife and

children were also sleeping. Probability factor of such incident will have to be examined at the time of final hearing of the matter.

13. In the wake of this position of evidence against the applicant/accused, considering the fact that he was on bail during the pendency of the appeal and had not misused his liberty, he deserves to be released on bail. Therefore, the order;

- : ORDER : -

- (i) The applications are allowed.
- (ii) The substantive 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 of Rs.15,000/- and on furnishing surety in the like amount.
- (iii) As a condition of this order, the applicant/accused should not reside in the Indira Nagar area, Khar, Mumbai wherein the victim female child and her family members are residing.
- (iv) As a condition of this Order, the applicant/accused should not contact the victim female child or her family members in any manner during the pendency of the appeal.
- (v) Failure to abide these conditions shall entail cancellation of bail granted to the applicant/accused.
- (vi) The applications are disposed of accordingly.

(A.M.BADAR J.)