

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.1210 OF 2016
IN
CRIMINAL APPEAL NO.371 OF 2016**

Vaibhav Vyankatesh Deshak ... **Applicant**
V/s.

The State of Maharashtra .. **Respondent**

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Mr.Hrishikesh Mundargi i/b. Mr.Jayant J. Bardeskar, Advocate for
the Applicant.

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

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CORAM : A.M.BADAR J.

DATED : 24th JANUARY 2018.

P.C. :

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

2 The applicant/accused has been convicted of the offence punishable under Section 376 of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012. He has been sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine and sentence in default for these offences.

3 Heard the learned Advocate appearing for the applicant/accused. He submitted that according to the prosecution case, the alleged victim had been to the photo shop for snapping a photograph for pasting it on the application for scholarship. This incident in question took place on 11/05/2015 when there was summer vacation to the school. Therefore, the prosecution case is improbable. It is further argued that evidence of P.W.No.4 Sameer shows that two persons were present in the photo studio and, therefore, possibility of mistaken identification of the applicant is there. Parents of the alleged minor victim of the crime in question have not identified the applicant/accused as perpetrator of the crime in question. The learned Advocate further argued that both parents of the alleged victim have not deposed that the victim vomited after she came to the house. By drawing my attention to the evidence of P.W.No.3/mother of the alleged victim of the crime in question, the learned Advocate submitted that her post-event conduct makes her evidence strange. She had been to the photo studio for getting back the photograph. At that time, an amount of Rs.10/- was due and payable to the photographer. It is further argued that clothes of the accused including his underwear and pant were seized but what is sent to the chemical analysis was only his pant. With this, the learned Advocate submitted that as the applicant was on bail during pendency of the trial and as he had undergone sentence of about three years, he be released on bail.

4 The learned Additional Public Prosecutor opposed the application by drawing my attention to the evidence of the applicant/accused, who had examined himself as defence witness and submitted that there is no question of mistaken identity as the applicant himself deposed that he had snapped the photograph of the minor female child. The learned APP further draw my attention to the evidence of the minor female victim of the crime in question.

5 I have carefully considered the rival submissions and also perused the impugned Judgment and Order of conviction as well as copies of depositions of prosecution witnesses.

6 The minor female victim of the crime in question is a eight year old female child. She was taking education in the 3rd Std. when she had appeared before the Court. The incident took place on 11/05/2015. Version of the minor female child is to the effect that she had been to the photo studio with Sameer and Abid. The applicant/accused, who was the photographer, had put his penis in her mouth when she had been there for getting her photographs. She deposed that on returning to the house she vomited.

7 Father of the minor female victim was not present either at the photo studio or at the house. His evidence is to the

effect that he returned her home subsequently and went to the photo studio. Mother of the minor female child has categorically deposed that there minor female child had vomited. This is also reiterated in her cross examination by the mother of the female child. That apart, this aspect is inconsequential.

8 The applicant had examined himself in his defence. He has deposed that on 11/05/2015, two boys accompanied by one girl came to his photo studio and he had snapped the photograph of the girl.

9 P W.No.4 Sameer had deposed that he had accompanied the minor female child to the photo studio. Abid was with them. The applicant asked them to wait outside and took the minor female child inside the room and closed the door. He stated that the applicant was not opening the door. Subsequently, it was opened and while returning home the minor female child was vomiting. While in the dock, P.W.No.4 Sameer as well as the minor female victim have identified the applicant. Prima facie, at this stage, considering this evidence as well as statement on oath of the applicant makes it difficult to digest the theory if mistaken identity.

10 Though it was sought to be demonstrated that they was a reason of vacating the photo studio by the employer of the

applicant, it is seen that the applicant was not possessor of the photo studio. D W.2 Sushant Shinde was possessing that photo studio owned by Yasmin. D W.No.Sushant Shinde has not even deposed that the applicant used to hold control over the said photo studio. Nothing has come on record from cross examination of prosecutrix as well as other prosecution witnesses to point out that they were holding grudge against the applicant leading to his false implication.

11 The prosecutrix has not deposed that the applicant had ejaculated inside her mouth and therefore which clothes were sent for chemical analysis does not bear any importance at this stage. Considering the fact that the case in hand is that of penetrative sexual assault on a familie child below 12 years of age, no case for bail is made out.

12 The application is therefore rejected.

13 Hearing of the Appeal is expedited.

(A.M.BADAR J.)