

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.1402 OF 2017
IN
CRIMINAL APPEAL NO.776 OF 2017**

Mohd. Raja Mohd. Islam Dhuniya ... **Applicant**
V/s.

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

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Ms.Saima Ansari with Mr.Khan Fakhruddin, Advocate for the Applicant.

Mr.V.V.Gangurde, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 22nd JANUARY 2018.

P.C. :

1 This is an application for suspension of sentence and releasing the applicant/accused on bail during pendency of the appeal filed by him, which has already admitted for final hearing

2 The applicant/accused is convicted of the offence punishable under Section 6 read with Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POSCO Act' for the sake of brevity) and he is sentenced to suffer rigorous imprisonment for 10 years apart from directing him to pay fine. For the offence punishable under

Section 506 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for six months. Though he is convicted for the offence punishable under Section 376 of the Indian Penal Code, the learned trial Court did not impose any separate punishment on the applicant/accused in the wake of sentencing him under the POCSO Act on the said count.

3 Heard the learned Advocate appearing for the applicant/accused. He vehemently argued that P.W.No.1, who is alleged first victim of the crime in question though narrated the incident has failed to identify the accused as perpetrator of the crime in question. The learned Advocate further argued that P.W.No.2 Kalpana is the mother of the P.W.No.1. Her evidence is of no assistance to the prosecution because the alleged victim of the crime in question has not identified the applicant. The learned Advocate further argued that there is unexplained delay in lodging the FIR of the incident in question which allegedly took place on 15/12/2014. The learned Advocate further pointed out that evidence of P.W.No.2 Kalpana shows that her daughter was not weeping when she came back. This witness had not decided to lodge report to the police even after knowing the alleged incident. It is further argued by the learned Advocate for the applicant that alleged second victim of the crime in question is the P.W.No.3. By taking me through the evidence of the P.W.No.3, the learned Advocate further argued that she has not supported the case of the

prosecution on material aspects as she had not volunteered to disclose the incident, but just nodded her head in affirmative when the leading question was put to her by the prosecutor. This victim has not identified the applicant/accused. The learned Advocate further argued that even her mother P.W.No.4 Mamta has failed to identify the applicant/accused and therefore, the learned trial Court erred in convicting the applicant/accused. As such, in submission of the learned Advocate for the applicant, he is entitled for bail. My attention was also drawn to the evidence of P.W.No.7 Dr.Kalyani Kale in order to point out that neither the victim nor her mother had reported history of subjective penetrative sexual assault or unnatural sexual assault on the victim/P.W.No.3. The learned Advocate further argued that the reports of medical examination of both the alleged victim are negative. It is further argued that evidence of the prosecution suffers from infirmities, improvements and omissions, which are duly proved through the evidence of Investigating Officer Ashwini Jadhav.

4 The learned Additional Public Prosecutor opposed the application by drawing my attention to the evidence of P.W.No.2 Kalpana to demonstrate that she has duly identified the applicant/accused and she has deposed about what her minor female child has disclosed to her. The learned Additional Public Prosecutor relied on evidence of sister of the P.W.No.1 to demonstrate that the P.W.No.1 was taken by the applicant/accused.

5 In reply, the learned Advocate appearing for the applicant drew my attention to the grounds raised in the application and submitted that unfair trial was granted to the applicant/accused as evidence of sister of the P.W.No.1 was recorded in his absence. The said witness has attended the Court at earlier occasion and had seen the applicant/accused. The learned Advocate for the applicant further argued that even at the time of arrest of the applicant/accused he was not having mustache as per arrest panchanama.

6 I have carefully considered the rival submissions and also perused the entire evidence.

7 *Prima facie*, it is seen that the evidence of the P.W.No.3, who is alleged second victim of the crime in question as well as evidence of her mother i.e. P.W.No.4 Mamta is not of much assistance to the prosecution as neither of these two witnesses have identified the applicant/accused as perpetrator of the crime in question.

8 The P.W.No.1 has disclosed the incident by stating that at the time of the incident, Raja Uncle had taken her in the car and licked her vagina. The witness, at the time of the incident, as seen from the prosecution case, was of four and half years old minor female child. She has further deposed that she has disclosed the

incident to her mother. While in the witness box, the P.W.No.1 could not identify the applicant/accused as the perpetrator of the crime in question, but while answering question No.68, put to her in cross-examination, she has stated that Raja Uncle was looking like the accused in the dock.

9 Necessary explanation is found in evidence of P.W.No.2 Kalpana – mother of the P.W.No.1. In paragraph 10 of her deposition she has stated that at the time of the incident, the accused was keeping mustache and was looking different. This witness has stated that now the accused is looking weak and has kept thin and small mustache.

10 P.W.No.2 Kalpana in her evidence narrated what she heard from her minor female child i.e. the P.W.No.1. As seen from her evidence, minor female child/P.W.No.1 deposed that the applicant has licked her vagina. This evidence is proving former statement made by P.W.No.1 to the P.W.No.2 Mamta and cannot be said to be hearsay evidence in the wake of provisions of Section 157 of the Evidence Act. P.W.No.6 Radhika is elder sister of the P.W.No.1. She has also proved former statement of the P.W.No.1 made to her soon after the incident and that statement is licking of the vagina of the P.W.No.1 by the present applicant. This witness has also identified the applicant/accused while in the witness box. At this stage, it cannot be said that recording of evidence of P.W.No.6 in absence of the learned Advocate for the

applicant/accused by the learned trial Court amounts to giving unfair trial to the applicant/accused. Opportunity of cross-examining the P.W.No.6 was given to the learned Advocate for the applicant/accused.

11 P.W.No.7 Dr.Kalyani Kale had examined both alleged minor victims in the crime in question. So far as the P.W.No.1 is concerned, P.W.No.7 Dr.Kalyani Kale has deposed that the P.W.No.1 had given history of licking her vagina by the present applicant/accused.

12 Section 3 of the POCSO Act deals with the penetrative sexual assault and applying mouth to the vagina of the child also amounts to penetrative sexual assault. Considering the evidence against the present applicant as discussed *supra* no case for grant of bail is made out.

13 The application is rejected.

14 Considering the fact that the applicant is behind bars since the year 2014, hearing of the appeal is expedited.

15 Parties are at liberty to mention the matter as soon as the paper book is prepared or they may chose to file the private paper book.

(A.M.BADAR J.)