

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 806 OF 2019
IN
CRIMINAL APPEAL NO. 1064 OF 2019

Kalim Attarali Shaikh ... Appellant

V/s.

The State of Maharashtra and Anr. ... Respondents

Mr. Kushal Mor for the Appellant/Applicant.

Mr.Y.M. Nakhwa -APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J
DATED : 14TH AUGUST, 2019.

P.C. :

1. Heard.
2. This is an application filed under Section 389 of Cr.P.C. The applicant herein is seeking suspension of substantive sentence imposed upon the applicant by the Additional Sessions Judge, Designated Judge, under Protection of Children from Sexual Offences Act, 2012, Greater Bombay, in POCSO Spl. Case No. 1094 of 2013, vide judgment and order dated 15th February, 2017 thereby convicted the applicant for the offences punishable under Section 354 of the Indian Penal Code and sentenced to suffer S.I. for one year and to pay a fine of Rs. 1,000/-, in default, he is further sentenced to suffer S.I. for one month. He is also convicted for the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 and sentenced

to suffer S.I. for five years and to pay a fine of Rs. 5,000/-, in default, he is further sentenced to suffer S.I. for one month.

3. The sentence imposed upon him is short term sentence. The applicant was on bail during the pendency of the trial but he is in custody since 15th February 2017. The advocate is appointed through legal aid. Perused the evidence of the material witnesses including the victim who was five years old. It appears from the evidence that the accused had rather committed an offence punishable under section 7 of the Protection of Children Protection of Children from Sexual Offences Act, 2012 and the allegations against the accused appellant are that of touching the vagina of the child and attempting to kiss her with sexual intention. The sentence contemplated under section 8 of Protection of Children from Sexual Offences Act, 2012 for the offence committed under section 7 not less than 3 years but which may extend to 5 years. However, it appears that the Trial Court was of the opinion that the victim had not identified the accused before the Court. However, it appears that during the course of recording evidence, the mother of the victim who was present in the Court hall had directed the victim not to identify the accused.

4. In paragraph 29 of the judgment the learned Trial Court has observed that 'though the victim and the informant had not identified the accused in court, but their demeanor and evidence of the other witnesses as to the place where the accused was residing at the relevant time' could be significant to hold him guilty under section 10 of the POCSO Act. This Court cannot be oblivious of the fact that the applicant has been in custody since 15th of February 2017 and during the trial he was in custody for six months. The applicant was granted

bail after six months. Hence, he has almost undergone 3 years in custody. Since he was entitled to set off. In view of the above discussion, we pass the following order:-

ORDER

- i) The Criminal Application is allowed.
- ii) The substantive sentence imposed upon the applicant vide judgment and order dated 15th February, 2017 by the Additional Sessions Judge, Designated Judge under POCSO, Greater Bombay is hereby suspended.
- iii) The applicant be enlarged on bail on furnishing P.R. bonds in the sum of Rs.15,000/- (Rupees Fifteen Thousand Only) and one or more local sureties in the like amount.
- iv) The applicant shall not reside nor visit within the jurisdiction of Shivaji Nagar Police Station, Mumbai, more particularly, Govandi, Mumbai for a period of one year from the date of he being released.
- v) The applicant shall cause his presence before the Additional Sessions Judge, Designated Judge under POCSO, Greater Bombay once in six months on the date assigned by the the Designated Judge, Greater Bombay.
- vi) Upon failure to attend any two consecutive dates, the the learned the Additional Sessions Judge, Designated Judge under POCSO, Greater Bombay, shall make report to the High Court and the prosecution would be at liberty to seek cancellation of bail.

vii) The learned counsel is appointed through legal aid and hence he is entitled to the professional fees as per the rules paid by High Court Legal Aid Services Committee, Mumbai within three months.

viii) The application stands disposed of.

5. Parties to act on an authenticated copy of this order.

(SMT. SADHANA S. JADHAV, J)