

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 214 OF 2019
IN
CRIMINAL APPEAL NO.1417 OF 2019**

Javed Salim Pathan

...Applicant

Versus

1.The State of Maharashtra
2. Santoshi Parmeshwar Bolde

...Respondents

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Ms. Jayshree Tripathi, Advocate for the Applicant.
Mr. A. R. Kapadnis for the Respondent – State.
Ms. Deepa S. Amati, Amicus Curie for Respondent No. 2.

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**CORAM : PRAKASH D. NAIK, J.
DATE : 14th OCTOBER, 2020.**

PC :

1. This is an application for the suspension of sentence of imprisonment imposed vide Judgment and Order dated 19th April, 2018 passed by Additional Sessions Judge, Solapur in Sessions Case No. 149 of 2016 during the pendency of Criminal Appeal No. 1417 of 2019.

2. The applicant is convicted for the offence punishable under Section 4 of Protection of Children from Sexual Offences, Act 2012 (“POCSO” ACT) and sentenced to suffer rigorous imprisonment for ten years. He is also convicted for the offence punishable under Sections 363 and 366-A of Indian Penal Code, 1860 (“IPC” for short)

and sentenced to suffer imprisonment for two years, one year and four years respectively. The applicant is further convicted for the offence punishable under Section 376(2) (i) of IPC but no separate sentence is awarded. The substantive sentences were directed to run concurrently.

3. Notice was served to respondent No.2. Report submitted by police with regards to the service upon the respondent No.2 is placed on record. The report indicated that the parents of respondent No.2 had requested that they may be represented by advocate through legal aid. Hence, Ms. Deepa Amati was appointed as Amicus Curiae vide Order dated 30th September, 2020 to represent respondent No.2.

4. The prosecutions case is that, the victim was aged about 15 years at the time of incident. On 12th January, 2016 she did not return home after attending stitching classes. The father of victim came to know from friend of victim that the victim and the accused who are resident of same area were acquainted with each other and they had eloped. Complaint was lodged for the offence under Sections 363, 366-A of IPC. The victim was traced on 13th January, 2016. Her statement was recorded. She stated that the accused enticed her by saying that he loves her and wants to marry with her.

She was taken to his friend's house at Solapur. Accused committed sexual intercourse with her. On the next day, the victim and the accused came to know that complaint was lodged by victim's parents, hence both of them visited Ashok Chowk Police Chowky. Section 376 of IPC and Section 4 of POCSO Act were added. Accused was arrested on 14th January, 2016.

5. Learned advocate for the applicant submitted that the relationship, if any, between the accused and the victim was of consensual nature. Victim had voluntarily accompanied accused. Applicant is in custody for a period of about four years nine months. The statement of the victim recorded under Section 164 of Code of Criminal Procedure, 1973 ("Cr.PC" for short) was overlooked. Victim has given different story in her evidence. Accused and the victim were known to each other. They were having love affair. Victim's parents were planning to arrange the victim's marriage against her wish with man, who was much elder to her and she was against the said marriage. Learned advocate relied upon the order passed by this Court in Bail Application No. 1471 of 2019, wherein bail was granted to the convict, who was sentenced to imprisonment for the offences punishable under Section 376 of IPC and Section 4 of POCSO Act, on the ground that there was relationship between the accused and the victim. Victim was not interested in lodging complaint against the

accused. Learned advocate further relied upon the order passed by this Court in Bail Application No. 2632 of 2019, granting bail to the accused, considering the fact that, victim who was minor, had left the house on her own. She had surrendered to physical desire of the accused out of love and affection for him.

6. Learned APP submitted that the offence is of serious nature. The applicant has been convicted for the offence under the POCSO, Act. Provisions of Section 29 and 30 of the POCSO Act are invoked against the applicant. The charges against the applicant are proved. Victim was minor. Her consent was immaterial. Accused had enticed her and had sexual relationship with her. Learned advocate Ms. Deepa S. Amati appointed to represent respondent No.2 opposed application for suspension of sentence. She reiterated the submissions of learned APP. It is submitted that even if victim has consented, she was minor aged about 15 years and her consent cannot absolve the accused from offence. She was threatened by the accused to accompany her. The charges are proved against the accused.

7. Applicant is in custody from 14th January, 2016 i.e. for a period of four years nine months. The evidence on record indicates that the victim was aged about 15 years at time of incident. She has

deposed that the accused was residing in the same locality and she was acquainted with him. On 13th January, 2016 she went for stitching class. She decided to go out with her friend Sonali. Accused came there. Sonali and accused waiting for her to go out. She refused to join them. Accused told her that if she does not join them, he will make show. Victim was frightened and accompanied him on his motorcycle. Sonali was also with them. Thereafter, Sonali left their company. Victim proceeded with accused on his motorcycle. He parked his motorcycle and both of them boarded auto rickshaw. She was threatened, as she was not willing to sit in auto rickshaw. Accused took her to his friend's house. Thereafter, she was taken to house of another friend. Accused committed sexual intercourse with her. In the morning, accused took the victim to his another friend's house. Thereafter both of them went to police chowki since accused received phone call that victim's mother has lodged complaint. Statement was recorded by police. Victim was taken for medical examination. The victim has stated in cross-examination that both were acquainted with each other. This fact is known to all in the area. On 11th January, 2016 she and her parents had proceeded to see the proposal. The boy was aged about 26 years old. She had refused to accept the said proposal, as the boy was 26 years old. The word forcibly is not mentioned in the statement before the

Magistrate. She had stated all the facts before the police and Magistrate while recording statement. However, all details are not mentioned in her statement. PW-7 has stated that he has not investigated the places visited by accused and victim. Thus from the evidence, it appears that the victim and the applicant were closely acquainted with each other. After learning about the complaint filed by the parents of the victim, they had approached the concerned police station. There are several omissions in the evidence of the victim. PW-6, Medical Officer has stated that she had given her opinion as evidence of sexual intercourse/assault cannot be ruled out and final opinion is kept pending till receipt of FSL. The applicant is in custody for substantial period. Case for suspending sentence of imprisonment is made out.

8. Hence, I pass the following order:

ORDER

- i) The sentence of imprisonment awarded by Judgment and Order dated 19th April, 2018 passed by Additional Sessions Judge, Solapur in Sessions Case No. 149 of 2016, is suspended during pendency of the appeal against conviction, preferred by the applicant before this Court. The

applicant is directed to be released on bail on furnishing P.R. bond in the sum of Rs.25,000/- (Twenty Five Thousand) with one or more sureties in the like amount;

- ii) The applicant shall report concerned police station once in a month on every first Saturday between 11.00 am. to 1.00 pm. till further order;
- iii) The High Court Legal Aid Committee shall pay professional fees of learned advocate Ms. Deepa Amati in accordance with the rules.
- iv) Interim Application No. 214 of 2019, stands disposed of accordingly.

(PRAKASH D. NAIK, J.)