

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

**CRIMINAL APPLICATION NO. 1108 OF 2019
IN
CRIMINAL APPEAL NO. 942 OF 2019**

Shahnawaz Rehman Shaikh .. Applicant

v/s.

The State of Maharashtra & Anr. .. Respondents

Ms. Anjali Patil a/w Mr. Aashay Topiwala for the applicant
Ms. M.R. Tidake, APP for the respondent State

CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 14th FEBRUARY, 2020

PRONOUNCED ON : 24th FEBRUARY, 2020

P.C.

1. This is an application for bail. The applicant has been convicted by the Special Judge under POCSO Act, Dindoshi, Mumbai of an offence under Section 376(D) of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 20 years with fine of Rs.25,000/-, in default to suffer Rigorous Imprisonment for one year. He has also been convicted under Section 377 read with Section 34 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 10 years with fine of Rs.20,000/-, in default to suffer Rigorous Imprisonment for 6 months. The substantive

sentences were directed to run concurrently.

2. There is no specific prayer of suspension of substantive sentence though the learned Counsel argued on the point of suspension of sentence pending appeal.

3. On 28.09.2015 around 12.30 in the noon, the victim went to the school and returned by 6.15 p.m. Around 7.00 p.m. along with one Mukundan (juvenile in conflict with law) proceeded to attend her tuition class. After having walked some distance, the juvenile hired one rickshaw and both of them boarded the same. However, after travelling some distance, the juvenile stopped the rickshaw under the pretext that he did not possess enough money to pay the hire charges. They alighted and started walking. After some distance, the juvenile held the hand of the victim and insisted her to cross the road and then to cross the railway track. Despite resistance by the victim, the juvenile forcibly took her towards the said direction when the applicant who was known as *Papa* came over there and caught hold the hand of the victim and dragged her near Indira Nagar slum area by the side of Dahisar Railway track near

bushes. The victim tried to raise shouts, however, both of them gagged her mouth. The applicant had forcibly removed the clothes from the person of the victim and thereafter removed his pant. He inserted his penis in her vagina and at the same time the juvenile who had grasped the victim from behind, inserted his penis in the anus. Due to the severe pain, the victim made all efforts to get herself rescued from the clutches of the applicant and the juvenile but she could not as both of them had tightly grasped her from either side. At the same time, both of them were touching her private part and were talking in vulgar language. No one was there. After some time they left the victim on the spot and escaped.

4. The victim somehow could manage to put on her clothes and reached her home. She informed her mother about the said incident. Accordingly, a report came to be lodged and the Investigating Officer arrested the accused and completed the formality of investigation.

5. The learned Counsel appearing for the applicant contends that the prosecution has failed to prove the age of the victim. The offence in question occurred at around 7.00 p.m. to 7.30 p.m. and,

therefore, the identity of the applicant has not been established as he was unknown to the victim. It is contended that it is not clear from the evidence of the victim whether reference qua the accused as *Papa*, is with regard to the applicant or it was someone else. No medical history has been given to the doctor about the sexual intercourse. It is submitted that the history given by the victim and the evidence is contradictory. There are no injuries or mark of violence. There was no fresh tear of hymen, no injury to the anal portion. It is submitted that the applicant was in the custody for 4 years who has been falsely implicated in this case. The evidence is not sufficient to hold him guilty.

6. The learned Counsel further contends that the spot of the incident is near a locality where there are huts at some distance and, therefore, it is unbelievable that nobody could hear the shouts of the victim. There is no history of penovaginal intercourse. There are no independent witnesses.

7. On the other hand, the learned APP strongly opposed release of the applicant on bail by pointing out that the victim was a minor

who was studying in 10th standard at the time of incident. The learned APP has pointed out to testimony of PW-2 – mother of the victim who has clearly deposed about the age of the victim at the relevant time, which is corroborated from the evidence of PW-4 – Teacher of the School, where the victim was studying. As per the testimony of this witness, the date of birth of the victim is 7th January, 2000, meaning thereby the victim was about 16 years of age at the relevant time. The Bonafide Certificate to that effect is at Exh.25 and the School Leaving Certificate is at Exh.26.

8. The learned APP has also drawn my attention to the fact that even during the cross-examination of the victim, the defence has substantiated the fact that the applicant who was present in the Court is also known as *Papa* in the area, who is a Muslim and his surname is 'Shaikh'. Thus, there is no question of identity of the applicant. It is significant to note here that the applicant is residing in the neighbourhood.

9. The learned APP has drawn my attention to the medical evidence of the doctor which supports the testimony of the victim

and her mother. The arrest panchanama also confirms the fact that the applicant and *Papa* is one and the same person.

10. The victim in her evidence gave a vivid account of incident as to how she was subjected the forcible sexual intercourse by the applicant and the juvenile after dragging her across the railway track. She clearly testified that both of them took her near the bushes by holding her hands and when she shouted, the juvenile pressed her mouth. She further testified as to how the applicant removed her red coloured slacks and black coloured pants. He was talking with her in abusive language. The applicant removed his pants and inserted his private part in her private part while the juvenile inserted his private part in her anus and did unnatural sex. The victim felt extremely despised by the said act of the applicant and the juvenile. Thereafter, she returned home and narrated the incident to her mother. There is no effective cross of the victim barring a few minor omissions. Her mother – PW-2 corroborated her version. Her evidence remained intact.

11. PW-5 – Dr. Amrita Jain who was as a Gynecologist in J.J.

Hospital, examined the victim on 29.09.2015 and had given a history that on the earlier date as on 28.09.2015 around 7.00 p.m. while she was going to the tuition classes, her classmate (juvenile) hired a rickshaw in the midway and thereafter along with the applicant she was dragged in the jungle adjoining the railway track. She was subjected to intercourse by the applicant while the juvenile was holding her hands. The history given to the doctor further reveals that there was no history of peno-vaginal intercourse. When the victim was examined, PW-5 noticed that the hymen was torned at 6.00 O'clock with tenderness and congestion present. Anal tenderness was present. It is opined that she was subjected to sexual intercourse / assault. The tenderness on the anus was because of sexual intercourse through anus. Thus, the medical evidence corroborates the version of the victim.

12. *Prima facie*, there is strong evidence against the applicant. The learned Special Judge in the impugned order has taken into account all the facts and evidence on record. The learned trial Judge has considered the testimony of the victim and the Medical Officer in the light of the POCSO Act.

13. Having considered the respectful submissions and after going through the record, I am not inclined to release the applicant on bail by suspending the substantive sentence. This for the reason that the applicant, not only had, in a planned manner, subjected the victim to the unnatural intercourse but also is a resident in the neighbourhood. It would definitely have a serious mental and psychological impact upon the mind of the victim in case of release of the applicant on bail. From the broader probabilities and without getting swayed away by minor contradictions or insignificant discrepancies, the testimony of the victim needs to be accepted and believed. A person like applicant, if released on bail, may pose some danger to the society and also would give a wrong signal. Looking to the age of the victim and the mode and manner in which the crime has been committed, I am not inclined to grant the prayer.

14. The application is without substance and hence rejected.

(PRITHVIRAJ K. CHAVAN, J.)