

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.516 OF 2021**

**IN
CRIMINAL APPEAL NO.145 OF 2021
WITH
CRIMINAL APPEAL NO.145 OF 2021**

Arbaz Moijjuddin Shaikh

...Applicant

Versus

The State of Maharashtra & Ors.

...Respondents

....

Ms Jyoti Shahu for the Applicant.

Mr. S.V. Gavand, APP for Respondent No.1-State.

Ms Devyani Kulkarni for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 2nd SEPTEMBER, 2021.

P.C.:-

This is an application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of substantive sentence imposed by judgment dated 15/10/2020 passed by learned Special Judge, POCSO Act, Greater Bombay, in POCSO Special Case No.482 of 2015 and to enlarge the Applicant on bail.

2. The Applicant was tried for offences punishable under Sections 363 and 376 of the IPC and Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO). By the impugned judgment dated 15/10/2020, the Applicant has been held

guilty of offence under Section 363 of the IPC and sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs.5,000/- i/d to suffer further rigorous imprisonment for 3 months. The Applicant has challenged this conviction and sentence in appeal filed under Section 374 of the Code of Criminal Procedure, 1973 and filed this application for suspension of sentence pending the hearing of the appeal.

3. Heard Ms Jyoti Shahu, learned counsel for the Applicant seeks suspension on the ground that the victim and her mother have expired, that there is delay of 9 days in recording the statement of the grandmother of the victim and further that the Applicant is a married man and has a child of one and half years of age.

4. Mr. S.V. Gavand, learned APP for Respondent No.1-State and Ms Devyani Kulkarni, learned counsel for Respondent No.2 submit that the victim has expired after her evidence was recorded. It is stated that the victim was 13 years of age and that her evidence as well as the medical evidence clearly makes out a case for rape.

5. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

6. The Applicant is alleged to have committed an offence of rape on a minor girl. As per the evidence of the prosecutrix and the birth certificate, the date of birth of the prosecutrix is 23/01/2002. The material on record thus prima facie reveals that as on the date of the incident i.e. on 11/06/2015 the prosecutrix was 13 years of age and thus a child within the meaning of Section 2(d) of the POCSO Act.

7. The evidence of the prosecutrix prima facie indicates that on 11/06/2015 the Applicant forcibly took her to his friend's house at Vithalwadi and introduced her as his girlfriend. Thereafter the Applicant took her to his house. He touched her and asked her to remove her clothes. When she refused, the Applicant slapped her. The Applicant thereafter had forcible sexual intercourse with her. On the next day the Applicant dropped her at Pratiksha Nagar. She narrated the incident to her family members. FIR came to be lodged against the Applicant for kidnapping the victim and for rape /penetrative sexual assault. Upon registration of the crime, the victim was referred for medical examination. She was examined by PW5-Dr. Rajesh Dere on 13/06/2015. He has deposed that the hymen of the victim was not intact. The learned Judge has observed in para 22 of the impugned judgment that the medical certificate records that hymen injury was

present and that this supports the prosecution story of recent sexual penetrative assault. The foundational facts having been established, learned Judge invoked the statutory presumption under Section 29 of the POCSO Act and held that the Applicant has not been able to create serious doubt about the veracity of prosecution case.

8. Having considered the evidence on record, in my considered view there is prima facie evidence to prove that the Applicant had committed penetrative sexual assault on a girl, who was barely 13 years of age. The gravity of the offence and the severity of sentence would not justify suspension of sentence. Hence, the Application is dismissed.

9. However, considering the fact that the matter relates to penetrative sexual assault against a child, hearing of the appeal is expedited. Appeal be listed on final hearing board commencing from **27/09/2021**.

(SMT. ANUJA PRABHUDESSAI, J.)