

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**BAIL APPLICATION NO.2725 OF 2021**

**ASIF RAFIK SHAIKH @ AASIF MOMIN )...APPLICANT**

**V/s.**

**THE STATE OF MAHARASHTRA & ANR. )...RESPONDENTS**

Mr.Vaibhav Gaikwad, Advocate for the Applicant.

Smt.PPShinde, APP for the Respondent – State.

Ms.Devyani Kulkarni, Advocate for Respondent No.2 (Through  
Legal Aid)

**CORAM : V. G. BISHT, J.**

**RESERVED ON : 25<sup>th</sup> OCTOBER 2021  
PRONOUNCED ON : 15<sup>th</sup> NOVEMBER 2021**

**P.C. :**

1           The present application has been moved by the applicant under Section 439 of the Code of Criminal Procedure in Crime No.144 of 2020 registered with Police Station Khadak, Pune, for offences punishable under Section 376, 354B, 506 of

the Indian Penal Code (IPC) and Section 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

2           The applicant resides in the same locality wherein the victim resides. The victim, at the relevant time, was 14 years 4 months old and was a student of Class 9. The prosecution alleges that in the month of December 2020 the applicant had asked the victim 2/3 times to accompany him to which she had refused. It is further alleged that the applicant had threatened the victim that if she does not accompany him, then he would show the photographs of birthday of her and her friends to her parents.

3           The prosecution next alleges that on 8<sup>th</sup> April 2021, at about 5.30 a.m., while the victim was going to attend call of nature, the applicant all of a sudden came across her and asked where she is going and that she should accompany him. The victim, however, resisted. The prosecution further alleges that the applicant then pressed the mouth of the victim and dragged

her towards a tin shed. While crossing the gate of Aanganwadi, with the help of scarf of victim, the applicant tied her both hands and kissed her. The applicant further uttered "तेरि और तेरि फ्रेंड के साथ कि फोटो तेरे अम्मी - अब्बा और बस्ति वालोन् को दिखौन्गा, कैसि लड्के लोग् के साथ् घुम्ति हो बताउन्गा यहान् बिल्कुल् चिल्लाने का नहिन्". The applicant then pull down the pant of victim and removed his pant and put his male organ in her female organ and tried to insert it. As it was dawning, the applicant then went away. Later on, the victim narrated the incident to her sister and parents and accordingly First Information Report (FIR) came to be filed.

4            Mr.Vaibhav Gaikwad, learned counsel for the applicant, submits that the entire FIR is silent on alleged sexual assault. Even the medical evidence does not support the case of prosecution. The learned counsel then invited my attention to the Medical Certificate and pointed out that no physical injury was noticed on the person of the victim. This being so, the present application deserves to be allowed, argued learned counsel.

5           Smt.PP.Shinde, learned APP, on the other hand, vehemently opposed the application by contending that the applicant committed not only penetrative sexual assault on the victim but also caused injury. The learned APP then submitted that the alleged offence becomes more serious having regard to the age of the victim and also the age of the applicant. The learned APP then invited my attention to the Medical Certificate to substantiate her submission and submitted that no leniency should be shown to the applicant.

6           Ms.Devyani Kulkarni, learned counsel for respondent no.2/victim also supports the submission advanced by the learned APP. The learned counsel also took me through Medical Certificate and submits that the Medical Certificate supports the version of the victim. Having regard to the seriousness of the offence, the application does not deserve consideration at all, and therefore, is liable to be rejected.

7            Perused the FIR and Medical Certificate and investigation papers. It appears that on the date of lodging of FIR, the victim was 14 years 4 months old. It also appears from the record and more particularly from the order of the learned trial Court that the applicant, at the relevant time, was 47 years old.

8            From the FIR of the victim two things are clear. Firstly, since December 2020 the applicant was not only following the victim with an evil intention but on 2/3 occasions even asked her to accompany him, otherwise he would show the birthday photographs of her and her friends to her parents. Secondly, on the day of incident i.e. on 8<sup>th</sup> April 2021, while the victim was going to attend call of nature, he again obstructed her, pressed her mouth, dragged her to nearby tin shed, tied her hands with her scarf and then kissed her. Thereafter, he not only removed his pant but also pant of victim and tried to insert his male organ in the private part of the victim. The contents of FIR prima facie attract the ingredients of Section 4 of the POCSO Act. This is

also supported by the medical evidence. The Medical Certificate filed on record clearly goes to show the opinion of the concerned Medical Officer in the following words :

“from history and clinical examination of the victim, possibility of vaginal penetration cannot be ruled out with no evidence of any other physical injury.”

However, at the same time, clinical findings point out that hymen was intact but there was evidence of presence of perihymenal inflammation. In my considered opinion, on the basis of medical evidence, the learned counsel for the applicant is absolutely wrong to say that there is no evidence of sexual assault. Rather, the medical evidence goes a long way in establishing prima facie that not only there was possibility of a penetration which the FIR also alleges, but there was evidence of perihymenal inflammation which is apparently indicative of clear sexual assault at the hands of the applicant, in the words of victim.

9           Having regard to the seriousness of offence, the learned counsel for the applicant is absolutely in error to say that

there is no evidence on record to show prima facie involvement of the applicant. What is disturbing is the age of the victim and as also the applicant. Having regard to the age of the applicant, it becomes more serious.

10           In the light of accusations made in the FIR, it prima facie finds support from the medical evidence. I am, therefore, not impressed by the submissions of the learned counsel. Rather it is fit case where no discretion is required to be exercised in favour of the applicant. In view of this, I pass the following order:

**ORDER**

- i)     Application is rejected.
- ii)    The learned trial Court is directed to expedite the trial.

**(V. G. BISHT, J.)**