

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

**INTERIM APPLICATION NO.362 OF 2021
IN
CRIMINAL APPEAL NO.109 OF 2021**

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...Applicant

Versus

The State of Maharashtra and Anr.

...Respondents

....

Ms Jyoti R. Salve for the Applicant.

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

Ms Ameeta Kuttikrishnan for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 18th NOVEMBER, 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 07/02/2020 passed by the learned Special Judge, POCSO Act, Greater Bombay in POCSO Special Case No.166 of 2017 and for release of the Applicant on bail.

2. By the impugned judgment the learned Judge held the Applicant guilty of offences under Sections 363 and 376 of the IPC and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). He has been sentenced to undergo rigorous

imprisonment for 10 years with fine of Rs.10,000/- i/d. rigorous imprisonment for three months for offence punishable under Section 6 of the POCSO Act, rigorous imprisonment for 7 years with fine of 7,000/- i/d. rigorous imprisonment for two months for offence under Section 4 of the POCSO Act, rigorous imprisonment for 5 years with fine of Rs.5,000/- i/d. to suffer further rigorous imprisonment for one month for offence under Section of 363 of the IPC. No separate sentence has been imposed in respect of offence under Section 376 of the IPC in view of the provisions of Section 42 of the POCSO Act.

3. The case of the prosecution in brief is that the victim, who was about 16 years of age at the time of the incident was acquainted with the Applicant. On 22/06/2016 she had called the Applicant. The Applicant had told her that he was indisposed and asked her to visit him. On 23/06/2016 after her father dropped her to school, instead of going to school she went to meet the Applicant. It is stated that the Applicant took her to a secluded place at Bandra Band Stand and had sexual intercourse with her against her wish. She was in the company of the Applicant till 26/06/2016. On the said date at about 10.00 p.m. the Applicant had brought her outside GTB Nagar Police Station. Father of the victim found her near the railway station, took her at home and later lodged the FIR.

4. The evidence of PW1 indicates that date of birth of the victim was 29/01/2001. He has produced the birth certificate, a perusal of which prima facie substantiates that victim was born on 29/01/2001 and hence as on the date of the incident she was below 18 years of age and a child within the meaning of Section 2(d) of the POCSO Act.

5. Ms Jyoti Salve, learned counsel for the Applicant states that the Applicant has disputed the said birth certificate. She states that the birth certificate indicates that the father of the victim was one Devidas whereas in the evidence before the Court, PW2 has stated his name as Devdas. She states that the discrepancy in the name casts a doubt on the genuineness of the certificate. She further states that prosecution has not examined the person issuing the said certificate. The prosecution has not produced school leaving certificate and has also not adduced medical evidence to prove the age of the victim.

6. A perusal of the evidence of PW1 and PW2 reveals that the Applicant had neither challenged the date of birth of the victim nor challenged the genuineness of the birth certificate. Moreover, the birth certificate records the name of the victim as well as the names of her parents as Devidas Birappa Salian and Netravati. The only discrepancy

pointed out by learned counsel for the Applicant is in spelling the name of the father as Devidas instead of Devdas. This minor discrepancy or the error in spelling the name can hardly be a ground to discard this certificate, when all other details clearly indicate that the birth certificate relates to the victim. The said birth certificate being an entry made by a public servant in the course of his public duty is presumed to be correct and conclusive evidence unless disproved. Since the birth certificate is a public document, it is not necessary to examine the person who made the entry or the person who issued the certificate. It is admissible without further proof and prevails over an entry in the school register or medical evidence.

7. The evidence on record prima facie reveals that the victim was a minor and a child within the meaning of Section 2(d) of the POCSO Act. The evidence of the victim prima facie proves that the Applicant had subjected her to penetrative sexual assault. The medical evidence also supports the case of the victim. Though the material on record prima facie indicates that the act was consensual, the victim was a minor hence her consent is immaterial.

8. Learned counsel for the Applicant contends that the Applicant is entitled for bail on medical grounds. No such grounds are

raised in the application and no particulars of health issues have been specified. Under the circumstances, the Applicant is not entitled for bail on medical grounds.

9. Considering the nature of accusations and the material in support thereof, in my considered view this is not a fit case for suspension of substantive sentence and enlargement of the Applicant on bail. Hence, the application is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)