

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

**INTERIM APPLICATION NO.2151 OF 2021
IN
CRIMINAL APPEAL NO.563 OF 2021**

Amin Alias Aftab Mehboob Hashmi

...Applicant

Versus

The State of Maharashtra

...Respondent

....

Mr. Anil Lalla i/b. M/s. Lalla and Lalla for the Applicant.

Mr. S.V. Gavand, APP for Respondent-State.

Ms Savita Yadav for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 25th OCTOBER, 2021.

P.C.:-

1. By this application filed under Section 389 of the Code of Criminal Procedure, 1973, the Applicant has sought suspension of substantive sentence imposed vide judgment dated 10/02/2021 passed by the learned Special Judge under POCSO Act, in POCSO Special Case No.317 of 2018 and to release the Applicant on bail.

2. By the impugned judgment, the learned Judge has held the Applicant guilty of offences punishable under Sections 376 and 420 of the IPC and under Section 8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. He has been sentenced to suffer rigorous imprisonment for a period of 15 years and to pay fine of Rs.10,000/- i/d.

to suffer further rigorous imprisonment for four months. He has been sentenced to suffer rigorous imprisonment for three years for the offence punishable under Section 420 of the IPC and to pay fine of Rs.5,000/- i/d. further rigorous imprisonment for two months. He has also been sentenced to suffer rigorous imprisonment for three years for the offence punishable under Section 8 of the POCSO Act and to pay fine of Rs.5,000/- i/d. further rigorous imprisonment for two months. The substantive sentences are ordered to run concurrently.

3. Mr. Anil Lalla, learned counsel for the Applicant states that the victim has not given details of the incident. Regarding the evidence of DW1, he states that though the victim was below 18 years of age, she was in a position to understand the consequences of her act. He submits that the Applicant was at his native place between 13/04/2017 to 20/6/2017 proves the defence of alibi. He further submits that the Applicant was on bail during pending trial.

4. Per contra, Mr. S.V. Gavand, learned APP for Respondent No.1-State and Ms Savita Yadav, learned counsel for Respondent No.2 submit that evidence on record amply proves that the victim was a minor and that the defence of alibi is nothing but an afterthought. He submits that suggestions between the Applicant and the prosecutrix

were consequential.

5. Perused the records and considered the submissions advanced by learned counsel for the respective parties.

6. The case of the prosecution in brief is that in June-2017 the Applicant herein called the victim to his home and had forcible sexual intercourse against her wish under the promise of marriage. It is further stated that the Applicant induced the prosecutrix to pay to him Rs.4,00,000/- in cash and property i.e. gold chain of 50 gms, four bangles of 10 gm and necklace of 40 gms under the pretext that he was needed the money for medical expenses of his mother and for marriage of his aunt.

7. It is to be noted that prosecution has placed on record birth certificate of prosecutrix at Exhibit-9. A perusal of which shows that the prosecutrix was born on 1/2/2001. The alleged incident had occurred in the year 2017. The victim was therefore 16 years of age and was therefore minor. Hence, consent is immaterial. Though the Applicant had taken the defence of alibi, it was suggested to the prosecutrix that she had gone to the residence of the Applicant on her own. It is also stated that she had herself called the Applicant and that

the Applicant had not called her. It was also suggested that the prosecutrix had consented for physical relationship only after the Applicant had promised to marry her. By putting these suggestions, it was sought to be suggested that relationship was consensual. As stated earlier prosecutrix was a minor and consent is immaterial. Evidence on record prima facie proves that the Applicant had sexual relationship with the prosecutrix. The medical evidence also prima facie indicates that prosecutrix was examined by PW3 on 05/04/2018 and that she had noticed an old healed tear of hymen. The medical evidence also prima facie corroborates the evidence of the prosecutrix. Delay in lodging the complaint is not relevant.

8. Considering the above facts and circumstances and also considering the nature of accusations against the Applicant as well as the evidence in support thereof, in my considered view this is not a fit case for suspension of sentence. Hence, the application is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)