

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

**INTERIM APPLICATION NO.867 OF 2022
IN
CRIMINAL APPEAL NO.151 OF 2022**

Mohd. Siraj Shabbir Rayan .. Applicant/Appellant
Versus
State of Maharashtra and Anr. .. Respondents

.....

Mr.Omprakash Pandey a/w. Ms.Suchitra Pandey, Mr.Prajapati Pramila
i/b. Ms.Pandey & Co., Advocate for the Applicant/Appellant.

Mr.S.v. Gavand, APP for the Respondent No.1–State.

Ms.Priyanka Chavan, Advocate for Respondent No.2.

.....

CORAM : PRAKASH D. NAIK, J.

DATED : APRIL 21, 2022.

P.C. :

This is an application for suspension of sentence and grant of bail pending criminal Appeal No.151 of 2022, challenging the judgment and order dated 27th October, 2021, passed by Special Judge under POCSO Act, convicting the applicant for the offence punishable under Section 6 of POCSO Act, Section 376 of IPC and Section 506 Part – II of IPC. Applicant has been sentenced to suffer imprisonment for 10 years and one year respectively. Both the sentences were directed to run concurrently.

2 The case of the prosecution in short is that the victim was aged around 13 years at the time of incident. The accused is her neighbour. The informant is the mother of victim. She conducted pregnancy test upon the victim as she had missed her periods. It was revealed that victim was pregnant. The victim disclosed that on 1st May, 2018 and 15th May, 2018, the accused committed sexual intercourse with the victim when she had been to his house. On 22nd June, 2018, the victim was taken to doctor, and, she was informed that the victim was pregnant. Sonography was conducted. First Information Report (“FIR” , for short) was lodged on 23rd June, 2018. Statement of victim was recorded. Accused was arrested on 23rd June, 2018. Samples of products conception of the victim were collected for DNA. Samples were forwarded to FSL. Statements of victim was recorded under Section 164 of Cr.P.C. On completing investigation, charge – sheet was filed.

3 Learned advocate for the applicant submitted that the accused is in jail since 23rd June, 2018. The applicant/accused has been falsely implicated in this case. DNA report does not support the prosecution case. The relations between the informant and the accused were not cordial. Various complaints were filed against each other.

4 Learned APP submitted that the crime is of serious nature. Victim was minor. This is not a false case. First informant being mother of the victim would not use her daughter to settle score with accused. The victim was pregnant. Accused is responsible for pregnancy. DNA report did not match due to error. There was no effective cross-examination at the instance of the accused to demolish the prosecution case.

5 Learned advocate for respondent no.2 submitted that the victim was aged around 13 years. The accused is neighbour. The victim has deposed that she was sexually assaulted by the accused. There was penetrative sexual assault. On account of error, the DNA report was not positive. Even if the DNA report does not match, the prosecution case cannot be discarded. Failure to conduct DNA test of samples taken from accused or produce the report from DNA profile would not necessarily result in failure of prosecution case. Reliance is placed on the decision of Supreme Court in the case of ***Sunil Vs. State of Madhya Pradesh***¹.

6 The applicant is in custody for a period of about 4 years. P.W.1 is the mother of the victim girl. In her evidence, she has deposed that she do not recollect the birth date of victim girl. She was 13 years

1 (2017) 4 SCC 393

old at the time of incident. The houses of accused and complainant are adjacent to each other. She do not know that since 2010 till 2018, the accused lodged several N.C. cases against her. It is not correct that on 12th November, 2019, N.C. No.15 of 2010, was lodged against her alleging that she had assaulted the child and abused them. She do not know that on 11th March, 2011, 25th October, 2011, 25th April, 2015 and 24th April, 2018, N.C. complaints were lodged against her for threatening that she would implicate accused in a false case. She admitted that she has copies of N.C. lodged against accused by her for number of times. Thus, this witness has admitted that she has lodged N.C. complaints against the accused on several occasion which reflects that the relations between both the families were hostile. P.W.2 is the victim girl. She stated that the incident had occurred in 2018. She was playing with the daughter of accused. Accused subjected her to sexual intercourse. Incidents had occurred for about 2-3 times. She admitted that she used to visit the house of accused daily. The wife and four children of the accused were residing with accused. Two married daughters and the accused were residing in the same house. She did not tell the police that there were blood stands on her clothes which were washed by her. She did not tell her mother that she washed the clothes as they were having blood stains. She admitted that there were quarrels between both the families. Due to such quarrels, her

mother warned her not to go to the house of accused, and, not to play with the daughter of accused. She did not said police that the incident took placed 15 days before Ramzan and even before that period. She also stated that there were frequent quarrels between the victim's family and the family of accused on the count of single staircase and paucity of space. The accused has filed N.C. cases against her parents following those quarrels. Suggestion was given to her that she was pregnant due to her sexual activities and affair with another person. P.W.4 is the medical officer. She examined the victim and collected DNA samples. P.W.5 had examined the accused. P.W.6 is the medical officer. According to him, the informant and her mother visited his clinic on 21st June, 2018, complaining that the victim did not get period for two months. On examination, it was revealed that she was pregnant. He admitted that he is Bachelor of Unani Medicines and Surgery. Since the victim was minor, it was his duty to call the police on noticing that she was pregnant. P.W.7 conducted sonography. P.W.8 is the Radiologists. P.W.9 is the panch witness. He stated that there is slum area near the spot. There was rush of public and crowd. He did not notice several things. There was door like iron grill in the house. There was no normal wooden door. Outsider can see the inside of the room through the grill door. The inside voice of the room can be audible to the outsider through iron window. P.W.10 was police

inspector attached to concerned police station. She stated that victim girl did not tell her that accused had threatened her that he would sent Rafiq to kill her and her father. P.W.12 was attached to the concerned police station as API. He conducted investigation. He deposed that there is delay of 9 days in carrying out spot panchanama. He did not read the history given by the victim to the doctor. He did not make any inquiry with the girls mentioned by victim in history to the doctor. He did not find it necessary to call their parents as victim has not made any complaint before him regarding said girls. He has not verified the CDR in respect of dates 8th May, 2018 and 15th May, 2018. On 15th May, 2019, moving location of mobile shown as moving towards Mumbai at 04:00 p.m. location is shown as Shirwad, District-Satara. On 30th May, 2018, the location is shown as 12:52 p.m., till 07:00 p.m. at Borivali. Thereafter, the location is at Bandra. The accused has examined D.W.1 as defence witness. The said witness has referred to the fact that the relations between the accused and the complainant were strained. N.C. complaints were lodged against the accused. complainant's family had quarreled with him. Accused is his father-in-law, and, he resides with him. About 9 persons resides in the house. Three children resides with them. He has lodged complaint against complainant as he was beaten. At that time, he was threatened in the police station that false report will be

lodged. D.W.2 has stated that he had given DNA report in 150 cases. He has referred the procedure followed for conducting DNA test. He referred to the manner in which the DNA tests were conducted in the present case. Undisputedly, the DNA did not match. Considering all these circumstances and the evidence on record, the case is made out for suspension of sentence and grant of bail.

7 Hence, I pass the following order:

:: ORDER ::

- (i) Interim Application No.867 of 2022, is allowed;
- (ii) During the pendency of Criminal Appeal No.151 of 2022, the sentence of imprisonment imposed *vide* judgment and order dated 27th October, 2021, passed by learned Special Judge under POCSO Act, Gr. Mumbai in POCSO Special Case No.452 of 2018, is suspended, and, the applicant is directed to be released on bail on executing P.R. Bond in the sum of Rs.25,000/-, with one or more sureties in the like amount;
- (iii) The applicant is permitted to furnish cash bail in the sum of Rs.25,000/-, for a period of eight weeks in lieu of surety;

- (iv) The applicant shall attend the trial Court once in six months on first Saturday of the month till the final disposal of the appeal;
- (v) In the event, there are two consecutive defaults in attending the trial Court, the said fact may be brought to the notice of this Court and in such eventuality, the prosecution will be at liberty to prefer an application for cancellation of bail;
- (vi) The applicant shall not cause any harassment to the victim and her family members;
- (vii) Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)