

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

**INTERIM APPLICATION NO. 1024 OF 2021
IN
CRIMINAL APPEAL NO.34 OF 2021**

Narbahadur Kalesingh Damai @ Ramsing ...Applicant/
Appellant

Versus

State of Maharashtra & Anr. ...Respondents

Ms. Anjali Patil, Advocate for the Applicant/Appellant.

Mr. S. H. Yadav, APP for the Respondent No.1 – State.

Ms. Manisha Deokar, Advocate for Respondent No.2.

**CORAM : PRAKASH D. NAIK, J.
DATE : 11th JANUARY, 2022**

PER COURT:

1. This is an application for suspension of sentence and grant of bail during the pendency of Criminal Appeal No.34 of 2021 preferred by the applicant challenging the judgment and order dated 24th November, 2020 passed by the learned Special Judge under the POCSO Act, convicting the applicant for offence under Section 376(2)(i) of Indian Penal Code (for short “IPC”) and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’).

2. The case of the prosecution is that the victim is

minor girl aged about 12 years at the time of incident. On 6th July, 2017, the relative of the complainant had expired and the post funeral rites were to be performed on 12th July, 2017. The victim and her father had attended the said rites. They returned home. The victim was found in disturbed state of mind. The complainant made inquiry with her. The victim had disclosed to her mother that the accused had sexually assaulted her by putting finger in her private part. The First Information Report (for short 'FIR') was registered. The victim was taken for medical examination. The accused was arrested. The statements of the victim was recorded under Sections 161 and 164 of Cr.P.C. On completing investigation, charge-sheet was filed.

3. The trial proceeded. The prosecution examined about 8 witnesses. The applicant was convicted for the aforesaid offences. He was sentenced to undergo rigorous imprisonment for 15 years and 5 years respectively on both the counts. The sentences were directed to run concurrently.

4. Learned Advocate for the applicant submitted that there is no evidence to convict the applicant for the aforesaid offences. There is variation in statements of the victim recorded under Sections 161 and 164 of Cr.P.C. The

medical evidence does not support the prosecution case. The identity of the applicant/accused is under the clouds of suspicion. It was not possible to commit such an act at the residential premises, where several other persons were present for attending the post funeral rites. The name of the accused was disclosed by the cousin of the victim. There was no proper identification of the accused. No parade was conducted. The applicant was on bail during the pendency of trial. He has not misused the facility of bail. The applicant is in custody from 24th November, 2020. The appeal may not come up for hearing within short span of time. Hence, sentence of imprisonment may be suspended and the applicant be directed to be released on bail.

5. Learned APP submitted that the victim was minor. There is no reason to disbelieve her version. Victim was subjected to sexual assault by the accused. The offence is proved beyond doubt. The victim and the complainant had supported the prosecution case.

6. Learned Advocate representing the respondent No.2 submitted that there is sufficient evidence against the applicant. The victim had no reason to falsely implicate the applicant. She was minor. Small infirmities in the evidence

does not affect the prosecution case. The presumption under the POCSO Act supports the case of the prosecution. The offence is of serious nature.

7. During the pendency of trial, this Court had granted bail to the applicant/accused by order dated 18th June, 2018, on the ground that there is variation in the statements under Sections 161 and 164 of Cr.P.C. The Medical Officer had opined that there was no evidence of sexual and physical violence. Prima facie it appears that the victim was either tutored or tampered by the near relatives. The accused was in custody since 14th July, 2017. Bail was granted on certain conditions. It is not reported that the accused had misused the facility of bail granted to him in any manner.

8. I have perused the notes of evidence. The victim has been examined as PW-1. The victim and her father had attended post funeral rites at the premises of their relative. The accused was allegedly present at the said place. The victim was not knowing the accused. The incident had occurred on 12th July, 2017. The victim had disclosed to her mother that the accused had sexually assaulted her by putting finger in her private part in the house of relative.

She was referred for medical examination. Statement of the victim was recorded under Section 161 of Cr.P.C. The complaint was lodged by the mother of the victim. The evidence of these witnesses disclosed that there are houses adjoining to the place, where the victim and her father had visited for attending the post funeral rites. The evidence also disclosed that there are other family members in the house. In the subsequent statement recorded under Section 164 of Cr.P.C. the victim had alleged that there was sexual intercourse. In her cross examination however she stated that there was no physical relationship by the accused with her. She also stated that after the incident, she visited her school in routine manner on 13th July, 2017. The police recorded the statement as per the information provided by her mother. She was not knowing the contents of the statement. Thus, there is variation in statement under Section 164 where it is alleged that she was forcibly sexually assaulted by the accused. The victim also admitted that the name of the accused was disclosed to her by her cousin. She had disclosed to Police that she came to know the name of the accused from her cousin Anil. She was not knowing his name. Thus, the victim was not knowing name of applicnat. The identity of the accused is thus under the clouds of suspicion.

The evidence of PW-2 (mother of victim) mention that the police did not record her statement. Anil disclosed the incident to the Police. She has not made complaint to the police. She do not know what is written in the complaint. PW-5 is the Medical Officer, who had examined the victim. The said witness have stated that she conducted general examination of the victim. It was found normal. Local examination was also normal. After examination she gave opinion that there was no evidence of physical sexual violence. However, she has stated that sexual physical violence cannot be ruled out. The medical report has been adduced in evidence. The defence had harped upon the fact that there were no injuries of whatsoever nature to corroborate the prosecution case.

9. All these factors will have to be considered at the stage of final hearing. Prima facie on the basis of the infirmities as stated above and also considering the fact that the applicant/accused was on bail during the trial, case for suspension of sentence is made out.

10. Hence, I pass the following order:

ORDER

- i. Interim Application No.1024 of 2021 is allowed;

ii. During the pendency of Criminal Appeal No. 34 of 2021, the sentence of imprisonment imposed vide judgment and order dated 24th November, 2020 passed by learned Special Judge, under the POCSO Act, at Greater Bombay, in POCSO Special Case No. 430 of 2017, awarded on both the counts 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 months between 11.00 a.m. to 1.00 p.m.

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.

vi. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)