

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

**INTERIM APPLICATION NO.2590 OF 2022
IN
CRIMINAL APPEAL NO.1198 OF 2019**

Kalam Ahmed Nasir Ahmad Shaha Appellant
Versus
The State of Maharashtra & Anr. Respondents

Mr. Manoj Kumar Tiwari, Advocate a/w. Seema Dubey i/b.
S.J. Dubey, for the Applicant.
Smt. M.R. Tidke, APP for the Respondent No.1-State.
Ms. Fatima Gani, Advocate for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 08th DECEMBER, 2022

P.C. :

1. This is an application for bail pending hearing and final disposal of appeal. Earlier the applicant had preferred Criminal Application No.27/2019 in Criminal Appeal No.1198/2019. It was dismissed as withdrawn. That order was passed on 3.2.2021.

2. Now this application is again preferred on the ground that more than half the sentence is over and,

therefore, the application be entertained.

3. I have heard the parties and I have considered the submissions made by learned counsel for the parties.

4. At the outset, it must be pointed out that learned counsel for the victim, PW-2 in this case, has stated that the victim does not have any objection for grant of bail to the applicant. In fact the victim wants to marry him as he is father of her child and they had love affair.

5. Learned APP, however, opposed this application on the ground that the offence is proved and the applicant, therefore, cannot be released on bail.

6. In the background of these two opposite views taken on behalf of the respondents, I have heard learned counsel for the applicant. I have heard him on the merits of the matter. The applicant was convicted and sentenced by learned Special Judge under POCSO for Greater Bombay vide his judgment and order dated 29.7.2019 passed in POCSO Special Case No.459/2016. The applicant was

convicted for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and was sentenced to suffer RI for ten years and to pay fine of Rs.8,000/- and in default of payment of fine amount to suffer RI for six months. He was also convicted for commission of offence punishable under Section 4 of the POCSO Act and was sentenced to suffer RI for seven years and to pay fine of Rs.2,000/- and in default of payment of fine amount to suffer RI for six months. Both the sentences were directed to run concurrently. No separate sentence was imposed on him for the offence punishable under section 376(2)(i)(j) & (l) of IPC, as per Section 42 of the POCSO Act.

7. The prosecution case is that the victim was about 17 years of age at the time of incident. According to the prosecution case, her date of birth was 15.10.2000. The birth certificate is produced on record by the mother of the victim PW-1. The victim herself was examined as PW-2. She has not given clear evidence and she was declared hostile.

In the examination-in-chief, she has not deposed about the penetrative sexual assault. Therefore, she was declared hostile. Then learned APP put questions in the form of cross-examination. She admitted about the sexual intercourse. In the cross-examination again she admitted that she had love affair with the applicant and they had regular physical relations though she claimed to be 17 years of age at the time of incident. The prosecution case is that the incident had taken place in 2016.

8. Learned APP pointed out that ossification test mentioned that the victim's age was between 15 and 16 years.

9. At this stage, there is hardly any dispute that the victim and the applicant had physical relations and out of that relations a child is born. The victim wants to marry the applicant. The applicant also wants to marry her. This is the submission made by the respective counsel for them.

10. Therefore, in this background, the age of the

victim would assume importance. The ossification test is approximate and its effect will have to be decided at the final hearing stage.

11. There is another circumstance in the form of birth certificate produced at Exhibit-20 by PW-1 i.e. mother of the victim. However, in her cross-examination she admitted that the victim was born at village Baloli, District - Sidharth Nagar, State U.P. She has categorically stated that the birth certificate was prepared by one Advocate at her village. The victim was born in the house and not in the hospital. The certificate was prepared for taking admission of the victim in a school and it was prepared about 3 to 4 years before recording of deposition. She has further stated that she did not know the exact date, month and year of the date of birth of the victim and the certificate is also prepared by an Advocate on approximate date, month and year and that she herself had not given that date of birth to the Advocate. Thus, at this stage, a reasonable doubt is created regarding age of the victim and there is a reasonable

possibility that she could be more than 18 years of age. At this stage it can be observed that the prosecution case is little doubtful regarding the victim's age being below 18 years.

12. In this view of the matter, the theory of consensual sex assumes importance. The victim has not only given no objection for grant of bail, in fact she insisted that the applicant be granted bail pending appeal. The applicant has already served more than six years of his sentence.

13. In this view of the matter, at this stage for consideration of bail pending appeal, all these factors can be taken into account in favour of the applicant. It is obvious that all these issues will have to be finally considered and decided at the final hearing stage. But, if at the final hearing stage of the appeal he is acquitted then by that time he will have suffered irreparable loss and even the victim and their child would suffer. Therefore, taking overall view of the matter, I am granting bail to the applicant pending final hearing of appeal. Hence, the following order :

:: O R D E R ::

- i. During pendency and final disposal of Criminal Appeal No.1198/2019, the applicant is directed to be released on bail on his furnishing P.R. bond in the sum of Rs.30,000/- (Rupees Thirty Thousand Only) with one or two sureties in the like amount.
- ii. Interim Application is disposed of accordingly.

(SARANG V. KOTWAL, J.)

Deshmane (PS)