

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

**INTERIM APPLICATION NO. 2725 OF 2021
IN
CRIMINAL APPEAL NO. 261 OF 2021**

Joy Rajendran ..Applicant/Appellant
Versus
The State of Maharashtra and Ors. ..Respondents

**WITH
CRIMINAL APPEAL NO. 256 OF 2021**

Salomi Rajendran ..Applicant/Appellant
Versus
The State of Maharashtra and Ors. ..Respondents

Mr. Kuldeep Patil i/by Mr. Shashank P. Borade, Advocate for the Applicant/Appellant.
Ms. Saziya Mukadam, Advocate for the Respondent No.3.
Mr. S.V. Gavand, APP for the State.
Ms. Megha Bajoria, Advocate for Respondent No.2, 4 to 9.

CORAM : PRAKASH D. NAIK, J.

DATE : 24th February, 2022.

PC.

1. The applicant is seeking suspension of sentence and grant of bail during the pendency of Criminal Appeal No.261 of 2021.
2. The applicant (Accused No.2) has been convicted for the offences under Sections 377 Indian Penal Code (for short "IPC"),

506-II IPC, 354-A IPC, Section 8 of Protection of Children from Sexual Offences, 2012 (for short "POCSO") and Section 7 r/w Section 8 of POCSO, Section 9 (d)(f)(i)(l)(m)(o)(p) r/w Section 10 of POCSO and Section 11(iii) r/w Section 12 of POCSO.

3. The case of the prosecution is that Shanti Ashram was conducted by Rajendran and other accused. He is the husband of accused No.3 and father of the accused No.1 and 2. The victim girls were residing in the Ashram. It is situated at village Chambharli, Tq. Khalapur, Dist. Raigad. There were eleven girls and seven boys in the Ashram. PW-5 to 11 and PW-13 are the victim girls who were residing in the Ashram. The victim girls were subjected to sexual assault by accused No.1 and 2. Accused No.3 did not report the incidents to police station or Special Juvenile Police Unit. The victim girl (PW-5) was brought to Shanti Ashram by father of accused No.1 and 2. The accused No.1 used to call victim in his bedroom and commit rape on her. The victim disclosed this fact to another victim (PW-6). PW-6 disclosed this fact to tuition teacher and tuition teacher disclosed it to Principal madam. Latter Principal madam disclosed it to Manisha Tulpule. Thereafter, Manisha Tulpule visited

Ashram and had talk with minor victims. They complained to Manisha Tulpule about the sexual assault committed on them by accused No.1 and 2. On 29.04.2015 Manisha Tulpule took victims to hostel at Karjat. Thereafter, they were shifted to Prerna Navnihal Balika Aashram. They were medically examined at Sub-District Hospital karjat. On 18.05.2015 Manisha Tulpule disclosed the matter to Rasayani Police Station alongwith medical report with victim girls. On 29.05.2015 Police Officer visited the office of Manisha Tulpule. She disclosed the incident to him. Police Officer interrogated the victim girls and recorded their statements. On 10.06.2015 offences were registered against Rasayani Police Station. Charge-sheet was filed against accused No.1 to 3. charge was framed, witnesses were examined by Judgment and order dated 03.03.2020. The accused were convicted. The accused No.2 (Applicant) was convicted for offences has stated herein above.

4. Learned Advocate for the applicant submitted that the applicant is in custody from the date of arrest. He has undergone the sentence of about six years and six months. The offence under Section 377 of IPC is not made out. Applicant is in custody from

15.06.2015. There is delay in lodging complaint. The medical evidence does not support the prosecution case. The sentence of imprisonment for offence under the POCSO Act is already undergone by him. The appeal may not come up for hearing within short span of time. The accused No.3 is on bail. There are serious discrepancies in the evidence of witnesses.

5. Learned APP submitted that offence under Section 377 of IPC is made out. The accused ought to have been tried for offence under Section 376 of IPC. The applicant has subjected the victim girls to sexual assault. The victims were minors. They were in custody of accused. The victim girls were sexually exploited. They were inmates of Ashram. Learned Advocate for the respondent No.2 to 4 and 9 supported submissions of Learned APP. It is submitted that the incident is of serious nature. The victim girls were residing at Ashram and her reportedly subjected to sexually assaulted. The offence is of serious nature. Specific role has been attributed to the applicant by the victim girls.

6. Learned Advocate for the respondent No.2 to 3 has submitted that the respondent No.2 to 9 are victims. The applicant

has been convicted for various offences. There is no error in the judgment of trial Court. The Court has appreciated the evidence . The offences are heinous in nature. The victim girls were aged about six to seven years. The offence committed by accused No.2 is of aggravated sexual assault since the girls were below twelve years of age at the time of incident. The act committed by the applicant against the order of nature hence section 377 of IPC is attracted. The respondent No.8 and 9 described the offence committed by accused No.2. There is no reason to disbelieve the evidence of victims. The oral sex also falls within definition of Section 377 i.e. unnatural offence and carnal intercourse against the order of nature. The expression against the order of nature is not defined under Section 377 of IPC or in any other provisions of IPC. The said provision is only read down and struck as unconstitutional only with respect to sexual acts between consenting adults. Learned Advocate relied upon several decisions. The offence would also fall within the definition under Section 375(d) and the accused ought to have been convicted under Section 376(2)(j) and 376 (3) of IPC as well as under Section 6 of POCSO.

7. I have perused the evidence, victims were helpless minor girls. PW-11 is aged about nine years at the time of recording evidence. She has stated that the applicant has sexually assaulted her. She has described the act committed by him. The accused used to lick her private part. The accused told her to touch her private part. This had happened with her several times. PW-13 is the victim aged around eight years. She has deposed that the applicant/accused taken her to bathroom and removed her under garments and put his finger in her urinating part. She was scared. The act attributed to the applicant is also covered under the definition of rape. Surprisingly the applicant has not been convicted for the offence under Section 376 of IPC. Prima facie the offence is of serious nature. The minor victims were subjected to sexually assaulted. Considering the nature of crime, no case is made out for suspension of sentence and grant of bail.

8. Hence, I pass the following order:-

ORDER

- i.** Interim Application No. 2725 of 2021 is rejected;
- ii.** Hearing of both the appeals is expedited;

(PRAKASH D. NAIK, J.)