

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

**INTERIM APPLICATION NO. 2798 OF 2021
IN
CRIMINAL APPEAL NO. 206 OF 2022**

Salim Hassan Shaikh ..Applicant/Appellant
Versus
State of Maharashtra And Anr. ..Respondents

Shri. Prashant Jadhav i/by Ms. Shabana M.A. Syed Advocate for the
Applicant/Appellant.

Shri. Ajay Patil APP for the State.

Ms. Manisha Devkar Advocate for Respondent No.2

CORAM : PRAKASH D. NAIK, J.

Date : 21st APRIL, 2022.

PC.

1. This is an application for sentence of imprisonment and grant of bail during the pendency of Criminal Appeal No.206 of 2022.

2. The applicant is convicted vide Judgment and order dated 27th November, 2019 for offence punishable under Section 376(2) of Indian Penal Code (for short “IPC”) and Section 6 of Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”). He has been sentenced to suffer imprisonment of ten years for the offence punishable under Section 6 of POCSO Act and

five years for the offence punishable under Section 10 of POCSO Act.

3. The prosecution case is that the mother of victim girl met the accused with her daughter in his arm. The informant questions accused about it. The accused disclosed that the victim girl fell on the ground while running. She was crying. The informant took her daughter from the accused. The accused walked away. Complainant inquired with the victim girl as to what had happened. The victim disclosed that the accused took her to his house, showed her T.V. and fingered her private part. The victim was taken to hospital. Information given to police. First Information Report (for short "FIR") was registered. Investigation was completed, charge-sheet was filed.

4. Learned Advocate for the applicant submitted that the applicant was arrested on 19.03.2017. He is in custody for five years. The victim was tutored. The statement of the victim girl was recorded by private person. There was breach of section 24 of POCSO Act. The victims statement disclose that, she was told to depose by police.

5. Learned APP and learned Advocate for the respondent no.2 submitted that the victim was minor. She was sexually assaulted by accused. The medical evidence supports the prosecution case. Merely on the ground that the statement was recorded by private person. The evidence cannot be discovered. There is sufficient evidence to prove that the victim was sexually assaulted by the accused. The incident is of serious nature.

6. The applicant is in custody for a period above five years. The incident is dated 19.03.2017. The trial Court in the impugned judgment has observed that the statement of victim girl under Section 161 of Cr.P.C. was recorded by PW-9 who is the member of NGO. The statement of the witnesses under Section 161 of Cr.P.C. is required to be recorded by Police. Those powers cannot be delegated by investigation agency to outsider. The recording of statement by PW-9 is highly objectionable. Section 161 of Cr.P.C. does not empower the investigating agency to appoint outside person to record the statement. Section 24 of POCSO Act empowers the women police officer not below the ranking of Sub-Inspector to record the statement of child. It is serious lacuna in the investigation.

7. PW-1 is the complainant. She is the mother of victim girl. According to her the victim girl disclosed her the act committed by the accused. PW-4 is the victim girl. She has deposed that she met the police on the previous date and she was told by the police what she has to depose before the Court. PW-8 was attached to Sewree police station at the relevant time. He stated that, he conducted investigation and filed charge-sheet against the accused. The statement of the victim girl was not recorded in his presence. He recorded the statement of the member of NGO on the date when the statement of victim was recorded by the member of NGO. On 15.04.2017 no WPC nor WPSI were present at the police station. He did not try to secure the presence of WPC nor WPSI. Neither WPC or WPSI was present at the police station. He found it proper to opt for NGO to get the statement of victim girl recorded. He do not know whether NGO is registered or not. PW-9 is the member of NGO who recorded the statement of the victim. She has stated that on 14.04.2017, she received a phone call of PW-8 to record statement of victim girl. She recorded the statement of the victim on 15.04.2017. The statement of victim girl indicate that, it was recorded by PW-9.

It is not in accordance with the Section 24 of the POCSO Act nor in accordance with Section 161 of Cr.P.C. The evidence of PW-8 discloses that WPC and WPSI were not present at police station at the time of when the statement of victim was recorded.

8. Considering the aforesaid circumstances the sentence of imprisonment can be suspended.

9. Hence, I pass the following order:-

ORDER

- i. Interim Application No. 2798 of 2021 is allowed;
- ii. During the pendency of Criminal Appeal No.206 of 2022, the sentence of imprisonment imposed vide Judgment and order dated 27th November, 2019 passed by learned Judge, under POCSO Act, 2012, Greater Bombay in POCSO Special Case No.278 of 2017 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 approach the victim and her family members.
- vii.** Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)