

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

**INTERIM APPLICATION NO. 3152 OF 2021
IN
CRIMINAL APPEAL NO. 177 OF 2022**

Mohd. Salim Noor Mohd. Shaikh ...Applicant/Appellant
Versus
State Of Maharashtra And Anr. ...Respondents

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Mr. Prashant V. Nayak, Advocate for the Applicant/Appellant

Mr. Kartik Garg, Advocate for Respondent No.2.

Ms. P. N. Dabholkar, APP for the Respondent No.1 – State.

CORAM : **PRAKASH D. NAIK, J.**
DATE : **28th MARCH, 2022.**

PER COURT:

1. The applicant has preferred this application for suspension of sentence and grant of bail pending Criminal Appeal No.177 of 2022.

2. The applicant is convicted for the offence punishable under Section 5(1)(m) r/w Section 6 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and sentenced to suffer imprisonment for 10 years. He is also convicted for the offence under Section 377 of Indian Penal Code (for short "IPC") and Sections 4, 8, 10 & 12 of POCSO Act. However, no separate sentence was imposed in view of Section 42 of POCSO

Act.

3. The case of the prosecution is that the victim boy aged about 11 years was subjected to sexual assault by the accused. On 8th April, 2016, the father of the victim returned home after work and noticed that the victim was in uneasy condition. The father had conversation with him and victim had divulged the information that on the same day the accused took him to mobile shop and subjected him to unnatural sexual assault. Similar incident had occurred two weeks ago. He was subjected to such sexual assault 5 to 6 times. The complainant approached the Police and lodged the First Information Report (for short 'FIR'). On completing the investigation, charge-sheet was filed. The accused was tried and convicted.

4. Learned Advocate for the applicant has submitted as follows :-

- i.** The applicant is in custody for a period of about six years.
- ii.** The appeal may not come up for hearing immediately.
- iii.** The identity of the applicant as a person, who had allegedly committed the offence, is doubtful.

iv. The victim had not disclosed the name of the accused during medical examination.

v. The victim has alleged that the incident had occurred in a mobile shop as well as public place. There are no independent witnesses.

vi. The victim has admitted that the statement under Section 164 of Cr.PC. was not read over to him.

vii. There are serious discrepancies in the evidence adduced by the prosecution.

5. Learned APP submitted that the victim was aged about 10 years at the time of incident. The accused is aged around 50 years. He has subjected the victim to sexual assault. There is sufficient evidence to convict him for the offences charged against him. The victim was subjected to sexual assault on 5 to 6 occasions.

6. Learned Advocate for respondent No.2 supported the submissions of learned APP. It is submitted that there were repeated instance of sexual assault. The evidence of the victim child was supported by medical evidence. The victim had confided the act to his father only when it was uneasy for him. There are several circumstances which complete the chain to show the involvement of the applicant in the crime.

7. The FIR was registered on 9th April, 2016. The incidents were disclosed by the victim to his father in the night of 8th April, 2016. The victim has also referred to the incident which had occurred 15 days prior to the last incident. The complaint was lodged by the father of victim who was examined as PW-1. It appears that, earlier sexual assaults were not disclosed by the victim to his father or any other person immediately after the incident. The victim was examined as PW-2. He has stated that he was subjected to sexual assault 5 to 6 times within 15 days. He has referred to the incident occurred in the mobile shop. He has not stated the name of accused, during medical examination. His statement was recorded by the Police. He identified the accused at Police Station. At that time he came to know the name of accused. From his evidence it is apparent that the victim was not knowing the accused. The identification of the accused is at Police Station. He admitted that, he did not disclose the name of accused, when he had been to Police Station first time. The statement recorded by Magistrate was not read over to him. PW-3 has deposed that she had taken the victim for medical examination. In her presence, the victim had identified the accused at Police Station. She recorded the statement of the victim boy. The victim had stated that on 8th April, 2016, accused took him to mobile shop of one Mallavi and

touched his private part to his anus. She admitted that the victim had disclosed before the Medical Officer that one unknown person had committed the act. Only after accused was shown to him at Police Station, victim disclosed the name of the accused in his statement. From the evidence of victim it is clear that the accused was not known to the victim. It is not clear as to how the accused was present at the Police Station. The said witness also does not refer to any information being provided by the victim about penetration. PW-4 was attached to Nirmal Nagar Police Station. Victim disclosed that two weeks ago the accused took him to city garden. The accused touched his penis near place of anus. Accused took victim to one factory committed similar act. Victim did not hear victim stating that, he was playing near rail track and accused took him to factory. PW-10 is the Medical Officer, who examined the victim. She has deposed that there was tenderness over the anal area of the victim. She admitted that the medical examination report does not show her final opinion. PW-4 is the women Police Constable attached to Nirmal Nagar Police Station. She stated that the victim had disclosed that two weeks before accused took him to garden, he touched his private part to his anus, and thereafter, subjected to sexual assault in a factory. The version of this witness is apparently contrary to other witnesses with

regards to the place of incident. It is noted that the applicant is in custody for a period of 6 years.

8. Considering the evidence on record as stated above, case for suspension of sentence and grant of bail is made out.

9. Hence, I pass the following order:

ORDER

- i. Interim Application No. 3152 of 2021 is allowed;
- ii. During the pendency of Criminal Appeal No.177 of 2022, the sentence of imprisonment imposed vide Judgment and order dated 7th October, 2019 passed by learned Special Judge, under POCSO Act, Greater Bombay in POCSO Special Case No.248 of 2016 is suspended and the applicant is directed to be released on bail on executing PR. 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. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)