

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPLICATION NO.1917 OF 2023
IN APEAL/457/2023 WITH APEAL/457/2023**

**ASHISH EKNATH DHAS
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

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Advocates for Applicant : Mr. V. V. Gujar, Mr. C. C. Deshpande and Mr.
P.P. Pangal

APP for Respondent No.1: Mr. S. B. Narwade
Advocate for respondent No.2 : Mr. D. S. Ingole

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CORAM : S. G. MEHARE, J.

DATE : 06.06.2023

PER COURT :

1. Heard the learned counsel for the applicant, the learned
A.P.P. and the learned counsel for respondent No.2.

2. The applicant is seeking the suspension of a sentence
imposed on him by the learned Special Judge Shrigonda for the
offence punishable under the POCSO Act.

3. The learned counsel for the applicant took the Court
through the impugned Judgment and order and the evidence of the
victim and her mother. He has vehemently argued that the mother

appears to have played an active role in initiating the prosecution against the applicant. The statement of the victim was recorded belatedly. Her cross-examination reveals that she gave a statement to the police identical to her mother's statement. He tried to argue that the victim might have been tutored, and considering her age, she was amenable to tutoring. The incident happened in a marketplace where people used to be there. The incident appears not probable. He has also read the cross-examination of the victim and argued that on the day of the alleged incident, her test in School was not good, and hence she was weeping in front of her mother. In sum and substance, he has tried to argue that the prosecution has not proved the case beyond a reasonable doubt. The learned Special Judge (POCSO) Shrigonda has incorrectly applied presumption under Section 29 of the POCSO Act. He would also argue that the applicant is a young boy and the sentence is for a short term. Reading the material placed before this Court, he prayed to suspend the sentence till the conclusion of the appeal.

4. Per contra, the learned A.P.P and learned counsel for the victim have strongly opposed the application. They have argued that there are no material contradictions and omissions in the evidence of the witnesses. The victim was 11 years old at the time of the incident.

She has no reason to implicate the applicant falsely. However, her evidence inspires confidence. Normally the girls share such incidents with the mother first. Narrating the incident by the victim to another person is not hearsay evidence. It was a direct communication between mother and daughter. The report was immediately lodged. The evidence of the witnesses corroborates each other. There is no apparent mistake on the record to disbelieve the prosecution case. The offence is serious. A girl child of 11 years has been humiliated. The applicant took a disadvantage of the situation when the victim went to his shop to repair her school bag. It cannot be accepted that it is a short-term sentence as the minimum punishment for the offence proved against the accused is five years and a fine. They prayed to reject the prayer of suspension of sentence.

5. The Supreme Court in the case of *Kiran Kumar Vs. State of Madhya Pradesh (2001)9 Supreme Court cases 211* held that the normal rule is that when the appeal of a person convicted and sentenced is pending, the sentence passed on him should be suspended unless any exceptional reason existing therein requires the denial of the same. The Court should also consider short-term imprisonment while suspending the sentence. The Hon'ble Supreme Court was of the view that the rejection is only by way of exception.

6. The order of suspension of sentence shall be reasoned order. It has to be passed on careful consideration of all relevant aspects and not as a matter of routine.

7. The powers under Section 389 of the Code of Criminal Procedure are discretionary. While exercising such powers, entire facts and circumstances should be considered.

8. In the case at hand, the maximum punishment for the offence allegedly proved against the applicant is not less than five years, which may extend up to seven years and a fine. The applicant is a young boy of 19 years old. There are no antecedents to his discredit. The material produced on record needs appreciation on merit. The applicant has roots in the village Ghotvi, Taluka Shrigonda, District Ahmednagar. It is also to be examined whether the presumption under Section 59 of the POCSO Act would attract in the case at hand. This is the first appeal. The applicant has deposited a fine amount. The victim and the applicants are not residents of the same village. There may not be any harm to her and her family. The applicant is a first-time convict. Taking the facts and circumstances into consideration, the Court is of the view that the sentence passed on the applicant should be suspended till the conclusion of the appeal on certain conditions.

Hence, the following order.

ORDER

- (i) The Criminal Application is allowed.
- (ii) The execution, implementation and effect of the sentence passed on the applicant by the learned Judge Special Court (POCSO) Shrigonda, District Ahmednagar in Special Case No. 107 of 2019 dated 10.05.2023 for the offences punishable under Sections 354, 354- and 506 of the Indian Penal Code and Section 9(m) read with Section 10 of the POCSO Act, is suspended till the conclusion of the appeal.
- (iii) The applicant shall be released on bail on executing P.B. and S.B. of Rs.50,000/- with one solvent surety of the like amount on the condition that he shall attend the appeal on material dates.
- (iv) Bail before the learned Sessions Judge Special Court (POCSO), Shrigonda.

(S. G. MEHARE)
JUDGE

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