

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

**CRIMINAL APPLICATION NO.3807 OF 2022
IN APEAL/866/2022 WITH APEAL/866/2022**

**AMJADSHAH NASHIRSHAH FAKIR
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

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Advocate for Applicant : Mr. C. C. Deshpande
APP for Respondent No.1: Mrs. Vaishali N Patil Jadhav
Advocate for respondent No.2 : Mr. R. P. Patwardhan

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CORAM : S. G. MEHARE, J.

DATE : 06.07.2023

PER COURT :

1. Heard the learned counsel for the applicant, the learned A.P.P for the respondent No.1/State and the learned counsel for respondent No.2/victims.
2. The learned counsel for the applicant submits that the applicant has deposited the fine amount.
3. The applicant is seeking suspension of the sentence, under Section 389 of the Code of Criminal Procedure imposed upon him in Special Case No. 51/2016, passed by the learned Special Judge, Dhule vide its Judgment and order dated 20.10.2022.

3. The learned counsel for the applicant would argue that there was no evidence to prove penetrative sexual assault except the words of the victims. The Medical Officer has categorically given the admissions that there were no signs of penetration particularly inserting the fingers into their private parts. In view of this fact, the learned counsel for the applicant would argue that the applicant has been incorrectly held guilty for the penetrative sexual assault and erroneously convicted for the same.

5. Per contra, the learned A.P.P. and the learned counsel for the victim would argue that in the absence of medical evidence, the children of small age cannot be disbelieved. They have no reason to lie against the applicant. They have categorically deposed the fact as to what happened with them. Hence, the applicant does not deserve suspension of the sentence.

6. *Prima facie*, it appears that there is no medical corroboration to the victims that the fingers were inserted into their private parts. The Medical Officer has candidly admitted that there was no penetration. Relying on this, *prima facie* question arises whether the applicant

would be punished for penetrative sexual assault or bare sexual assault. Considering the facts of the case, the Court is of the view that this is a fit case to exercise powers under Section 389 of the Code of Criminal Procedure. Hence, the following order :-

ORDER

- (i) The application is allowed.
- (ii) The execution, implementation and operation of substantive sentence to suffer Rigorous Imprisonment for 10 years imposed upon the applicant by the learned Special Judge (POCSO Act), Dhule in Special case No. 51/2016 dated 28.10.2022, is suspended till conclusion of the appeal.
- (ii) The applicant be released on bail on executing P. B. and S.B. of Rs. 50,000/- with one solvent surety of the like amount.
- (iii) Bail before the learned Additional Sessions Judge, Dhule.
- (iv) The Secretary, High Court Legal Services Sub-Committee, Aurangabad do pay the fee of Rs. 5,000/- (Rupees five thousand) to the learned counsel appointed for respondent No.2/victim.

(S. G. MEHARE)
JUDGE