

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 768 OF 2023

IN

CRIMINAL APPEAL NO. 215 OF 2023

Kallu @ Wasim @ Chanayya Sattar Khan ...Applicant

Versus

State Of Maharashtra And Anr. ...Respondents

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Mr. Ganesh K. Gole i/by Mr. Bhavin Jain Advocate for Applicant.

Mr. Ashish Satpute Advocate for Respondent No.2.

Ms. P. N. Dabholkar, APP for the Respondent – State.

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CORAM : PRAKASH D.NAIK, J.

DATE : 14th JUNE, 2023.

P.C.:-

1. This is an application for suspension of sentence and grant of bail during the pendency of Criminal Appeal preferred by the applicant challenging the judgment of conviction.
2. The applicant has been convicted for an offence punishable under Sections 354, 354(B) of Indian Penal Code and Section 10 of Protection of Children from Sexual Offences Act, 2012. He has been sentenced to suffer imprisonment for five years and to pay fine of Rs.5,000/-.
3. The case of the prosecution is that, the accused had removed clothes of the victim child aged around three years and touched her.

4. Learned Advocate for the applicant submitted that, the prosecution case suffers from serious discrepancies. The applicant was not present in the house on the date of incident. He was driving tempo and has produced challan in that regard. Victim was being tutored by the social worker, who was present in the Court, which is apparent from her evidence. The exact time of alleged incident has not been spelt out by any witnesses. The complainant/mother of victim stated in her cross-examination that, she visited the house of the accused and at that time he was not in the house which runs counter to her version in the examination-in-chief that the victim took her to the house of the accused and pointed out him as the person, who committed the alleged act. The victim or the mother has not stated as to where the accused had touched the victim girl. The applicant was on bail during the trial. The sentence is of five years. The applicant is in custody for a period of six months.

5. Learned APP and learned Advocate for Respondent No.2 submitted that, there is sufficient evidence to convict the appellant. The applicant has not examined any defence witness. There is no reason to falsely implicate the applicant. The evidence of mother and victim child attributes specific role to the applicant having committed alleged offence. The only defence urged by the applicant is that, there was quarrel between the mother of victim and the brother of accused, which is not supported by any evidence.

6. The applicant has been acquitted for offences punishable under

Section 366-A of IPC and Sections 8 and 12 of the POCSO Act. The victim was aged around 8 years at the time of giving evidence. The victim has stated that, the accused had removed her clothes and touched. The victim has also stated that, the accused had entered into the house and closed the door and offered chocolate to her which is apparently an omission. In the judgment, the trial Court has observed that, the statement of the victim was recorded under Section 164 of Cr.P.C. and the victim has not stated before the Magistrate that the accused touched her but it has to be appreciated that statement recorded by the Magistrate is used for the purpose of corroboration. From the said observation it appears that, the statement recorded by the Magistrate under Section 164 of Cr.P.C. does not refer to the fact that the accused had touched victim. PW-1 (mother of victim) in her cross-examination has stated that, she went to the house of the accused, he was not there. It is pertinent to note that, prosecution case is based on the version of the complainant that the victim child had informed her that uncle had committed alleged act and she pointed out at the accused in his house. Whereas in cross-examination she stated that, accused was not in house when she visited his house. There are several discrepancies pointed out by learned Advocate for the applicant. Considering the nature of evidence and the fact that, the sentence is of five years, the applicant was on bail during the trial, case for suspension of sentence and grant of bail is made out.

ORDER

- (i) Interim Application No. 768 of 2023 is allowed.
- (ii) The substantive sentence of imprisonment imposed vide judgment and order dated 20th January 2023 passed by learned Special Judge under POCSO Act, Greater Bombay in POCSO Case No. 65 of 2017 is suspended and the applicant is directed to be released on bail in executing PR Bond in the sum of Rs.20,000/- with one or more sureties in the like amount;
- (iii) The applicant shall report concerned police station once in six months on First Saturday of the month between 11.00 am to 01.00 pm.
- (iv) Interim Application stands disposed off.

(PRAKASH D. NAIK, J.)