

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

**INTERIM APPLICATION NO.4483 OF 2022
IN
CRIMINAL APPEAL NO.624 OF 2019**

Nadeem Abdul Sattar Shaikh Applicant
Versus
The State of Maharashtra & Anr. Respondents

Mr. Vashish Kumar Arora, Advocate i/b. Pravin U. Gaikwad a/
w. Shahrukh Siraj Shaikh, Vishnu V. Bhatt, Akash Giri, for the
Applicant.

Mr. S.R. Agarkar, APP for the Respondent No.1-State.

Mr. Veerdhawal Deshmukh, Advocate (appointed) for the
Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 17th FEBRUARY, 2023**

PC. :

1. This is an application for bail pending Criminal
Appeal of the applicant.

2. The applicant has preferred Criminal Appeal
No.624/2019 challenging the judgment and order dated
4.1.2019 passed by the Special Judge under POCSO Act in
POCSO Special Case No.179/2016. The applicant was
convicted for commission of offence punishable under Sections

5(m) read with 18 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer RI for ten years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer SI for one month. Though he was also convicted for commission of offences punishable under Section 376 read with 511 of IPC and under Section 9 read with Section 10 of the POCSO Act, no separate sentence was imposed for these offences in view of the sentence imposed under Section 5(m) read with Section 18 of the POCSO Act.

3. The applicant is in custody since 27.2.2016 till today. He was given set-off under Section 428 of Cr.PC. from his date of arrest till the date of conviction.

4. Heard Shri Vashish Kumar Arora, learned counsel for the applicant, Shri S.R. Agarkar, learned APP for the respondent No.1-State and Shri Veerdhawal Deshmukh, learned appointed counsel for the respondent No.2.

5. The prosecution case is that the victim was around ten years of age at the time of incident dated 25.2.2016. The

victim's date of birth was 13.4.2005. The prosecution case is that on that day, she was going to her school in the morning. One unknown person came near her. He told her that he had a daughter about the same age and he requested the victim to accompany his daughter to the school as she was also studying in the same school. Believing his words, the victim followed that unknown person to a room on the first floor of a building. It is the prosecution case that taking advantage of her helpless condition, the offender tried to commit rape on her. She started crying loudly and, therefore, before he could do anything further he left her. The victim came back home and narrated the incident to her parents. The parents first went to some local Corporator and also to their landlord. On their advise, the parents of the victim went to Nirmal Nagar police station and the mother of the victim lodged her FIR vide C.R. No.62/2016. The victim's statement was also recorded. She gave the description of the offender. The police arranged for drawing of the sketch of the offender. It is the prosecution case that the applicant was arrested on 27.2.2016.

6. During investigation, the police arranged to lay a trap. One squad of the police brought two persons as suspects to the police station. The applicant was brought to the police station by the squad headed by API Deokar. PW-17 Markad who was the investigating officer called the victim in the police station and the applicant was shown to her. She identified the applicant. After that further investigation was carried out. The applicant as well as the victim were sent for medical examination.

7. The statements of the witnesses were recorded and ultimately the charge-sheet was filed. During investigation, the police collected the CCTV footage around the area where the offender had taken the victim. The walking style of the applicant was captured on a CCTV camera fixed on the terrace of the police station. His walking style was also captured on a video. The CCTV footage of the area where the offence had taken place showed one boy and girl going towards that particular room at that particular time. However, the prosecution evidence led through the CCTV owner Nadeem

Khan, examined as PW-10, shows that the image quality of that record was not clear.

8. After completion of the investigation, the charge-sheet was filed and the case was tried before the Special Court under POCSO Act. The prosecution examined seventeen witnesses including the victim, her mother, various panchas, the persons who had transferred the CCTV footages on pendrive and the investigating officer. During investigation, test identification parade was held and the victim had identified the applicant in that test identification parade held on 5.5.2016. The learned Judge relied on the evidence of the test identification parade and also on the fact that the victim had identified the applicant in the Court during her deposition.

9. Learned counsel for the applicant submitted that out of ten years sentence, the applicant is in custody for almost seven years and a very short period is left. The appeal may not be decided within that period.

10. He submitted that the most important feature in this case is about the identification of the victim. According to

learned counsel, the identification in the test identification parade as well as in the Court is totally worthless because admittedly the applicant was shown to the victim on the very day when he was arrested.

11. He further submitted that there was delay in holding test identification parade which has remained unexplained. He relied on the judgment of the Hon'ble Supreme Court in the case of **Gireesan Nair and others Vs. State of Kerala**¹ to contend that once the accused is shown to the witness, subsequent identification in the test identification parade as well as identification in the Court is worthless. He submitted that there are no other corroborating pieces of evidence. There was no recovery of knife.

12. Learned APP as well as learned counsel for the respondent No.2 submitted that the applicants gait and walking style was captured on the CCTV device in the police station. His walking style was also captured on video. It was compared with the CCTV footage of the spot where the offender and the victim were seen in that area when offence was committed.

¹ (2023) 1 SCC 180

By comparison of the walking style, his identity could be established through the evidence of different panch witnesses including PW-8 Geeta Shirodkar and PW-10 Nadeem Khan. Both learned counsel submitted that the medical evidence also showed that there was an attempt to commit rape.

13. I have considered these submissions. Undoubtedly some incident had taken place because the victim and one boy was seen walking towards that particular spot at that particular time. This was captured on the CCTV footage placed in the opposite building. PW-10 Nadeem Khan is examined in that behalf. However, he has admitted that the recording quality was not clear.

14. The medical evidence also shows that there was some redness and tenderness around the private parts of the victim. Therefore, some incident had definitely taken place.

15. The most important fact in this case is about identity of the offender. There is substance in the submission of learned counsel for the applicant that the applicant was already shown to the victim by the police and, therefore, the

observations of the Hon'ble Supreme Court in the case of **Gireesan Nair** (supra) would apply. However, this will have to be considered at the final hearing stage of the appeal. At this stage, there is definitely substance in the submissions of learned counsel for the applicant. Apart from that, admittedly the CCTV footage of the spot was not very clear. The persons, who have compared the CCTV footage of the spot with the CCTV footage showing walking style of the applicant, were not the experts in their field and that evidence remained as their opinion evidence. This will also have to be tested during the final hearing stage of the appeal.

16. There are no other circumstances against the applicant except these circumstances. All the points raised by learned counsel for the applicant require serious consideration.

17. The remaining sentence of the applicant is less and, therefore, it is difficult to decide the appeal within that short period. In this view of the matter, the applicant has made out a case for his release on bail till disposal of his appeal.

18. Hence, the following order :

:: O R D E R ::

- i. During pendency and final disposal of Criminal Appeal No.624/2019, the applicant is directed to be released on bail on his furnishing P.R. bond in the sum of Rs.30,000/- (Rupees Thirty Thousand Only) with one or two sureties in the like amount.
- ii. The applicant shall not cause any harassment to the victim or her family in any manner.
- iii. The Application is disposed of accordingly.

PRADIPKUMAR
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Deshmane (PS)

(SARANG V. KOTWAL, J.)