

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 550 OF 2023

IN

CRIMINAL APPEAL NO. 182 OF 2023

Mohammad Rafiq Shaikh ... Appellant/Applicant

V/s.

State of Maharashtra and Anr. ... Respondents

Mr. Irfan Shaikh, for the applicant.

Mr. A.R. Patil, APP, for the State.

Mr. Shailesh Kharat, for the respondent no. 2., appointed through legal aid.

CORAM : KISHORE C. SANT, J.

DATE : 8TH FEBRUARY, 2024.

PC:

1. Heard the parties for some time.
2. This application is filed by the applicant for suspension of sentence and for release on bail. The applicant is convicted for the offence punishable under sections 354, 363, 366A, 376(2) (i) of Indian Penal Code read with Section 6 of the Protection of Children from Sexual Offences Act. The sentence awarded under Section 376 (2) (i)

is 20 years and to pay fine of Rs. 50,000/- in default of payment of fine he shall suffer 6 months RI. In view of section 42 no separate sentence is awarded under section of POSCO Act.

3. Learned advocate for the applicant vehemently argued the application. He has taken this Court through the evidence of the victim as recorded in Marathi. He submits that in case of variance between Marathi version and English version it is the Marathi Version that would prevail and the same needs to be considered. He submits that from evidence of the victim what appears is that there is no penetration. It is not a case of section (5) of the POCSO, Act at the most offence can be said to be under Section 7 of the POCSO, Act. He submits that in view of this deposition, no case under section 376 is also made out. For the offence punishable under section of POCSO, the maximum punishment is 5 years and if that is considered, the applicant has already undergone more than 5 years and the applicant needs to be released on bail.

4. Learned advocate for the respondent no. 2 opposes the bail application stating that the prosecution has clearly established its case. Victim was hardly 7 years of age, whereas the accused is of 54 years of age. He submits that looking to the gravity and other circumstance,

this is not a fit case to release accused by suspending the sentence.

5. Learned APP points out from the medical evidence that there was abrasion to the private part. This submission would show there is a penetrative. He further submits that in the offence under Section POCSO, it is not necessary to prove the penetration. There has to be injury in the private part. He thus submits that looking at the age of victim the prosecution has clearly proved its case beyond reasonable doubt and prays for rejection of the application.

6. This Court gone through the submissions. Reading all the evidences of the victim, it is seen that she has stated about the incident. The evidence of the Doctor, where he has stating that there was “*abrasion on fourchette posterior area and lateral vagina wall*”. Dr. has further opined that overall findings are consistent with attempt of forceful sexual intercourse.

7. This Court finds that *prima facie*, no case is made out. It is the case of lack of evidence. In view of the judgment in the case of ***Sandam Bhogen Meetai vs. State of Manipur*** reported in ***MANU/MN/0139/2022***, wherein Court has held that the cases of bail be decided by judiciously using discretion when the sentence is for fixed period. The Court may consider the applications liberally unless

there is any statutory restriction.

8. This Court finds that there is necessary while considering the application for bail, the principle as stated in the aforesaid judgment. Considering this aspect, this Court is not inclined to allow the application. The application is, therefore, rejected and the same stands disposed of accordingly.

9. The appeal be expedited as the applicant is in jail since 2018.

(KISHORE C. SANT, J)