

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

**INTERIM APPLICATION NO.3996 OF 2022
IN
CRIMINAL APPEAL NO.1159 OF 2022**

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Salman Ahmad Nafees Ansari ..Applicant/Appellant
Versus
The State of Maharashtra & Anr. ..Respondents

Mr. Majeed Memon a/w Mateen Qureshi, Khalil Girkar & Tapish Jain, for the Applicant/Appellant.
Mr. A. R. Patil, APP for the Respondent/State.
Mr. S. B. Shelar, Advocate Appointed Through Legal Aid for Respondent No.2.
Mr. Rathod, API, Kurla Police Station & Mr. Meher, PSI, V.B. Nagar Police Station – present.

CORAM : KISHORE C. SANT, J.

DATE : 30th JANUARY, 2024

PC.

1. Heard learned advocates for the parties.
2. This Application is for suspension of sentence awarded by the learned Special Judge, under POCSO Act dated 20th October, 2022 in PSC No.399/2019. By way of the impugned judgment and order, the present Applicant/Appellant is held guilty for the offence punishable under Section 376AB of the IPC and directed to undergo rigorous imprisonment for twenty years and to pay fine of Rs.5000/-. In default, to undergo simple imprisonment for three

years. Though the Applicant/Appellant is also convicted under Section 6 of the POCSO Act, however, no separate sentence is awarded in view of Section 42 of the POCSO Act.

3. It is the case of the prosecution that a victim girl aged about 8 years used to go to Madarsa for her education. Accused, who was teaching there committed sexual assault on her on 6th May, 2019. Because of this incident, she did not go to school in the afternoon. On asking by the informant/her mother, she narrated about the alleged incident. For the alleged incident, FIR came to be lodged by the informant/PW-1. After the trial, the Trial Court found the accused/Applicant guilty of the offence and sentenced the Applicant.

4. Learned advocate for the Applicant/Appellant vehemently argued that the prosecution case suffers from inherent weaknesses. There is no evidence corroborating version of PW-1 and PW-2. Except the version of these two witnesses, there is no supporting evidence. Even the medical evidence does not support the case of the prosecution. He has taken this Court through the evidence of PW-4 i.e. doctor, who examined the victim, wherein she has stated that there was no evidence of fresh tear or bleeding. No stains/foreign material on body was present. Thus, he further submits that the evidence of PW-1 and PW-2 cannot be said to be corroborative to each other, as it can be said to be only the version of the mother of the victim. He pointed out some contradictions in

respect of timing of the victim going to the school. He submits that prosecution has also not produced on record attendance register to show that the victim attended school on that day. His next submission is that since out of 20 years of sentence, Applicant has suffered more than 5 years of sentence and he is in jail since the date of incident i.e. 6th May, 2019. He thus prays for suspension of sentence.

5. Learned advocate for the Respondent No.2 vehemently opposes the Application. He submits that PW-4/doctor has clearly given an opinion of sexual assault stating that there was history of sexual assault and finding was consistent with the recent sexual assault. He submits that offence under POCSO can also be proved by testimony of the victim. This Court at this stage need not go into the details to find out whether there is sufficient evidence. Unless any infirmity is shown in the judgment, no bail be granted. Applicant has suffered only five years of sentence.

6. Learned APP submits that there is sufficient evidence on record. He points out the testimony of the PW-2 i.e. victim. He submits that the defence has accepted that the victim was a student who used to attend the Madarsa. At this stage, he submits that no case is made out to allow the Application.

7. Learned advocate for the Applicant/Appellant relies upon judgment in the case of ***Bhagwam Rama Shinde Gosai & Ors.***

Vs. State of Gujarat reported in ***1999(3) SCR 545***, wherein the Hon'ble Apex Court has held that when a convicted person is sentenced to fixed period of sentence and when he files appeal, suspension of sentence can be considered by the Appellate Court liberally unless there are exceptional circumstances. Learned advocate for the Applicant/Appellant further relies upon order passed by the Hon'ble Apex Court in the case of ***Takht Singh & Ors. Vs. The State of M. P. reported in JT 1999 (10) SC 438*** wherein the Hon'ble Apex Court granted bail to the accused, who was convicted for the offence punishable under Sections 302 and 149 of IPC. The main consideration was that the Appeal was pending before the High Court. The High Court rejected the prayer twice for bail and considering that there was no possibility of early hearing of the Appeal. In that case the convict had suffered three years sentence.

8. Learned advocate for Respondent No.2 relies upon judgment in the case of ***Preet Pal Singh Vs. The State of Uttar Pradesh & Anr. in Criminal Appeal No.520 of 2020***. The Hon'ble Apex Court in the said judgment has held that while considering application for suspension of sentence, the Appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction *prima facie* erroneous. He further relies upon judgment in the case of ***Chandrakant Mahadev Tawade Vs. State of Maharashtra & Anr.*** reported in ***2023 GoJuris (Bombay HC) 128***, wherein this Court relying on the definition under Section 3 of POCSO Act held that absence of medical

evidence is not *sine-qua-non* in the offence under POCSO. What is sufficient to constitute an offence is the penetration.

9. This Court finds that the judgments cited by the learned advocate for the Applicant/Appellant are not much helpful to him at this stage, as in the present case, this Court does not find any patent infirmity in the judgment of conviction by the Trial Court. So far as absence of positive medical evidence is concerned, this Court finds that in fact the doctor has clearly opined that on examination that it is consistent with the history of sexual assault. At this stage, this Court finds that there was sufficient evidence before the Trial Court to convict the Applicant/Appellant. At this stage, this Court need not go into the minute details. *Prima-facie*, this Court finds that no case is made out to allow this application.

10. The Application therefore stands rejected.

11. Learned advocate for Respondent No.2 is appointed through legal aid. Office to supply copy of paper-book.

[KISHORE C. SANT, J.]