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

**INTERIM APPLICATION NO. 4387 OF 2023
WITH
INTERIM APPLICATION NO. 4390 OF 2023
IN
CRIMINAL APPEAL NO. 1316 OF 2023**

Shabbir Javed Ansari

... Appellant/Applicant

Vs.

The State of Maharashtra & Anr.

... Respondents

Adv. Arti Bajpai, Adv. Nitin Satpute, for the Appellant/Applicant.
Adv. Mainak Adhikary, for the Respondent No. 2 through Legal Aid.
Mrs. M. R. Tidke, APP for State.
PSI- Meher, V. B. Nagar Police Station.

CORAM : KISHORE C. SANT, J.

DATE : 8th March, 2024

P.C.:-

1. Heard. Interim Application No. 4387 of 2023 is preferred for suspension of sentence and Interim Application No. 4390 of 2023 is for release of the Applicant on bail in connection with the conviction awarded by the learned Special Judge Under POSCO Act, 2012, Gr. Bombay, by Judgment and Order dated 12.10.2023 in Special Case No. 1049 of 2021. All the accused are convicted for the offence punishable under Section 235 (2) of the Code of Criminal Procedure of the offences punishable under Sections 363, 354, 366-A, 376, 506(II) r/w Section 34 of the Indian Penal

Code and under Sections 4, 8, 12 of the Protection of Children From Sexual Offences Act, 2012. Maximum sentence awarded is for the offence under 4 of the Protection of Children From Sexual Offences Act, 2012, i.e. 20 years and to pay fine of Rs. 7,000/-. Fine amount is directed to pay the victim. No separate punishment is awarded for the other offence, in view of Section 42 of POSCO Act.

2. It is the case of the prosecution that the victim aged 14 years was taken by Accused No. 3 to Titwala where the Accused No. 1 and 2 were present. After reaching to Titiwala all the Accused took the victim at one place where the Accused No. 1 and 2 committed rape on the victim. By that time the parents has lodged a missing report. The victim on coming to know that the police is in search of the victim, the Victim came along with the Accused to Thane. From Thane again they went to Titwala. The complaint came to be lodged on the next day i.e. on 23.06.2021 at Police Station V. B. Nagar Thane, Mumbai.

3. In the Trial the age of the victim is proved by producing on record birth certificate showing the date of birth of the victim as 06.10.2006. The Victim's statement shows that there was rape committed on her. The evidence of the victim is corroborated by a medical evidence. A medical certificate is proved by PW-4 doctor and also by PW-5, another doctor who examined the Victim.

4. The learned Advocate for the Applicant vehemently argued that

from the story narrated by the victim it is clear that it was case of consensual relation. The victim on her own went to Titwala along with Accused No. 3. At Titwala also she stayed for a night with all the accused persons and did not raise any shout. From Titwala she came to Thane and again went back to Titwala with the Accused persons which shows that she had no grievance and she was moving with the Accused persons on her own. He thus submits that this case is clearly case of consensual relationship and prays for suspension of sentence.

5. The learned Advocate for Respondent No. 2 opposes the Application who relied upon by Judgment reported in ***2023 AIR (SCW) at page 2202 in the case of Omprakash Sahani vs. Jai Shankar Chaudhary and Another***. The Hon'ble Apex Court in the said case has laid down that at the stage of considering the Application under Section 389 the Appellate Court is not to re-appreciate the evidence. He thus submits that at this stage this Court need not undertake the exercise of re-appreciation of the evidence. In the present case there is clear evidence to prove the guilt of the Accused. He prays for rejection of the Application.

6. The learned APP also submits that in this case the consent of the victim is immaterial. The prosecution has proved age of the victim by producing birth certificate on record. She also prays for rejection of the Applications. On prima facie consideration, this Court finds that there is clear evidence against the accused persons. No case is made out to allow

the Applications.

7. Both Applications therefore stand dismissed. Hearing of the appeal is expedited.

(KISHORE C. SANT, J.)