

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 67 OF 2024

IN

CRIMINAL APPEAL NO. 462 OF 2018

Nijamuddin Nazim Shaikh

... Applicant

Versus

The State of Maharashtra and Anr.

... Respondents

.....

Mr. Prashant Gurav, Advocate for the Applicant.

Ms. Sangita D. Shinde, APP for Respondent – State.

Ms. Trupti Khamkar, Appointed Advocate for Respondent No.2.

CORAM : SARANG V. KOTWAL &
R. M. JOSHI, JJ.

DATED : 24th SEPTEMBER, 2024.

P.C. :

1. This is another bail application in Criminal Appeal No. 462 of 2018 which is pending before this Court.

2. The applicant was the original accused in Special Case No. 1194 of 2013 before the Special Judge under Protection of Children from Sexual Offences Act, 2012 (for short “**POCSO Act**”). The learned Judge vide the Judgment and order dated 29.06.2017 convicted the applicant for commission of offence under Section 6 of the POCSO Act. He was sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- and in default of payment of fine to suffer simple imprisonment for three

months. Since he was sentenced under Section 6 of POCSO Act, no separate sentence was imposed under Section 376 of Indian Penal Code, 1860 (for short “**IPC**”). The victim was directed to be given compensation of Rs.25,000/-.

3. The prosecution case is that the victim was 1½ year old at the time of incident which occurred on 02.11.2013. The applicant was knowing the family of the victim. On the pretext of taking the victim out for giving her chocolate, he took her away for some time. He took her to a secluded spot and committed rape on her. The mother of the victim tried to search for her in the vicinity. After some time, the applicant brought the victim back to her house. The mother of the victim saw that victim was scared and was trembling. The victim uttered some words and made gestures to convey that applicant had committed rape on her. She was suffering from injuries. The mother of the victim took her for medical treatment and then lodged an FIR. The applicant was arrested. The investigation was carried out. The chargesheet was filed and the applicant was convicted.

4. During the trial, 15 witnesses were examined by the prosecution and one defence witness was examined by the applicant. After his conviction, the applicant preferred this appeal before this Court. On the previous occasion, he had made an application for bail vide the Criminal Application No. 807 of 2018 in Criminal Appeal No. 462 of 2015. The application was

heard on merits and vide the order dated 10.07.2018, the application was rejected. After that, again this application is made for his release on bail. In between, the applicant had preferred one more application for bail on the ground of ailment of his mother. Even that bail application was rejected. Today, the application is filed mainly on the ground that more than 10 years have passed and the appeal is still not decided.

5. Before referring to the merits of the matter, learned counsel for the applicant relied on the observations of the Hon'ble Supreme Court made in the order dated 25.02.2022 in the case of *Saudan Singh Vs. The State of U.P.* reported in 2022 SCC OnLine 697. He invited our attention to the observation that when the person has served more than 10 years of sentence, in those cases, bail can be granted, unless there are any extenuating circumstances against him. Learned counsel for the applicant submitted that in the present case he was arrested on 02.11.2013 and therefore more than 10 years have passed. He relied on the observations of the Hon'ble Supreme Court in claiming release on bail during the pendency of his appeal.

6. Learned counsel also made certain submissions on the merits of the matter. He submitted that the medical evidence in this case is quite vague. The defence witness had categorically submitted that there was no written report suggesting that rape was committed on the victim. The evidence of

the doctors is not supported by their medical reports. He submitted that there is one incriminating circumstance in the form of DNA report which shows that the blood found on the clothes of the applicant was shown to be that of the victim's as per the DNA report. He submitted that the panchanama and pancha's evidence indicate that there were no blood stains on the applicant's clothes. The clothes remained with the police for quite some time before being forwarded for chemical analysis therefore there is a strong possibility of tampering with the clothes.

7. Learned APP and learned counsel appearing for respondent No.2 submitted that it is a very serious offence and a heinous crime. The victim was only 1½ years of age. She has suffered tremendously and even at the time of recording of the evidence she was suffering physically and mentally. Learned APP relied on the order passed by another Division Bench of this Court on 02.07.2024 in Criminal Appeal No. 938 of 2019 with I.A.No. 4045 of 2022 in the case of ***Kartik Pratap Kaunder Vs. State of Maharashtra***. In this case, the order passed in ***Saudan Singh Vs. The State of Uttar Pradesh*** as reported in 2022 SCC Online SC 697 was considered and the bail was denied to that applicant, even though he had undergone more than 10 years imprisonment.

8. We have considered these submissions. The important evidence in this case is that of the mother of the victim who was examined as PW-1.

She has stated that at the time of the incident, the victim was around 1½ to 2 years old. PW-1 knew the applicant. She identified him in the Court. He used to visit their house. He was addicted to liquor. He used to take the victim out and used to offer her chocolates. On 02.11.2013 at about 1:15 p.m. he came to PW-1's house and said that he would take the victim out. PW-1 refused but he insisted. He took the victim with him. He did not return for quite sometime. PW-1 then searched for the victim. She went to the house of the applicant. After sometime, the applicant brought the victim back to her house. She was scared and was trembling. The victim with broken words and gestures told PW-1 that the applicant had caused penetrative sexual assault. PW-1 saw that the victim's undergarments were bloodstained. She questioned the applicant. The people gathered there. They caught the applicant and assaulted him. PW-1 took the victim to Ruby hospital and gave her some treatment. Thereafter, the victim was taken to Cooper hospital. PW-1 was informed that there were injuries to the private parts of the victim. Then the victim was taken to Oshiwara Maternity home. The doctor endorsed the opinion of the earlier doctor regarding the penetrative sexual assault. PW-1 then lodged the FIR which is produced on record at Exhibit-10. After 2-3 days, the victim was taken to J.J.Hospital. She was examined there. PW-1 has further stated that for about six months, the victim was having trouble in

passing urine. Even till the time of deposition, her situation had not changed. The police seized the victim's clothes. PW-1 also identified the clothes of the applicant in the Court which were produced at Article-4.

9. Apart from this main evidence, there are depositions of doctors. PW-5 Dr. Pathrikar has deposed that he had examined the victim on 02.11.2013, he was attached to Ruby Hospital. He observed that there was bleeding from the opening of the vagina of the victim and there was a discharge which looked like semen. The injury was fresh. He clearly opined that such injury was possible due to penetration or attempt to connect the private parts with the victim's private part. PW-6 Dr. Kurude was attached to J.J. Hospital who examined the victim on 09.11.2013. He observed that the victim's hymen was torn and ruptured at 1, 2, 3, 6 and 9 position. There was mild redness plus mild odema plus mild tenderness. PW-8 Dr. Balaji Ghumatdar was attached to Cooper hospital. He had examined the victim on 02.11.2013. On his examination, he had observed that vulva was swollen, there were bleeding marks of dried blood present from vagina. He had clearly opined that the injuries were possible due to attempt of penetrative sexual assault. Thus, there is a very strong ocular and medical evidence against the applicant.

10. The pancha for the seizure of the clothes had also deposed that the applicant's lungi was bloodstained but it was not so mentioned in the

panchnama. The DNA report at Exhibit-43 which is explained by PW-11 shows that the applicant's clothes show presence of the victim's blood. PW-11 has deposed that after the DNA analysis, it was interpreted that DNA profile of blood detected on the lungis of accused and the blood detected on the full pant of victim matched with DNA profile of the victim's and DNA profile was identical and from one and same source of the female origin i.e. of victim. Thus it is quite clear that victim had suffered bleeding injury to her private part. The blood was present on the clothes of the applicant. In the case of ***Saudan Singh*** (supra) the Hon'ble Supreme Court has observed that in case the accused has served more than 10 years of sentence, he can be granted bail unless there are extenuating circumstances against him. In the present case there are certainly extenuating circumstances against him. The offence is heinous. The victim was 1½ to 2 year old child. She was taken out for a stroll by the applicant. PW-1 trusted him. He committed breach of that trust and committed this heinous offence. The victim was suffering for quite some time. She was of tender age. There were injuries to her private parts. As mentioned earlier, another judgment of the Division Bench of this Court in the case of ***Kartik Pratap Kaunder*** (supra) had also taken a view that though the applicant in that case had served more than 10 years, the bail was denied to him considering the gravity, manner and the nature of offences concerned. In

the present case as described earlier, there are overwhelming circumstances against the applicant as far as the evidence is concerned. The offence is extremely serious. We are not inclined to grant bail in the pending appeal to the present applicant. Hence, the application is rejected. The applicant is at liberty to make an application for early listing of his appeal.

(R. M. JOSHI, J.)

(SARANG V. KOTWAL, J.)

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