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

**INTERIM APPLICATION NO. 1631 OF 2024
IN
CRIMINAL APPEAL NO. 409 OF 2024**

Faiyyaz Ahmed Mohd Ahmed Siddiqui @ Imran ...Applicant

Versus

State of Maharashtra and Anr.

...Respondents

Mr. Gaurav Bhavnani i/b. Mr. Rafiq Gori & Ms. Afin Pathan for Applicant.

Ms. R.D. Humane, APP for Respondent No.1-State.

Mr. Omprakash Jha i/b. The Law Point for Respondent No.2.

CORAM : M. M. SATHAYE, J.

DATED : 6th DECEMBER 2024

P.C.:

1. Learned Counsel for the Applicant/Convict and learned APP for the Respondent-State assisted by learned Counsel for the Respondent No. 2-Victim were heard on 29.11.2024.

2. This is an Application for suspension of sentence and interim bail. By the impugned order dated 19/03/2024 passed in Special Case Child Prot. No. 447/2018, the Applicant / sole Accused has been convicted u/s. 363, 376(2)(i) and (n), 354, 354-A, 354-D & 452 of the Indian Penal Code ('IPC' for short) and u/s. 5(l) and 6 of Protection of Children from Sexual Offences Act ('POCSO' for short) and he is sentenced to suffer rigorous imprisonment of 10 years in addition to fine.

3. Learned Counsel for the Applicant submitted that the Applicant is 28 years old as on today, and he has already suffered detention of 6 years and 4

months, which is more than half of the sentence awarded. He has submitted that the Appeal is admitted in April 2024 and as such, it is not likely to be taken for final disposal shortly.

4. He submitted that the alleged first incident of 15/04/2018 night is at the house of the Respondent No. 2/Victim. The victim is born on 29/06/2002 and therefore, on the alleged date of first incident, she was almost 16 years old and on the dates of subsequent incidents in July 2018, she was more than 16 years old. He submitted that as per the victim's own statement u/s. 164 of the Cr.PC. she had ran away to Nepal with the Applicant willingly. He submitted that from Nepal the Applicant and the Victim had come to Udaipur at the Victim's relative place (Mr. Vishwa Murti Mishra), from where they were brought to Mumbai by police. He submitted that if the said statement of the victim is considered alongwith other evidence and medical history as narrated by her, it can be seen that this is a case of love-affair between the Applicant and Accused, which had turned sour resulting into criminal case being filed. He submitted that the Applicant is a young man of 28 years as on today, who has already suffered more than half of the maximum sentence imposed and as such, this is a fit case of grant of interim bail.

5. Learned APP for the Respondent – State assisted by learned Counsel for the Respondent No. 2 / Victim submitted as under. That if the first date of the incident is considered, the age of the victim was below 16 years and therefore concerned provisions of the POSCO Act will apply with full force. The Applicant was stalking the victim as he had a mobile shop near Victim's coaching classes. Thereafter taking advantage of her tender age, physical relationship was established, which was used to blackmail the victim for subsequent acts of kidnapping and repeated acts of penetrative assaults. It is

submitted that the victim came from a conservative family and therefore, fearing for family's reputation, she had to give in to Applicant's demands. It is submitted that this is not just a case of love affair gone sour, but this is a case of targeting a young girl, misusing her tender age and then blackmailing her for repeated sexual / penetrative assaults.

6. I have considered the submissions and perused the record shown during arguments.

7. Indeed, the Appeal is admitted recently and is not likely to be taken up for final disposal. It is not disputed that the Applicant has already suffered more than half of the sentence awarded.

8. The offence is of serious nature and the sentence awarded is of 10 years. In **Preet Pal Singh Vs. State of U.P**¹, Hon'ble Supreme Court has held as under :

“35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider

1. (2020) 8 SCC 645

the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC.”

[Emphasis supplied]

9. As per the law laid down by Hon’ble Supreme Court in paragraph 33 of **Omprakash Sahni vs. Jai Shankar Chaudhary & Anr.**², the Court will have to see whether the convict has fair chance of acquittal on the basis of something palpable or so apparent or gross on the face of the record, on the basis of which, the Court can arrive at *prima facie* satisfaction that the conviction may not be sustainable. The Court will have to check if this threshold is crossed in the present case.

10. The age of the victim is not under dispute. It is proved vide birth certificate Ex. 28, duly verified by Medical Officer of Municipal Corporation vide letter Ex. 60-A, showing date of birth as 29.06.2002. The Victim / Prosecutrix has specifically stated the first incident of 15.04.2018 night. She has stated that the Applicant came to her house at night and forced her to open the door and after she opened the door, Applicant took her to bedroom and forcibly raped her. Assuming at this stage the argument of the Applicant to be right, that it was a consensual relationship, *prima facie* there is nothing to doubt the date of incidence. Therefore consent loses its value, considering that on said day, the victim was below 16 years of age. The presumptions under section 29 and 30 of the POCSO Act will operate. The Applicant has not led any evidence. The Victim has deposed that on subsequent dates on 18.04.2018 and 19.04.2018 the Applicant called again

2. (2023) 6 SCC 123

on mobile phone and asked her to open the door and when the Victim did not want to talk to him, he started blackmailing her that he would disclose that they have had sexual intercourse. Victim has deposed that thereafter on 2 occasions, the Applicant raped her and ultimately asked her to run away with him. She has further deposed that when she said no for running away, he again blackmailed her. The Victim has further stated that while in Nepal, Applicant asked her to arrange for money anyhow and therefore she asked for help from her relative in Udaipur, who told her that he can not transfer money but asked the victim to come to Udaipur. Evidence of PW7 (first IO) shows that on 29.07.2018, the detention team brought the Applicant and the Victim from Udaipur to police station at Mumbai.

11. Evidence of PW 4 indicates that the Applicant took the panchas to house of the Applicant for panchnama. Medical Evidence of PW6 & PW9 (doctors) indicates that in the medical history, Applicant was mentioned and that sexual intercourse has been apparent. Para 39 of the impugned Judgment would show that amendment of section 376(3) of IPC coming into force w.e.f. 21.04.2018 and first incident being of 15.04.2018, has played its role in awarding sentence.

12. In the aforesaid peculiar facts and circumstances, the threshold as set out by the Hon'ble Supreme Court in the case of **Omprakash Sahni (supra)** is not crossed in my considered opinion.

13. Therefore I am not inclined to grant bail. The Application is rejected.

14. Hearing of the appeal is expedited.

(M. M. SATHAYE, J.)