

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

***INTERIM APPLICATION NO.2610 OF 2024
IN
CRIMINAL APPEAL NO.1081 OF 2023***

Faiz Mohamad Fatte Mohamad Shah
Age - 35 years., Occu: Business,
Residing at Indira Nagar,
Near Ramalal Hotel,
Behind Shiv Mandir,
30 Feet Road, Mandala,
Mankhurd, Mumbai 43.

} Applicant/
Appellant

Versus

1. The State of Maharashtra
(Through Mankhurd Police Station,
Mumbai);
2. ABC (Victim Girl); and
3. XYZ (Victim Girl),

} Respondents

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Mr.Nitesh Nevshe, Advocate for the Applicant/Appellant.

Ms.S.S. Kaushik, APP for Respondent No.1 - State.

Ms.Ankita Nishad, Advocate for Respondent Nos.2 and 3.

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***CORAM : BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.***

DATED : 18th DECEMBER 2024.

ORDER : (PER : Manjusha Deshpande, J.)

1. The Applicant is seeking directions to release him on bail
in C.R.No.381 of 2016, registered with Mankhurd Police Station,

Mumbai, pending his substantive Appeal. The Applicant has

Rajeshri Aher

been convicted by the Additional Sessions Judge, Greater Mumbai in Special Case No.55 of 2017, *vide* judgment and order dated 09.05.2018, for the offences punishable under Sections 354A and 376 of the Indian Penal Code alongwith Sections 6, 8 and 12 of the Protection of Children from Sexual Offences, 2012 (POCSO Act). The Applicant has challenged the said judgment and order of conviction before this Court in the Appeal which is pending.

2. During the pendency of the Appeal, the Applicant has filed the present Application under Section 389 of Cr.P.C. The prosecution story leading to filing of complaint against the Applicant is that the aunt of the victim girl namely Sehrunissa Shoaib Shah made a phone call to the first informant, namely, Laxmi Sakat, who is a social worker and informed her that the accused who is father of the victim girls and brother of Sehrunissa, had committed wrong with his elder daughter ABC aged 15 years and tried to commit wrong with his younger daughter victim XYZ, who was about 12 years. Upon receiving such information, the informant social worker arrived at Mankhurd Police Station, Mumbai, where the sister of the accused Sehrunissa alongwith her husband was present with the victim girl XYZ. The victim girl XYZ informed that her

father Faiz Mohamad Fatte Mohamad Shah had committed wrong with her elder sister ABC. She informed that 10 to 15 days prior to the incident when she was at home, her father had told her to remove her clothes. She was frightened, but in the meanwhile, her father received a phone call therefore taking advantage of the same, she ran away from the house to her aunt Sehrunissa Shah's house, and thereafter she continued to reside with her. While residing there, she had confided about the wrong committed by her father with her elder sister, and also with her cousin Naziya. Naziya in turn communicated it to her aunt Shabnam and Shabnam told the same to Shoaib, and he informed it to his wife Sehrunissa Shah. The informant has also stated that, she has taken the victim girl ABC into confidence, who stated that her father had forcibly committed sexual intercourse with her twice. She has also told about it to her younger sister, upon knowing this their father has beaten them with hand, belt and wire.

On this background the social worker-complainant has filed a complaint. The victim girls were sent for medical examination, and upon completion of investigation, chargesheet was filed.

3 During the trial, prosecution has examined P.W.1 Laxmi Sakat, informant, P.W.2 ABC-victim, P.W.3 XYZ-victim, P.W.4 Dr. Narendra Baluram Kumar, P.W.5 Dr.Abhijit Patil, P.W.6 Sadrunissa Faiz Mohamad Shah-mother of the victim, P.W. 7 Abdul Hasan Lal Mohd. Choudhari-a panch witness, P.W.8 PSI Rohan Tanaji Suryavanshi, attached to Mankhurd Police Station, Mumbai, P.W.9 Sharad Ramchandra Gare, API Gaondevi Police Station, Mumbai. The accused had examined defence witness No.1 Sehrunissa Shoaib Shah. Upon considering the evidence on record, the accused has been convicted by the Additional Sessions Judge, Greater Mumbai.

4. The learned Advocate Mr.Nevshe for the Applicant submits that the Applicant is an innocent person, who is falsely implicated in this case. He has not committed any offence as alleged by the prosecution. According to the learned advocate for the Applicant, the Applicant has already undergone 8 years of imprisonment. He has very good chances of succeeding in the appeal, considering the evidence on record, he does not deserve to be further incarcerated in the prison, since the final disposal of Appeal will take time.

5. We have heard the learned advocate for the Applicant as well as the learned APP. The advocate for the Applicant has drawn our attention to the statement of the prosecutrix victim P.W.2, recorded under Section 164 of Code of Criminal Procedure (Cr.P.C.). Upon going through the statement recorded before the Magistrate under Section 164 of Cr.P.C., wherein she has stated that due to the dispute between her father and her uncle Bholu, she was persuaded by her uncle Bholu to give a statement against her father in the police station, alleging that her father has committed wrong with her. Her uncle Bholu had promised her that if she gives such a statement against her father, he would pamper her with food, money and all the goodies. When the victim was confronted with her statement recorded under Section 164 of Cr.P.C., she could not give satisfactory answer. She merely deposed that since she was not keeping well, she has given such statement.

6. The prosecution has also examined her younger sister P.W.3 XYZ, who is also a victim. She has given a testimony that her father had also committed wrong with her, when everybody was absent from the house. He had sent away her siblings out of the house and closed the door, he further ordered her to remove her clothes. When she refused, he insisted, on her refusal he had

scolded her. During the incident, her father received a phone call, taking advantage of the same, she ran away from the house, and went to her aunt's house. When she disclosed it to her aunt, her aunt and her husband took her to Lallubhai Compound Police Station, Mankhurd, Mumbai. When they reached there, the police told them to come after some time. Thereafter, one lady came there, and started inquiring with her about the incident. She narrated the entire incident to her. Her elder sister was also inquired by the said lady. She has further deposed that she was taken for the medical examination, but she was not questioned by the Doctor. In her cross examination, she has deposed that she was taken to the Magistrate at Kurla, and her signatures were obtained on the statement.

In the cross-examination, she has given an evasive answer that she does not recollect what she has stated before the Magistrate in her statement under Section 164 of Cr.P.C.

7. On going through her statement recorded under Section 164 of Cr.P.C., we find that she stated that on the fateful day, her uncle and her aunt had a fight in their shop in her presence. Her uncle refrained her from returning home and promised to take her alongwith his children to have fun. However, he asked his

children to stay at home and to watch TV and took her to the police station to file complaint against her father. He insisted that she should give a statement before police that her father has committed wrong with her and with her elder sister. He also promised her that if she gives such a statement, he would pamper her. Therefore, she had accordingly given statement against her father before the police.

8. On going through the medical examination report of the victim- P.W.2, which is proved by P.W.5 Dr.Abhijit Patil, it discloses that the Doctor has given an opinion that there is no sign of use of force, however, possibility of sexual assault cannot be ruled out. In the local examination of genital part, and other orifices, the Doctor has not given any opinion about the examination of genitals. When confronted about it in his testimony, the Doctor has stated that he has not found any abnormality in her body. He has also not mentioned about status of hymen in his report which is an important aspect for proving the allegations in the complaint. According to him, since the victim came for the medical examination 7 to 8 days after the incident, the injuries must have healed, hence, he did not find any injuries.

Though he has accepted that the victim had narrated that there is a history of forceful penovaginal sexual intercourse by the father twice, he has not found it necessary to examine her in view of the history given by the victim. In the column against the external examination on genital, he has merely stated 'not applicable'. Furthermore, under the category of body evidence samples, the doctor failed to collect crucial evidence, including swabs, nail scrapings, nail clippings, and blood samples for grouping etc., as provided in the table. In fact, against reason for not collecting the sample, there is an endorsement made by him that the samples are not collected as there is no history of sexual violence. This endorsement is contrary to the history recorded by him as per the say of the prosecutrix.

The testimony of the victims P.W.2 and P.W.3 are neither supported by the medical reports nor by the testimony of the Doctor. When in fact P.W.2 has alleged forceful sexual assault, the same was required to be supported by the medical evidence.

9. It is also worthwhile to note that the defence has examined Sehrunissa Shoaib Shah, who is the sister of the accused, and who has been referred to in the complaint given by the informant. In the complaint, the informant stated that she

had met Sehrunissa, her husband Shoaib Shah and victim girl XYZ near Mankhurd Police Station, Mumbai. In the presence of Sehrunissa Shoaib Shah, P.W.2 and P.W.3 have confided to her about the incident that had occurred. However, Sehrunissa Shoaib Shah, who is Defendant witness No.1 has deposed that a dispute had arisen between her brother and sister-in-law i.e. accused and his wife. Therefore she was summoned by her sister-in-law, to the police station, since the dispute was of domestic nature, the police officer Shri.Gare gave her a number of an NGO and told her to make a call in order to resolve their dispute. Accordingly, she made a call to the NGO, and after waiting for some time, she returned to her home. Her niece i.e. P.W.3 the victim girl XYZ was present in the police station, who told her that she would falsely implicate her father, on which she advised her not to do so.

10. On going through the testimony of the witness, and evidence on record, *prima facie* we are of the opinion that, a reasonable case is made out by the accused in the present Application, and upon scanning of the evidence, it is evident that there are discrepancies and inconsistencies in the testimony of the witnesses. The testimony of P.W.2 is not supported by the medical evidence. Therefore, in our view,

Rajeshri Aher

considering that the Applicant has fair chances to succeed in the Appeal, it would not be fair to continue his incarceration till the disposal of the Appeal. This Appeal being of the year 2023, the chances of final disposal of Appeal in near future are bleak. In the wake of the fact that the Applicant has already undergone 8 years of imprisonment, in our opinion it would be appropriate to release him on bail, pending the Appeal, on the following terms and conditions:

:: ORDER ::

- (i) The Applicant Faiz Mohamad Fatte Mohamad Shah shall be released on bail in connection with C.R.No.381 of 2016, registered with Mankhurd Police Station, Mumbai on furnishing P.R.Bond in the sum of Rs.20,000/-, with one or two sureties in the like amount;
- (ii) The Applicant shall report to the concerned police station once in every three months, on first Monday of the month, till the final disposal of the Appeal;
- (iii) The Applicant shall inform from time to time, the concerned police station about his current residential address and mobile contact number and/or change of residence or mobile details, if any.

14 The Interim Application is allowed in the aforesaid terms and is accordingly disposed off.

All concerned to act on an authenticated copy of this order.

(MANJUSHA DESHPANDE, J.)

(BHARATI DANGRE, J.)