

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.262 OF 2017
IN
CRIMINAL APPEAL NO.138 OF 2017**

Sunil Pandit Gangurde)...Appellant/Applicant

**V/s.
State Of Maharashtra)...Respondent**

Mr. Ashutosh Kale with Mr. Rajesh Jadhav, Advocates for the Appellant/Applicant.

Mr. S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 12th April, 2017.

P.C. :

This is an application for suspension of sentence and releasing the applicant-accused on bail during the pendency of the appeal filed by him which has already been admitted by this Court for final hearing.

2 The applicant-accused is convicted of the offences punishable under Section 5(1) read with Section 6 of the Protection of Children from Sexual Offences, Act, 2012 (For the sake of brevity '**POCSO Act, 2012**') and is sentenced to suffer RI

for 10 years apart from payment of fine of Rs.1,000/- and in default to undergo further rigorous imprisonment for 25 days by the learned Sessions Judge, Nashik. He is, however, acquitted of the offence punishable under Section 376 of the IPC and Section 5(j)(ii) read with 6,7 and 8 of the POCSO Act, 2012.

3 Heard the learned advocate appearing for the applicant-accused. He drew my attention to paragraphs 24 and 25 of the impugned judgment and argued that the learned trial Court itself has observed that relations between the applicant-accused and the prosecutrix were outcome of love affair between them. The learned advocate further argued that the prosecutrix who is stated to be '**desperately in love**' by the learned trial Court was not willing to join company of her parents as noted by the learned trial Court in paragraph 25 of the impugned judgment. He further argued that the applicant-accused was on bail during the pendency of the trial and he has never misused his liberty.

4 As against this, the learned APP by drawing my attention to the evidence of PW.7-Pandurang Bagul Head-Master of school so also narration of the prosecutrix to the medical officer

has argued that the prosecutrix was below 18 years of age at the time of incident in question and, therefore, her consent is immaterial. Therefore, in submission of the learned APP, the applicant-accused is not entitled for bail.

5 I have carefully considered rival submissions and also perused copies of deposition of witnesses so also the impugned judgment and order. Evidence of P.W.1-Prosecutrix goes to show that while travelling in ST bus, she and the applicant-accused used to talk frequently and, therefore, love affair between them developed and bloomed. In paragraph 16 of her cross-examination , the prosecutrix has accepted the fact that she and the applicant-accused were liking each other and they indulged in sexual relations with consent of both parties. She further stated that she and the applicant-accused wanted to marry with each other but her father was opposing her marriage. It is thus, clear that the prosecutrix and the applicant-accused were in deep love with each other and out of that relationship, they indulged in sexual relations.

6 It is well settled that consent of a female below 18 years of age is immaterial. In the case in hand, the prosecution averred that the prosecutrix was born on 6.5.1998 and, therefore, at the time of incident, she was more than 17 years of age but below 18 years of age. For proving age of the prosecutrix, reliance is placed on evidence of P.W.7-Pandurang Bagul, Head-Master of the school, who deposed that on the basis of narrations of mother of the prosecutrix, her date of birth recorded in the school is 6.5.1998. When we turn to the evidence of P.W.2-Surekha mother of the prosecutrix then it becomes clear that she was not knowing date of birth of her daughter, i.e. the prosecutrix. This fact is coming on record from examination-in-chief of P.W.2-Surekha itself. In very first para of her evidence, she has stated that she is not in a position to tell date of birth or birth place of her daughter i.e., the prosecutrix. The question which will have to be addressed at the time of final hearing of this matter will be whether with such evidence prosecution has proved age of the prosecutrix.

7 The applicant-accused was on bail throughout the trial. In the matter of **Sunil Mahadev Patil v. State of**

Maharashtra reported in **2016 ALL MR CRIMINAL 1710** in paragraph 12, this Court has enumerated categories in which the applicant in such cases can be enlarged on bail. The case of the applicant-accused is falling in those categories. The applicant-accused had not indulged in any violence. He has no criminal antecedents nor he had committed act of threatening the victim. On the contrary, they both were deeply in love. Evidence regarding the age of the prosecutrix as stated in forgoing paragraphs is infirm. Therefore, the applicant-accused deserves liberty and as such, the order:

- (1) The application is allowed.
- (2) Substantive sentence of imprisonment imposed on the applicant-accused is suspended and he is directed to be released on bail on executing PR bond in the sum of Rs.15,000/- and on furnishing surety in the like amount.
- (3) As a condition of this order, the applicant-accused should not contact the prosecutrix or her relatives in any manner and he should not

extend threats, promise or inducement to any of them.

(A. M. BADAR, J.)