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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1595 OF 2020
IN
CRIMINAL APPEAL NO.488 OF 2020

Shaikh Isak Shaikh Moosa = APPLICANT

VERSUS

The State of Maharashtra = RESPONDENT

Mr. SP Jogdand, Advocate for Applicant;
Mr. AM Phule, APP for Respondent-State.

CORAM : SMT.VIBHA KANKANWADI, J.

RESERVED ON : 23/10/2020

PRONOUNCED ON : 06/11/2020

PER COURT:-

1. Heard learned Advocate and learned APP
appearing for respective parties.

2. In this Criminal Application, the
applicant, who is the original accused, prays for
suspension of substantive sentence and releasing
him on bail during pendency and final hearing of
the Criminal Appeal.

3. The applicant is the original accused in
Special Case(Child) No.53 of 2017, who has been

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convicted by learned Judge, Special Court, Jalna, vide judgment and order dated 7th August, 2020. The applicant has been convicted, thus, -

a) Under Section 376(1) of IPC and sentenced to suffer R.I. for ten years and to pay fine of Rs.10,000, in default, R.I. for three months.

4. It is vehemently submitted on behalf of the applicant that the applicant has been erroneously convicted by the learned Judge under Section 376(1) of IPC. Though the evidence produced by the prosecution is having material contradictions and omissions, the same has not been properly appreciated. The prosecution has failed to prove the guilt of the accused beyond reasonable doubt. The learned Sessions Judge failed to consider that testimony of the victim creates doubt and not reliable. The testimony of PW No.2, i.e. victim, does not corroborate and support the case of the prosecution. The learned Judge failed to appreciate the evidence of PW 2, wherein she admits in her cross-examination that she has voluntarily given consent to the accused to go along with him. The learned Sessions Judge failed to consider the testimony of PW 5, who is an eye-witness who later

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on turned hostile. There is no evidence of forceful sexual assault by the accused as there is no clinching evidence to that effect. The prosecution has failed to prove the medical evidence adduced by them. While conducting the medical examination of the accused, the medical expert opined that the accused is unable to do sexual act or intercourse and though that document is exhibited at Exh.53, it has not been considered by the learned Judge. Inference of the guilt of the applicant is drawn by the Trial Court in absence of any cogent and reliable evidence which is erroneous and contrary to the evidence brought on record.

. The applicant was on bail during the trial of the Sessions Case and he has not misused the liberty and he has deposited the fine amount. The learned Advocate further submits that the appeal involves other legal and technical points/issues, which the applicant/appellant wants to agitate and address them at the time of final hearing of the appeal and the applicant have every hope of success in the appeal. Consequently, the applicant prays for enlarging him on bail by

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suspending the substantive sentence awarded by the learned Special Judge on such terms and conditions as this Court may deem fit and proper.

5. Per contra, learned APP resisted the application and supported the reasons assigned by the learned Sessions Judge while convicting and imposing the sentence, in question, against the applicant. The learned APP submitted that the case is based on the direct as well as other material evidence. The learned Judge has properly scanned the evidence brought on record. It is, therefore, submitted that the application being sans merit, deserves to be dismissed and it be dismissed accordingly.

6. At the outset, it is to be noted that age of the victim is not proved. The learned Advocate pointed out that though the victim has stated her date of birth and produced school record to that effect; yet the basic information on the basis of which that entry about the date of birth is recorded in the school record, has not been proved. Further, mother of the prosecutrix is not aware

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about exact date of birth of the prosecutrix. Though she states that she had obtained the birth certificate from Gram Panchayat, she says that it was lost. In view of the decision in the case of Kiran Kumar Vs. State of M.P. - (2001) 9 SCC 211, the sentence awarded to the applicant, in the present case, can be said to be short term sentence, benefit will have to be extended to the applicant-appellant when he has demonstrated that the material and significant points raised by him in the appeal are required to be considered at the time of final hearing of the appeal. Further, the applicant was on bail throughout the trial, has not misused his liberty and deposited the fine amount. In view of the matter, it can be said that a case is definitely made out for releasing the applicant on bail by suspending the substantive sentence during pendency and final disposal of the appeal. Hence, following order,-

ORDER

- i. The Criminal Application stands allowed.
- ii. The substantive sentence imposed on the applicant by learned Judge,

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Special Court, Jalna, vide judgment and order dated 7th August, 2020 in Special Case (Child) No.53/2017, is hereby suspended till hearing and final disposal of the appeal.

iii. The applicant be released on executing PR and SB of Rs.15,000/ (Rupees fifteen thousand) each.

iv. The applicant shall not commit any criminal activity.

v. The applicant shall remain present before the learned Trial Judge once in six months, till final hearing and disposal of the appeal, commencing from the date he tenders bail papers and, thereafter, the Trial Judge to fix dates for their subsequent appearances.

vi. In case of two consecutive defaults on the part of the applicant to remain present before the Trial Court, the Trial Court to inform this Court about the same and in that eventuality, the prosecution would be at liberty to file an application for cancellation of

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the bail granted to the applicant.

vii. Bail before the Trial Court.

(SMT. VIBHA KANKANWADI,J.)

BDV