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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1632 OF 2020  
IN  
CRIMINAL APPEAL NO.497 OF 2020

Tulshiram s/o Bapurao Gundale  
Age: 21 Yrs., occu. Labour,  
R/o Borgaon, Tq. Bhokar,  
District Nanded.

= APPLICANT  
(Orig.Accused)

VERSUS

The State of Maharashtra  
Through Police Station Inspector,  
Bhokar Police Station,  
Tq.Bhokar, Dist. Nanded.

= RESPONDENT/S

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Mr.Rahul O.Awsarmol, Advocate for Applicant;  
Mr.SB Pulkundwar, APP for Respondent-State.

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CORAM : SMT.VIBHA KANKANWADI, J.  
DATE : 9<sup>th</sup> October, 2020.

PER COURT:-

1. Present application has been filed for suspension of sentence imposed on the applicant-appellant in Special (POCSO) Case No.9/2017 by Special Judge, Bhokar, District Nanded on 3.12.2018. The applicant-accused has been sentenced to suffer rigorous imprisonment of ten years and to pay fine of Rs.10,000/-, in default, S.I. for six months.

2. Heard learned Advocate Shri R.O.Awsarmol for applicant and learned APP Shri S.B.Pulkundwar for State. Perused the Judgment as well as the copies of the depositions made available.

3. It has been vehemently submitted on behalf of the applicant that the applicant himself, when the alleged incident of kidnapping had taken place on 6.4.2017, was minor. He was short of two months for completing 18 years of age. However, the learned Special Judge has stated that when the accused-applicant was arrested on 18.9.2017, he was 18 years and 5 months and during that period, continuous act of sexual intercourse by him with the victim will not allow him to take benefit of minority or juvenality. The learned Trial Judge has failed to appreciate that, in fact, the victim, who was then aged 15 years, had taken active part and because of her insistence only, the accused-applicant had ran away with her. In her deposition, the victim has clearly stated that when she had asked the applicant that they should run away, the applicant had refused. But, thereafter, after about 2-3 days from *Gudipadwa*, she again

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insisted and when again the applicant refused, she had cut her veins of her hand, then only he accepted the proposal by her to run away. The main hurdle in their love affair was that they belong to different community. The victim is a Muslim while the applicant-accused is a Hindu. The victim has stated that till date of arrest of the accused, they both have resided as husband and wife. There was no intention of the applicant-accused to commit any offence. But, even as per the evidence of the victim, they had performed marriage in a temple immediately after they had gone away from their village and thereafter they had resided together as husband and wife. This intention ought to have been considered by the learned Special Judge. Further, the learned Trial Judge has not properly considered that there was no proper evidence regarding the age of the victim. Only the school record has been produced and Headmaster has been examined. However, the basis, on which her date of birth was registered in the Register of the School, has not been proved properly. The applicant has every hope in the appeal and, therefore, till the appeal is decided, the sentence be suspended.

4. Per contra, learned APP submitted that the victim is admittedly minor. She was only 15 years of age when the incident had taken place. Though she has stated in her examination-in-chief that, she had insisted upon the applicant-accused to take her away; yet the accused-applicant could have refused flatly. Age of the victim has been properly proved. Medical evidence is also supporting the prosecution story. A well reasoned judgment has been given, which requires no interference. When the competent Court has come to the conclusion and held the applicant guilty of committing the offence, then the sentence need not be suspended.

5. At the outset, it is to be noted that, the sentence, that has been imposed upon the applicant, is for ten years and which can be stated to be a short term sentence in view of the decision in the case of Kiran Kumar Vs. State of M.P. - (2001) 9 SCC 211.

6. The another fact, that is required to be

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noted, is that the present applicant has been acquitted of the offence punishable under Sections 363 and 366-A of IPC. His conviction is only under Section 6 of the Protection of Children from Sexual Offences Act, 2012, which is on the basis of the fact that the victim is minor and there is aggravated penetrative sexual intercourse with the victim. The age of the victim has been tried to be proved through PW 6 - Shivdas - Headmaster, ZP Primary School, Borgaon, Tq. Bhokar. He has produced the extract of the School Admission Register and he has stated that the victim had got admission in the school in 1<sup>st</sup> Std. on 14.6.2010. In his cross-examination, he has claimed ignorance to many facts. The important fact is that he had not brought Admission form of the victim nor documents which were presented by parents of the victim at the time of admission. He was unable to say on the basis of which document date of birth of the victim was recorded in the School Admission Register. Therefore, this fact is required to be undergone at the time of final hearing as to whether the said date of birth of the victim has been properly and legally proved or not. It is

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also then required to be seen that when the victim had stated that because she had cut veins of her hand, the applicant accepted her proposal to run away and then the applicant is acquitted of Section 363 of IPC. It is stated by the victim that they have performed the marriage in the temple, then whether the husband can be said to have committed rape on the wife, is also required to be considered. Further, whether the benefit of the decision in the case of S.Varadrajan Vs. State of Madras - AIR 1965 SC 942, can be extended to the applicant. Therefore, definitely case is made out to suspend the sentence by releasing him on bail during pendency and final disposal of the appeal as the appeal is admitted and it is less likely that it will be taken up for final hearing in near future. Hence, following order, -

#### ORDER

I. The substantive sentence imposed upon the applicant by learned Special Judge, Bhokar, District Nanded on 3.12.2018 in Special (POCSO) Case No.9/2017, stands suspended till final

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disposal of the Criminal Appeal.

II. The applicant be released on his executing PR and SB of Rs.30,000/- with two sureties of Rs.15,000/- each.

III. The applicant shall not commit any criminal activity.

IV. The applicant-appellant to remain present before the learned Trial Judge once in six months, till final hearing and disposal of the appeal, starting from the date he tenders bail papers and, thereafter the Trial Judge to fix dates for his subsequent appearances.

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

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VI. Bail before the Trial Court.

VII. The Criminal Application for bail and suspension of the sentence stands disposed of.

(SMT. VIBHA KANKANWADI,J.)

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