

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPLICATION NO.4038 OF 2019
IN
CRIMINAL APPEAL NO.1262 OF 2019**

Anil s/o Sunil Pawar ... Applicant

Versus

The State of Maharashtra ... Respondent

.....
Mr. Amol S. Gandhi, Advocate for applicant.

Ms. R. P. Gaur, APP for respondent-State.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 8th October, 2020

ORDER :

. Present application has been filed for suspension of sentence. The applicant/appellant has been convicted in Special (POCSO) Case No.22 of 2017 by learned Special Judge, Beed on 10-04-2019. He has been convicted for the offence punishable under Section 363 of the Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.500/- (Rupees Five Hundred only), in default, to suffer further rigorous imprisonment for three months. Further, he has been convicted for the offence punishable under Section 366 of the Indian Penal Code and thereby sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.500/-(Rupees Five Hundred only), in default, to suffer further rigorous imprisonment for three

months. Further, he has been convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act') and thereby sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer further rigorous imprisonment for three months. Further, he has been convicted for the offence punishable under Section 6 of the POCSO Act and thereby sentenced to suffer rigorous imprisonment for twelve years and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default, to suffer further rigorous imprisonment for three months.

2. Heard learned Advocate Mr. Amol S. Gandhi for applicant and learned APP Ms. R. P. Gaur for respondent – State.

3. It has been vehemently submitted on behalf of the applicant that the learned trial Judge has not appreciated the evidence properly and wrong conviction has been awarded. The learned trial Judge failed to consider that there was love affair between the applicant and the victim. The victim was of understandable age at that time. She was aged 17 years even if we consider her testimony. However, if we consider the medical evidence, then the testimony of P.W.-5 Dr. Shinde would show that the findings of dental examination of the victim showed her age between 16 to 18 years. The radiological age is stated to be 15 to 16½ years and, therefore, the doctor has concluded regarding the age of the

victim as 15 to 18 years. The rule of +1 or -1 would then come into play and whatever would be in favour of the accused will have to be interpreted. It would show the age of the victim as 18 to 19 years. Another fact to be noted is that immediately after the alleged incident, the parents of the victim performed the marriage of the victim. This also shows that since she was of marriageable age, they have performed her marriage. The testimony of the victim would also show that she had the ample opportunity to flee away, but she has not done that, which shows that she was a consenting party. Therefore, the conviction under Section 363 and 366 of Indian Penal Code is wrong. There are other points which the appellant wants to raise at the time of final hearing as the appeal has been admitted and it is less likely that the appeal would be taken up for final hearing, the appellant be released on bail by suspending the sentence.

4. Per contra, the learned APP strongly opposed the application by submitting that the birth certificate of the victim has been produced on record which would show that her birth date is 22-01-2002. Her school leaving certificate would also show the same date which has no erasers or additions. The victim has also stated the same date in her examination-in-chief. Therefore, there is no question of the opinion given by the doctor while assessing age determination. It has clearly come in the evidence of the victim that by putting her under pressure and by giving promise to marry, she was taken away by the

accused to the place of his relatives and other places. He had sexual intercourse with her without her consent. Even if for the sake of argument we take that she had given consent later on for the sexual intercourse, yet, she being minor, her consent is no consent at all. The conviction is proper and legal. Further, from the judgment, it can be seen that the accused had fled away from the Court and was required to be brought back to jail by arresting him. Therefore, the possibility of fleeing away by the accused-applicant cannot be ruled out.

5. At the outset, it can be said that the sentence that has been awarded to the accused for the offence punishable under Section 6 of the POCSO Act would make it clear that it cannot be a short sentence. Therefore, benefit of the ratio laid down in ***Kiran Kumar Vs. State of M. P [(2001) 9 SCC 211]*** cannot be given to the applicant. Though there appears to be a medical evidence stating that the age of the victim is between 15 to 18 years, the birth certificate issued by Municipality, Beed has been produced. No doubt, the extract is taken on 22-01-2019 and was not part of the charge sheet, yet it can be seen that it is a public document. Further, it can be seen that the said birth extract has been exhibited as Exhibit-79 and, therefore, it is required to be seen which document to be prevailed and whether any benefit needs to be given to the accused, but that would occur at the time of final hearing. At this *prima facie* stage, note of the public document is definitely required to be taken which shows that on the day of incident, the victim

was minor. The most important fact is that in the impugned judgment, the learned special Judge has specifically observed that an application was filed at Exhibit-58 by the surety of the accused stating that the accused is remaining absent and, therefore, he is producing the accused before the Court. In that application, the said surety clearly stated that he does not want to continue to remain as the surety for the accused. The accused was asked to furnish another surety, however, accused did not give another surety and, therefore, he was taken in judicial custody on 21-01-2019. Thereafter, the Superintendent of District Prison, Beed reported to the Special Judge vide letter dated 20-02-2019 that when the accused was produced before the Court on 02-02-2019, the accused ran away from the Court and he was arrested on 16-02-2019. It is stated that since then the accused is in jail. This clearly shows that the accused had escaped from the custody of the Court and was required to be brought back by arresting him. He does not deserve any kind of sympathy. Possibility of similar incident cannot be ruled out. Hence, his application for suspension of sentence deserves to be rejected and the appeal may be expedited. Accordingly, the application stands rejected. Appeal is expedited.

[SMT. VIBHA KANKANWADI, J.]

SCM