

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.01 OF 2019
IN
CRIMINAL APPEAL NO.1240 OF 2019**

Ajinkya Eknath Kale

..... Applicant

VERSUS

State of Maharashtra

..... Respondent

Mr. Kuldeep S. Patil a/w. Ms. Saili N. Dhuru Advocate for
Applicant.

Mr. A. R. Kapadnis, APP for the Respondent-State.

**CORAM : PRAKASH D. NAIK, J.
DATED : 24nd SEPTEMBER 2020**

P. C.

1 This is an application for suspension of sentence and grant of bail pending appeal against the conviction preferred by the applicant. The appeal has been admitted. Vide judgment and order dated 17th August 2019 passed by Special Judge (POCSO), the applicant is convicted for the offence punishable under Section 376 (2) (n) of Indian Penal Code, 1860 (for short “IPC”) and sentenced to suffer rigorous imprisonment for 10 years. He is also convicted for offence punishable under Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act) 2012 and sentenced to suffer rigorous imprisonment for 10 years. The applicant is further convicted for offences under Section 342 read with Section 34 of IPC and

Section 9 of Prohibition of Child Marriage Act 2006 and sentenced to suffer imprisonment for two years. He was acquitted for offences under Section 366 read with Section 109 of IPC and Section 493 of IPC.

2 The prosecution case is that victim was studying in XIth standard. Her marriage was performed on 30th June 2013 with accused No.1 who is son of accused No.2. The victim was taken to house of accused No.1 and accused No.2. Accused No.1 had physical relationship with victim against her wish. The victim was 16 year old at the time of incident.

3 The accused No. 2 to 5 were convicted for the offence under Section 10 of Prohibition of Child Marriage Act and sentenced to suffer rigorous imprisonment for two years and also under Section 11 of Prohibition of Child Marriage Act 2006 and sentenced to suffer rigorous imprisonment for two years. Accused No.4 and Accused No.5 were convicted under Section 366 read with Section 109 and sentenced to suffer rigorous imprisonment for three years. The Accused No.1 to 3 were acquitted for offence under Section 366 read with Section 109 of IPC. Accused No. 4 and 5 were acquitted for offence punishable under Section 342 read with Section 34 of IPC. Accused No.2 to 5 were acquitted for

offence punishable under Section 376 (2) (n) read with Section 109 of IPC and Section 496 read with Section 34 of IPC.

4 First Information Report (for short “FIR”) was lodged by mother of victim on 03rd September 2013. Accused No.1 (Applicant) is the son of accused No.2. The accused No.2 is paternal aunt of victim. Accused No.3 is father of the Accused No.1 (applicant). Accused No.4 is the father of victim and accused No.5 is brother of Accused No.4 (uncle of victim).

5 Learned counsel for the applicant submits that, the applicant was on bail during the trial. There are no criminal antecedents against him. He had not misused facility of bail. The offence punishable under Section 376 is not attracted in this case. Exception 2 of Section 375 indicates that, sexual intercourse or sexual act by a man with his own wife, the wife not being under 15 year of age, is not rape. The victim was allegedly more than 16 years at the time of alleged incident. It is submitted that Section 376 (2) (n) will not be applicable since it refers to repeated rape on same woman. He further submitted that relations between mother and the father of victim (accused No.4) were strained. They were not residing together for a long time. Victim along with her siblings were looked after by father. It is

submitted that assuming that the prosecution case that marriage was performed is proved, there was no ill-intention. It was not forced marriage. Even the complainant was interested in performing the marriage of the victim and she had arranged proposals under the belief that the victim was of marriageable age. The complaint was lodged belatedly at the instance of mother of victim. The victim in her evidence deposed that rituals were performed during the marriage. After marriage, Satyanarayan Pooja was performed and several people were invited. Gifts were provided to her. Both victim and accused had visited deity. Victim had accompanied accused No.1 to Khanapur. The appeal preferred by co-accused has been admitted and they have been granted bail.

6 Learned APP submitted that the victim was minor at the time of incident. All the accused had acted in connivance with each other. The victim was minor and marriage ought not to have been performed. The evidence of the victim support the prosecution case. The mother of the victim has also corroborated the version of the victim. Complaint was lodged by the mother of victim after she learnt about the marriage. There was a physical relationship between victim and the accused No.1 at the residence of accused. The version of the victim is supported by medical evidence.

7 I have perused the documents. Appeal has been admitted. The accused No. 2 to 5 have also preferred appeal challenging conviction. Their appeal has been admitted and sentence of imprisonment as against them, has been suspended. The victim and the accused were relatives. Accused no.4 is father of victim. The relationship between the accused and the mother of victim (PW No.2) was not cordial. PW No.1 (Victim) has stated that since prior to three years of incident, her mother (PW No.2) was residing separate from her father. During three years victim has not visited her mother. So also her mother did not visit the place of victim to meet her. Victim did not speak to her mother for three years on mobile. During three years her father and paternal relatives looked after her and her siblings. Son of her mothers maternal aunt and brother of her maternal aunt had come to see her for marriage purpose. She also stated that four days after marriage, Satyanarayan Pooja was performed in the house. She performed said Pooja with applicant. People from village were invited for lunch. Her father and maternal aunt had been to her house with sweets and gifts on first festival of Bendur. Prior to marriage, she had been to Khanapur on motorcycle with accused No.1. She was gifted clothes and watch by accused No.1. After marriage she alongwith accused No.1 and others had gone to Jyotiba. They performed Pooja after returning from Jyotiba. The accused No.1 had

physical relationship with her on 15th August 2013. It was desire of mother that she should reside with accused No.1 at any cost, in consultation with each other to get separated from accused No.1. Complaint is filed against accused. The applicant was on bail during trial. The appeal would not come up for hearing soon. Considering the factual aspect and evidence, the sentence can be suspended.

ORDER

- (i) The sentence of imprisonment awarded vide Judgment and Order dated 17th August 2019 passed by Special Judge (POSCO Act) Sangli while convicting the applicant is suspended and the applicant is directed to be released on bail on executing PR bond in the sum of Rs. 25,000/- with one or more surety in the like amount.
- (ii) The applicant shall report concerned police station once in a month on every first Saturday of the month between 11.00 am to 01.00 pm. until further order.
- (ii) Application stands disposed off.

(PRAKASH D. NAIK, J.)