

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPLICATION (APPP) NO.11/2020
IN
CRIMINAL APPEAL NO.46/2020

Dnyaneshwar Mahadev Kawade
 Aged 25 years, Occ __ Labour,
 R/o Mirch Plot, Warud,
 Tq. Warud, Dist Amravati

.....APPELLANT

...V E R S U S...

The State of Maharashtra,
 Through Police Station Officer,
 Police Station Warud,
 Tq., Warud, Dist Amravati

...RESPONDENTS

 Shri S.V. Sirupurkar, Advocate for appellant.
 Ms. G.R. Tiwari, A.P.P. for respondent No.1/State.

CORAM:- VINAY JOSHI, J.
DATED :- 27/10/2020

ORDER

1. Heard finally with consent of learned counsel appearing for the parties.

2. A prayer has been made by the convicted accused for suspension of execution of sentence in terms of Section 389(1) of the Code of Criminal Procedure. The appellant/accused is convicted by Sessions Judge, Amravati

for the offence punishable under Section 376(1)(2)(n) and Section 323 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The maximum sentence awarded is to undergo rigorous imprisonment for 10 years and total fine of Rs.6000/- has been imposed. It is urged that the learned Trial Court failed to appreciate the evidence in proper perspective hence, erred in convicting the accused. According to him, the sentence of fixed period has been imposed therefore, his case for suspension of execution of sentence be considered liberally as there was love affair between victim and accused.

3. Learned A.P.P. resisted this application by submitting that there was overwhelming evidence against the accused, moreover, birth certificate has been produced and therefore, accused does not deserve for suspension of sentence.

4. While submitting to take liberal view, the appellant has relied on the decision of the Hon'ble Supreme Court in case of **Bhagwan Rama Shinde Gosai and Others Vs. State of Gujarat (1999) 4 Supreme Court Cases 421**, wherein it is

ruled that, if the sentence of limited duration is imposed then the Appellate Court can liberally considered the application for suspension.

5. Learned counsel for the appellant highlighted on the point that victim was major at the time of occurrence, therefore, it is a case of consensual sex. He took me through the evidence of victim wherein the girl herself has stated that she had love affair with accused and as there was promise to marry, she stayed with the accused at rented premises. Though, birth certificate has been produced by the investigating officer, the appellant has disputed it seriously by stating that the investigating officer has tendered birth certificate which was collected after the occurrence. He has produced a copy of evidence led by the victim girl in another proceedings on 09/07/2015 to show that the victim has stated her age as 18 years. Having regard to this fact, appellant would submit that there is serious doubt regarding the age of victim and therefore, at this juncture, his application be liberally considered for suspension of sentence.

6. The appellant by placing reliance on the decision of this Court in the case of **Vishal Anil Naik Vs. State of Maharashtra, 2019 SCC OnLine Bom 7316** submitted that even if the prosecutrix was held to be just below 18 years still this Court has suspended the execution of sentence by considering that the incident had arisen out of love affair. Apparently, the victim herself has stated that she was in love with accused and therefore there is no element of force or compelling circumstances. Even if, it is assumed that the date of birth as stated by prosecution is correct , she is about 17 years of age. The incident as stated is not violent but due to love affair, she appears to have stayed with accused for one month. The aspect of proof of date of birth of victim would be decided at the time of appeal. The applicant was on bail during the trial. There is no possibility of concluding the appeal in close proximity. Having regard to all these circumstance, I deem it fit to accord the benefit and suspended the execution of sentence. In view of this Criminal Application stands allowed. The execution of substantive sentence imposed by Trial Court in Special Case No.23/2016 stands suspended during the pendency of appeal, on

condition that the appellant shall deposit entire fine amount in Trial Court, if not already deposited.

7. The appellant-Dnyaneshwar Mahadev Kawade be released on bail on furnishing PR. Bond of Rs.15,000/- with one surety in the like amount.

This order be executed on verification of deposit of fine amount.

Application is disposed of accordingly.

JUDGE

R.S. Sahare