

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

**919 CRIMINAL APPLICATION NO. 239 OF 2021
IN CRIMINAL APPEAL NO. 48/2021**

**PANDHARI KACHRU PAWAR
VERSUS
THE STATE OF MAHARASHTRA**

...

Advocate for Appellants : Mr. Salunke Sudarshan J
APP for Respondent : Mr. V. M. Kagne.

**CORAM : MANGESH S. PATIL, J.
DATE : 04.03.2021.**

PER COURT :

This is an application under Section 389 of the Code of Criminal Procedure.

2. By the judgment and order impugned in this appeal against conviction he has been sentenced to suffer rigorous imprisonment for 10 years for the offence punishable under Section 376(2)(i) of the Indian Penal Code with a fine of Rs. 5000/-, in default he has been sentenced to suffer further rigorous imprisonment for one year. No separate sentence has been awarded for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act in view Section 42 of that Act.

3. The learned advocate for the appellant would submit that there is a serious dispute as to the age of the victim. Though some attempt was made to prove her date of birth, the witness from the school (PW. 8) has stated to have recorded her date of birth on the basis of a birth certificate issued by a Grampanchayat. However, her father (PW. 2) has specifically denied to have produced any such birth certificate while admitting her to school. The learned advocate would further submit that even the birth certificate purportedly issued by a Grampanchayat is highly suspicious. It does not

bear any outward number, date or stamp of the Grampanchayat.

4. The learned advocate would further submit that even the medical evidence is not concrete so as to justify conviction. No final opinion has been solicited from the Medical Officer who has been examined by the prosecution as P.W. 5. The Chemical Analysis Report is also of no use and still no final opinion is solicited from her. Therefore even there is a doubt as to if there was any sexual intercourse between the victim and the appellant.

5. The learned advocate would also point out from the testimony of the victim that even she has not used specific word to demonstrate that there was any sexual intercourse. She has only referred to as 'physical relation' which cannot be taken as sexual intercourse. The learned advocate would further point that there is enough material and evidence to show that the victim had voluntarily left the custody of her parents and had accompanied the appellant. At no point of time she had made grievance about he having kidnapped her or sexually exploited her albeit according to the prosecution he had taken her to various places including public places over a period of time. Considering all such state of affairs, there is reasonable doubt about involvement of the appellant in commission of the crime.

6. Lastly, the learned advocate would submit that the appellant has been in jail since the date of his conviction for almost three years. The appeal is not likely to be heard in the near future and the substantive sentence, therefore, be suspended.

7. The learned A.P.P. submits that the learned Sessions Judge has given plausible reasons to come to the conclusion that the victim was indeed a minor when the incident had taken place. He would further submit that the testimony of victim cannot be discarded at the threshold. She has specifically narrated the incidents about the appellant having taken her to various lodges at different places and having established physical relations. One will have to appreciate the reluctance of the victim to use specific words to

connote that there was any sexual relation. It is a matter of interpretation and understanding. She being a minor has used the words which according to her were sufficient to describe the crime. The offence is indeed serious and the learned Judge after having scanned the evidence has rightly sentenced the appellant for 10 years of rigorous imprisonment. There is no special and exceptional reason to suspend the sentence pending appeal.

8. I have carefully gone through the papers and the impugned judgment. Without intending to affect the final conclusion I cannot but observe that the victim has specifically stated her date of birth as 25.08.2000. Even her father (PW. 2) has stated the same date of birth. Irrespective of the veracity or otherwise of the Grampanchayat birth certificate, there is enough evidence in the form of Headmaster/employee of the school (PW. 8) who has stated by referring to the original school register about the date of birth which was entered in while the victim was being admitted in the school. There was no occasion for any manipulation having taken place at that time much less to substantiate the allegations in future.

9. Though the medical evidence does not indicate that there was any violence or injury, if the appellant had successfully enticed the minor victim and had established sexual relations obviously, there would not be any signs of violence therefore no much weight can be attached to that fact at this juncture.

10. The fact remains that the victim in her testimony has specifically stated about the appellant having established physical relations with her by taking her to various places and to different lodges. One need not delve much at this juncture. It would be sufficient to observe that there is nothing to disbelieve her version which connotes about he having enticed her and established sexual relations.

11. Pertinently, though there is no final opinion of the Medical Officer she did notice that there was a old tear of hymen. Taking into account the fact

that no plausible explanation has been elucidated during her cross examination for such state of affairs, coupled with the fact that the victim was still a minor, there is every room to believe that in all probability the appellant had indulged in sexual intercourse with her.

12. He has been sentenced to imprisonment for 10 years. Though the appellant has been in jail for last almost three years that cannot be a ground to suspend the sentence.

13. The Application is rejected.

14. The Appeal is expedited.

(MANGESH S. PATIL, J.)

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