

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

**914 CRIMINAL APPLICATION NO.2568 OF 2019
IN APEAL/875/2019**

**VIKAS JALINDAR CHAVAN
VERSUS
THE STATE OF MAHARASHTRA**

...

Advocate for Applicant : Mr. Shaikh Mobin H.
APP for Respondent : Mrs. R.P. Gaur.

**CORAM : MANGESH S. PATIL, J.
DATE : 20.07.2021.**

PER COURT :

This is an application under Section 389 of the Code of Criminal Procedure seeking suspension of substantive sentence and releasing the appellant on bail during pendency of the appeal against his conviction for the offences punishable under Section 376 (1)(2)(n), 450, and 506 of the Indian Penal Code and under Section 4, 5(j)(ii) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act').

2. Learned advocate Mr. Shaikh for the appellant would submit that there is serious doubt about the age of the prosecutrix/victim. There is no evidence led by the prosecution to demonstrate that the date of birth recorded in the Municipal Office is that of the victim and not her sister. He would submit that the learned Special Judge has not at all considered this missing link and has jumped to an erroneous conclusion that the date of birth recorded in the Municipal record is that of the victim.

3. Learned advocate Mr. Shaikh would further point out that there is enough material on record to at least demonstrate prime facie that the victim was having some consensual relation with the appellant. In fact the

stand of the appellant is not that bold. He has flatly denied having fathered the child. He would further point out that there is serious doubt as to the paternity as well. Though there is favourable DNA report showing him to be the father of the child born to the victim, the evidence of the Investigating Officer clearly demonstrates that the samples that were forwarded for analysis were not duly secured. In view of such serious lacuna, even the DNA report cannot be relied upon.

4. The learned advocate would point out few decisions of this Court wherein in similar set of facts the accused therein were granted bail by suspending the sentence in similar set of facts.

5. Lastly, the learned advocate would submit that since it is a short term sentence there are no exceptional circumstances to refuse to suspend the sentence as contemplated by the Supreme Court in the case of *Kiran Kumar Vs. State of M.P.; 2001 AIR SCW 5130*.

6. Per contra, the learned A.P.P. would submit that the offence is serious. The decisions of this Court being relied upon by the learned advocate for the appellant were mainly in respect of the offences prior to the coming into force of the POCSO Act. Though in some of these matters, even the accused were granted bail during appeal were already on bail during the trial and it is in the peculiar circumstances that this Court had granted them bail which is not the fact situation in the matter in hand.

7. Learned Prosecutor would further point out that at this juncture there is prima facie evidence in the form of original birth record maintained by the Municipal Council regarding date of birth of the victim. In fact there is a direct evidence of the mother of the victim regarding her date of birth which stands corroborated by the Municipal record. At this juncture this much of material is sufficient to conclude that prima facie the victim was indeed a child during commission of the crime.

8. Learned Prosecutor would further submit that at this juncture in view of the fact that a child was born to the victim and there is a DNA report showing that the appellant has fathered it, no leniency be shown. There is every room to believe that he has exploited a child to satisfy his lust. He was not granted bail during pendency of the trial and the situation may continue pending appeal.

9. I have carefully considered the rival submissions, the impugned judgment, copies of the testimonies and decisions cited at the Bar.

10. As far as the age of the victim is concerned, obviously, her mother who has been examined as witness would be a direct witness on the point of date of birth. Her such testimony stands duly corroborated by the birth record which is relevant under Section 35 of the Evidence Act. Though some capital can be made by the appellant pointing out the confusion as to if the date of birth being relied upon by the prosecution is that of the prosecutrix or her sister, in my considered view that is the matter which may have to be addressed during the hearing of the appeal. At this juncture, one can safely proceed with the premise that the birth date as narrated by the victim's mother stands corroborated by the Municipal record. Consequently, the victim was indeed a child as defined under the POCSO Act during commission of the crime.

11. As far as the conduct of the victim is concerned, irrespective of the fact as to if she was a consenting party or otherwise, once it is concluded that she was a child, her consent would be inconsequential. The appellant has lured the victim in having sexual relations and has prima facie made her pregnant. These circumstances in my considered view constitute an exceptional circumstance/reason as is required by the decision of the Supreme Court in the case of **Kiran Kumar (supra)**, to refuse to suspend sentence and to release the appellant on bail.

12. The decision in the case of **Pradeep Sunil Bawane Vs. The State of**

Maharashtra; 2018 ALL MR (Cri) 3053 would clearly show that it was an offence which had occurred prior to coming into force of the special legislation of the POCSO Act. Therefore the appellant is not entitled to refer to and rely upon this judgment at least while claiming suspension of sentence and bail.

13. In the case of **Ram Pralhad Ghodke Vs. The State of Maharashtra in Criminal Application No. 1867/2018 (in Criminal Appeal No. 431/2018)**, the appellant was already on bail during pendency of the trial which is not the fact situation in the matter in hand. Therefore he is not entitled to derive any benefit from this decision as well.

14. The Application is rejected.

(MANGESH S. PATIL, J.)

mkd/-