

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.1896 OF 2021
IN
CRIMINAL APPEAL NO.608 OF 2021**

Sanjay Ramchandra Waskar

...Applicant

Versus

The State of Maharashtra and Anr.

...Respondents

....

Mr. Balwant Salunkhe for the Applicant.

Ms P.N. Dabholkar, APP for the Respondent -State.

Ms Ameeta Kuttikrishnan appointed counsel for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 2nd SEPTEMBER, 2021.

P.C.:-

Learned APP states that Respondent No.2 has been duly served and that he has requested for lawyer from legal aid panel. Ms Ameeta Kuttikrishnan, learned counsel, who is on legal aid panel is appointed to represent Respondent No.2.

2. This is an application filed by the Applicant under Section 389 of the Code of Criminal Procedure, 1973 seeking suspension of substantive sentence imposed vide judgment dated 12/07/2021 passed by learned Extra Joint District Judge and Additional Sessions Judge, Sangli, in Special Case (POCSO) No.52 of 2016 and to enlarge the Applicant on bail.

3. Perused the records and considered the submissions advanced by the learned counsel for the Applicant, learned APP for Respondent No.1-State and Ms Ameeta Kuttikrishnan, learned counsel for Respondent No.2.

4. Case of the prosecution is that the Applicant herein has committed rape on the victim girl, who was a minor as on the date of the incident. The learned Judge has disbelieved the story of the victim girl that the Applicant had forcible sexual intercourse. Learned Judge has observed that the victim girl had voluntarily accompanied the Applicant to Ganpatipule. She had stayed with him in one lodge for six days and that she had gone sight seeing for six days at Ganpatipule. Learned Judge has observed that the victim had not sought help of any person and had not complained that she was kidnapped or that the Applicant had forcible sexual intercourse with her even though sufficient opportunity was available to raise an alarm. The learned Judge has however observed that the victim girl was a minor as on the date of the incident and despite consent, the act constitute an offence under Section 376 of the IPC and Section 6 of the Protection of Children from Sexual Offences Act (POCSO).

5. By the impugned judgment dated 12/07/2021 the Applicant has been held guilty of offence under Section 376(2)(n) of the IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and sentenced to suffer rigorous imprisonment for 10 years and to pay fine amount of Rs.5,000/- i/d to suffer rigorous imprisonment for six months.

6. It is relevant to note that the case of the prosecution is that the victim was born on 22/01/1999. According to the prosecution as on the date of the incident victim was 17 years and 5 months old. The Applicant has disputed that the victim is a child within the meaning of Section 2(d) of the POCSO Act. It is seen that the prosecution has not relied upon the birth certificate of the victim. The prosecution has relied upon the school leaving certificate and has examined the Head Mistress. The evidence of PW10-Head Mistress prima facie indicates that the birth date of the victim was not registered in the school records on the basis of the birth certificate. The prosecution has neither spelt out the basis on which the date of birth was recorded nor examined the person, who gave the date of birth as 22/10/1999. In the absence of such material, the school leaving certificate would not prima facie have any evidentiary value.

7. It is also pertinent to note that the victim was examined by the Medical Officer to ascertain her age. On the basis of clinical and radiological examination, the Doctor has opined that the victim is about 17 to 18 years of age. It need not be emphasized that the medical evidence would point out the approximate age and the margin of error, as recognised, is two years on either side. Hence, prima facie the medical opinion does not conclusively prove that on the date of the incident the victim was below 18 years of age. Considering this fact and in view of the findings recorded by the learned Judge as regards the relationship being consensual, in my view prima facie the provisions of Section 375 of the IPC and the provisions of POCSO Act would not be attracted. Further the Applicant was on bail during trial. It is stated that he has not misused the liberty.

8. Under the circumstances, in my considered view this is a fit case to suspend substantive sentence and to release the Applicant on bail pending disposal of the appeal. Hence, the application is allowed on following terms and conditions:-

- (i) The substantive sentence imposed on the Applicant vide judgment dated 12/07/2021 passed by learned Extra Joint District Judge and Additional Sessions Judge, Sangli, in Special Case (POCSO) No.52 of 2016 be suspended

pending disposal of the appeal.

- (ii) The Applicant is ordered to be released on bail on furnishing PR bonds of Rs. 10,000/- with one or two sureties in the like amount.
- (iii) The Applicant shall report to the Trial Court, once in six months on the day/date specified by the Trial Court, till the appeal is finally disposed of.
- (iv) The Applicant shall keep the Trial Court informed of his current address and mobile contact numbers and /or change of residence or mobile details, if any, from time to time.
- (v) If there are two consecutive defaults in appearing before the Trial Court, the learned Judge shall make a report to the High Court and the prosecution would be at liberty to file an application seeking cancellation of bail.

9. The application stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)