

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

**INTERIM APPLICATION NO. 760 OF 2019
IN
CRIMINAL APPEAL NO. 1397 OF 2019**

Dipak Mahadev Jambhale

..Applicant

v/s.

The State of Maharashtra

..Respondent/s

Mr. Kuldeep Nikam for the Applicant .

Mr.S.V.Gavand, APP for the Respondent-State.

Ms. Priyanka Chavan for the Respondent No.2.

CORAM : ANUJA PRABHUDESSAI, J.

DATED : 13th DECEMBER, 2021.

P.C.

1. This is an Application under Section 389 of Cr.P.C. for suspension of sentence imposed by judgement dated 30.08.2019 in POCSO Special Case No. 120 of 2015, Satara.

2. By the impugned judgment the learned Judge has held the Appellant guilty of offences under Section 376(ii)(f)(n) of Indian Penal Code and sentenced him to undergo rigorous imprisonment for 10 years with fine of Rs.50,000/- i.d. to undergo simple

imprisonment for 3 months.

3. Heard Shri Nikam, learned Counsel for the Appellant, Shri Gavand, learned APP for the State and Ms. Chavan learned Counsel for the Respondent No.2. I have perused the records and considered the submission advanced by the learned Counsel for the respective parties.

4. The records reveals that based on the FIR lodged by the prosecutrix, crime was registered against the Applicant for offences under Section 376 of Indian Penal Code and Section 4 and 6 of Prevention of Children from Sexual Offences Act, 2012. The learned Judge has recorded a finding that the prosecution has failed to prove that the victim was below 18 years of age and a 'child' within the meaning of definition 2(d) of Protection of Children from Sexual Offence Act, hence acquitted the Applicant in respect of offences under POCSO Act, and held him guilty of offence under Section 376(2)(f)(n) of Indian Penal Code and sentenced him as stated above.

5. The victim is a native of Nepal. Her mother had expired during her childhood. Her father had migrated to India for employment. Since her childhood, the victim and her father were working in the field of the Applicant as labourer. In the year 2014 the father of the victim left Mahabaleshwar, living her in the house of the Applicant. The evidence of PW1 reveals that since her childhood she was residing in the house of the Applicant and doing their household and field work. Her evidence prima facie indicates that the Applicant had sexual relationship with her, resulting in pregnancy. The DNA test prima facie supports the case of the victim. There are no foundational facts to accept the contention of the learned Counsel for the Applicant that the relationship between the Applicant and the victim was consensual. At this stage there is no reason to disbelieve the testimony of the prosecutrix.

6. The mother of the victim had expired during her childhood and her father had abandoned her, leaving her at the mercy of the Applicant, who was her employer. The records prima facie

indicate that the Applicant has taken undue advantage of the helpless situation of the victim and repeatedly subjected her to rape. Considering the nature of accusation and the evidence in support thereof, in my considered view, this is not a fit case for suspension of substantive sentence. Hence the Application is dismissed.

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(ANUJA PRABHUDESSAI, J.)