

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

**CRIMINAL APPLICATION NO.251 OF 2021
IN
CRIMINAL APPEAL NO.40 OF 2021**

Shashikant s/o. Bhagwat Kamble	..Applicant
Vs.	
The State of Maharashtra	..Respondent

Mr.B.M.Dhanure, Advocate for applicant
Mr.R.B.Bagul, APP for respondent no.1
Mr.S.P.Brahme, Advocate for respondent no.2

**CORAM : R.G.AVACHAT AND
R.M.JOSHI, JJ.
RESERVED ON : NOVEMBER 24, 2022
PRONOUNCED ON : NOVEMBER 25, 2022**

ORDER :-

This is an application under Section 389 of the Code of Criminal Procedure. The applicant has been convicted for the offences punishable under Sections 363 and 366-A of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO" for short) vide judgment and order dated 18.02.2020 passed by learned Special Judge, Latur, in Special (POCSO) Case No.2 of 2015 and therefore, sentenced to suffer various imprisonments including the imprisonment for life.

2. Learned counsel for the applicant would submit that the victim was little over 15 years of age. The applicant was 21 years of age at the material time. The victim's evidence indicates that she had left her house on her own for no return. Even there is no evidence to indicate prior acquaintance between the applicant and the victim. The inference could be drawn that she, on her own, stayed with the applicant for not less than fourteen days. Even she sported *Mangalsutra*. A friend of the victim, who was in her company, was allowed to go back home. The same indicates the applicant did not have any intention to detain the victim. The evidence of the Medical Officer, who examined the victim, has been adverted to, to suggest that it was doubtful, as to whether penetrative intercourse did take place. According to learned counsel, the applicant was on bail, pending trial. With the passage of time, both applicant and victim have got married. The applicant is blessed with three children. One of them is just one year's old. The victim too has been blessed with a daughter. It may take time of not less than 6-7 years to have the present appeal its turn for hearing on merit. He, therefore, urged for allowing the application.

3. Learned APP and learned counsel representing respondent no.2 would, on the other hand, submit that admittedly, the victim was below 18 years of age at the material time. Penetration, howsoever slight, is sufficient to constitute an offence of rape. The medical evidence supports the prosecution.

According to learned counsel for respondent no.2, it is a heinous offence. The applicant did not have acquaintance with the victim before she met him. Under the pretext of providing her shelter, he exploited her.

Both learned APP and learned counsel for respondent no.2, ultimately, urged for rejection of the application.

4. Considered the submissions advanced. Perused the evidence relied on.

5. True, the victim was below 18 years of age at the material time. Her consent was, therefore, immaterial. It also appears that the applicant was not known to the victim before they met at the relevant time. He would ply auto-rickshaw to earn his living. The victim has step-mother. The evidence indicates that the victim had left her house under some pretext, but with intention not

to return. She was in the company of her friends. They went to PVR for watching a movie and then went to a garden. When the victim saw her father, she hid herself in one footwear shop. Then she and her friend met the applicant. The victim requested him to provide her shelter for overnight. The applicant took her to his room. The victim, her friend and the applicant stayed overnight in the said room. It is the victim's case that during said night, the applicant had sexual intercourse with her. On the following day, the applicant allowed the victim's friend to go her house. There are very many omissions amounting to contradictions in the evidence of the victim. Admittedly, the victim was away from her house for fourteen days. She stayed with the applicant during those days. The places, whereat she stayed, were situated in thickly populated area. During some of these days, the applicant is alleged to have had sexual intercourse with her many a time.

6. The medical examination report of the victim reads – there were no signs of assault on her thighs and around the private parts but tears were at the vaginal part. Hymen was intact. There was one mark on buttock but it was old. The small tear at the posterior of vagina was fresh. Vaginal swab was collected. The

Medical Officer opined that there is possibility of sexual assault. He admitted in his cross-examination that after examining the patient, he did not come to the conclusion about the sexual assault and therefore, had not mentioned it in his report. He went on to admit that if hymen is intact, it is the sign of virginity. The C.A. report does not support the prosecution's case, although the victim was examined within 24 hours of she left the company of the applicant. In our view, the medical evidence, *prima facie*, runs counter to the case of the victim that for four days, the applicant had forcible sexual intercourse with her. The offence punishable under Section 4 of the POCSO Act, at the relevant time, was punishable with imprisonment which shall not be less than for a period of seven years but which may extend to imprisonment for life.

7. At the material time, the applicant was 21 years of age. Although the victim was below 18 years of age, it appears that she stayed with the applicant on her own volition. In the given circumstances, there is scope for exercising the discretion in imposing the sentence, more so, scaling the life imprisonment to a term of imprisonment. Even, it may be argued that the offence may be in the nature of attempt to commit penetrative sexual assault, in

view of the medical examination report of the victim. The applicant has been in jail for about 2 years and 8 months. The appeal is not likely to be heard on its own merits in the immediate future.

8. For all the aforesaid reasons, we are inclined to allow the application. Hence, the following order:-

(i) The application is allowed;

(ii) During pendency of the appeal, the substantive sentence of imprisonment imposed vide judgment and order dated 18.02.2020 passed by learned Special Judge, Latur, in Special (POCSO) Case No.2 of 2015, to stand suspended. The applicant be released on bail on executing P.R. Bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) with one surety in the like amount.

[R. M. JOSHI, J.]

[R.G. AVACHAT, J.]

KBP