

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

**CRIMINAL APPLICATION NO.744 OF 2021
IN
CRIMINAL APPEAL NO.149 OF 2021**

Afsar Latif Sayyed

...APPLICANT

VERSUS

1) The State of Maharashtra,

2) X Y Z

...RESPONDENTS

...
Mr.G.R. Syed Advocate for Applicant.
Mr.B.V. Virdhe, A.P.P. for Respondent No.1 – State.
Mr.A.D. Ostwal Advocate for Respondent No.2.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 14th JUNE, 2022

ORDER :

1. Present Application has been filed for stay to the conviction and sentence awarded to the applicant by the learned Special Judge, under Protection of Children from Sexual Offences Act, Ahmednagar in Special Case No.397 of 2018 on 5th December 2020, convicting him for the offences punishable under Sections 376-AB, 354-B, 323 of the Indian Penal Code and Section 5(m)

punishable under Section 6, Section 8 and Section 10 of the Protection of Children from Sexual Offences Act (for short "POCSO Act").

2. The Appeal came to be admitted by this Court on 29th June 2021.

3. The applicant / appellant has been held guilty for the offence punishable under Section 376-AB of the Indian Penal Code and has been sentenced to suffer rigorous imprisonment for twenty years and to pay fine of Rupees Fifty Thousand and in default to undergo rigorous imprisonment for one year. In view of the sentence imposed for the offence under Section 376-AB of the Indian Penal Code, no separate sentence has been awarded to the applicant under other Sections though he has been found guilty for the same. The applicant was accused No.1 and accused No.2 was also held guilty for committing offence under other Sections, however, as on today the Appeal has been filed by original accused No.1 only and oral statement has been made that original accused No.2 is no more. It has been noted by the trial Court that the amount of fine has not been paid by the present applicant / appellant.

4. Heard Mr. G.R. Syed learned Advocate for the applicant, Mr. Virdhe, learned A.P.P. for Respondent No.1 – State and Mr. Ostwal learned Advocate for Respondent No.2.

5. As per the prosecution story, the victim was residing in the neighbour-hood of the applicant and the applicant, four days prior to 15th September 2018, had assaulted the victim who is a girl below the age of 12 years, and committed rape on her. The prosecution has examined in all six witnesses, which includes the mother of the victim, the victim herself, the medical officer, panch witness and two investigating officers of different period.

6. The learned Advocate appearing for the applicant has submitted that the learned Special Judge had not considered that there is an inordinate delay in lodging the report. It was the prosecution case that the offence took place on the terrace of the adjoining house of the applicant. How the neighbours could not have noticed the same when it is stated that the alleged incident had taken place on the terrace, is a question. From the cross-examination of the victim as well as her mother, it can be seen that the applicant has been falsely implicated. The Investigating Officer has not collected the CCTV footage from the cameras which were installed in the nearby bungalows. The

medical evidence is in fact not supporting the prosecution. There were no injuries on the person of the victim. Under such circumstance a wrong conviction has been awarded. The Appeal is admitted and therefore, till the Appeal is finally decided, the applicant / appellant deserves to be released on bail.

7. Per contra, the learned APP as well as learned Advocate for respondent No.2 i.e. original informant supported the reasons given by the learned Special Judge while convicting the applicant and in his statement under Section 313 of the Code of Criminal Procedure it is only stated that a false case has been lodged to grab the property of the applicant, and therefore, the sentence cannot be suspended.

8. At the outset, at this moment, we are required to consider the evidence that has been brought on record. We are not required to assess that evidence as if the assessment that is required to be done for the final hearing. The statements of the victim and her mother stand corroborated to each other and they have tried to assign reason as to why there is delay in lodging the report. Though medical officer PW-3 Dr. Pratap Salve states that there was no apparent external injuries, but we will have to accept the position that the medical examination itself was

undertaken after the gap of 3 to 4 days. Still the tenderness was found around the genital. No doubt the medical officer says that the hymen was found in tact. He then says that they found tenderness present on separation of Labia majora / folds. He further states that he, as well as Dr. Patil, who was along with him, who was the gynecologist, both were of the opinion that there was recent forceful penetration of vagina on the victim. In the cross-examination that was taken on behalf of accused No.1, he had rather explained that the recent forceful penetration means between 3 to 5 days prior to examination. When this explanation is taken in the cross-examination, thereafter there cannot be further denial. Therefore, the medical evidence, at this stage, can be seen to be corroborated and therefore, no case is made out for suspending the sentence. However, taking into consideration the age of the applicant / appellant, the Appeal can be expedited. Hence, the following order:-

ORDER

- (I) The Criminal Application stands rejected.
- (II) Hearing of the Appeal is expedited.

(III) Liberty is granted to the learned Advocate for the applicant / appellant to take praecipe for early hearing of the Appeal.

[SMT. VIBHA KANKANWADI, J.]

asb/JUNE22