

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

**CRIMINAL APPLICATION NO.2177 OF 2021
IN
CRIMINAL APPEAL NO.465 OF 2021**

Chandrakant s/o. Namdeo Wagalgave ..Applicant

Vs.

The State of Maharashtra and anr. ..Respondent

Mr.V.D.Salunke, Advocate h/f. Mr.M.V.Salunke, Advocate for applicant

Mr.S.P.Sonpavale, APP for respondent no.1

Mr.S.N.Lale-Yelwatkar, Advocate for respondent no.2

**CORAM : R.G. AVACHAT, J.
RESERVED ON : FEBRUARY 08, 2022
PRONOUNCED ON : FEBRUARY 10, 2022**

ORDER :-

Heard.

2. This is an application for suspension of substantive sentence of imprisonment. The applicant/appellant herein has been convicted for the offence punishable under Section 376(2)(N) of Indian Penal Code (I.P.C.) read with Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act) and under Section 506 of I.P.C. He has been sentenced to suffer rigorous imprisonment of ten years for the offence punishable under Section 376(2)(N) of I.P.C. read with

Section 6 of the POCSO Act; and to suffer simple imprisonment of three months for the offence punishable under Section 506 of I.P.C.

3. Heard learned counsel for the parties.

4. The case of prosecution is that "R" had married one "X". The couple was blessed with three daughters (victims). The applicant herein is the husband of sister-in-law of "R". The applicant would regularly visit the house of "R". Emotional relationship came into being between "R" and the applicant. "X" got knowledge of this. He, therefore, deserted "R" first, and then, got the decree of divorce against her. The applicant, "R" and her three minor daughters (victims) would reside together. As such, all of them stayed together for the period from May, 2007 to October, 2017 and to be more specific, upto 9th October, 2017. It is also the case of prosecution that during this stay, the applicant had sexual intercourse with all the three daughters (victims) of "R" many a time (as and when occasion arose and circumstances permitted).

5. Learned APP for State and the learned counsel representing the respondent-victim took this Court through the relevant evidence, to ultimately urge for rejection of the application.

Learned counsel representing the victim also urged this Court to pass order after going through the file. Learned counsel first took this Court through paragraphs 5, 9, 19, 22, 36 and 47 of the impugned judgment. He also took me through the evidence of the victims and the Medical Officer as well.

6. On the question of age of the victims, it has to be stated that although the Headmaster of the school (PW 7 – Sunita) admitted to have not placed on record any document to show the basis on which the dates of birth of the victims were recorded in the school record, the mother of the victims has given their dates of birth. In proof of age of a particular person, best evidence would be that of his parents. Her evidence needs to be accepted as it is for the present, at least. As such, during the relevant time, the victims were minors.

7. Before the trial Court, "R" and her three daughters (victims) gave evidence consistent with their case. The victims were medically examined as well. Their medical examination reports indicate that the hymen was torn. It, however, indicates that there were no signs of sexual intercourse in the recent past (immediately before the medical examination).

8. There is, however, another aspect of the matter. According to "R" herself, the applicant stopped maintaining her and the victims in October, 2017. "R" had, therefore, lodged a report, alleging the applicant to have had stopped providing for their maintenance and even beaten her up and her daughters as well. The informant has given a specific date upto which the applicant and they had stayed together i.e. upto 9th October, 2017. After about 21 days thereafter, "R" lodged report against the applicant and alleged to have had stopped for providing for their maintenance and even beaten up them. By that time, none of them had made report against the applicant about sexual exploitation of the daughters of "R". It is only on 18.11.2017, the elder daughter of "R" lodged the FIR, alleging the applicant to have committed rape of her many a time. Her both sisters gave their statements with the same allegations against the applicant herein.

9. It is reiterated that "R" and her victim daughters gave evidence before the Court consistent with their case before the Investigating Officer. Learned counsel for the victim, therefore, may have a reason to contend that the trial Court has rightly convicted the applicant and he does not deserve grant of suspension of substantive sentence of imprisonment, pending the appeal.

10. The applicant was on bail, pending the trial. It will take time for the appeal to come up for final hearing. The medical examination reports of the victims may or may not support their case, since there were no signs of recent sexual intercourse. As per the FIR, it is the applicant on one hand and "R" and her daughters on the other, had stayed together upto 09.10.2017. On 30.10.2017, "R" had lodged a report against the applicant. There is evidence to suggest that the daughters (victims) had informed "R" as to what the applicant had done with them during their joint stay. Still, in the report lodged on 30.10.2017, there are no allegations against the applicant about having sexually exploited the daughters of "R". It is only about one month thereafter, the FIR has been lodged on 18.11.2017.

11. For about ten years, the applicant, the victims and their mother had stayed together as members of one family. It was the applicant who would provide for their maintenance. All of them had stayed together in the premises taken on rent. During the period from May, 2007 to October, 2017, they had stayed in not less than four different rental premises. None of the premises was comprising more than two rooms. The applicant, allegedly, sexually exploited

the victims when all of them used to be in the house/s. It is their case that the applicant, during night time, would exploit one of the victims, when others used to be asleep. It is also their case that the applicant would use tranquilizers/chloroform, whereby, other members in the family used to be not conscious. These facts do not, *prima facie*, appeal. In the circumstances, the application deserves to be allowed.

12. The submissions advanced by learned counsel representing the victim, made this Court to make some observations about merit of the matter, which this Court could have avoided.

13. For the reasons stated herein above, the application deserves to be allowed. Hence, the following order:-

- (i) During pendency of the appeal, the substantive sentence of imprisonment to stand suspended.
- (ii) During pendency of appeal, the applicant be released on executing P.R. Bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) with one surety in the like amount.

[R.G. AVACHAT, J.]

KBP