

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

**10 CRIMINAL APPLICATION NO.2217 OF 2021
IN APPEAL/469/2021**

DHIRAJ PASHYA PAWAR

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Mr. A.B. Girase, Advocate for the applicant

Mr. S.J. Salgare, APP for the respondent No.1

Mrs. Suvarna Zaware, Advocate (appointed) for the respondent No.2

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**CORAM : SMT. VIBHA KANKANWADI AND
RAJESH S. PATIL, JJ.**

DATE : 25th JULY, 2022

PER COURT :

1 Present application has been filed for suspension of sentence by the appellant-accused. The appellant-accused has been sentenced to imprisonment for life along with fine of Rs.5,000/- and in default of payment of fine, he has been directed to suffer rigorous imprisonment for one year, for the offence punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012, by learned Special Judge/Sessions Judge, Nandurbar in Special Case No.25/2019 on 01.09.2021.

2 Heard learned Advocate Mr. A.B. Girase for the applicant-appellant and learned APP Mr. S.J. Salgare for the respondent No.1/State. Perused the copies of depositions made available by the applicant-appellant.

3 It will not be out of context to mention here that though the applicant-appellant was facing charge for the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code, 1860 as well as under Sections 4 and 6 of the POCSO Act. The learned Special Judge has acquitted the applicant of the offence punishable under Section 363 and 366 of the Indian Penal Code. At this stage, the prosecution has not filed any appeal nor it is pointed out that it is so filed, but it is not before this Court. Under such circumstance, the conviction that has been awarded to the applicant will have to be considered here and it is to be seen as to whether the said sentence can be suspended.

4 The learned Advocate for the applicant has taken this Court through the entire evidence as well as the impugned Judgment. He has mainly relied on the reasons acquitting the applicant of the offence punishable under Sections 363, 366 of the Indian Penal Code which was basically on the basis of Exh.33, which was the statement of the prosecutrix-victim before the learned Judicial Magistrate First Class under Section 164 of

the Code of Criminal Procedure. It was stated in that statement by the prosecutrix that she had physical relationship with the accused even prior to the incident and she was carrying pregnancy of three months. So also, she had admitted in clear terms that she had compelled to take her with him and in fact, she had given threat to commit suicide. Learned Advocate appearing for the applicant submits that since the learned Special Judge had then come to the conclusion that the prosecutrix is a child as defined under Section 2 of the POCSO Act and her age/minority has been proved. Her consent is no consent and, therefore, the conviction has been awarded under Section 6 of the POCSO Act. According to the learned Advocate for the applicant, this is a wrong approach and when the admissions have been clearly given, it ought not to have been arrived at by the learned Special Judge that the act of the applicant is without the consent of the prosecutrix. He also pointed out that the prosecution had in fact not proved the age of the girl beyond reasonable doubt, though the prosecution had examined PW 7, who was the Gramsevika of the Village Panchayat. Though PW 7 has stated that she has issued the birth certificate of the prosecutrix on the basis of the birth report and the record with her office, the cross-examination of the Gramsevika would show that the birth report Exh.80 was without the name of the person giving information about the birth of the child. It cannot be stated that in absence of the name of the person giving information the information could have

been correct and could have been relied by the Grampanchayat authorities. Therefore, the documents at Exhs.32 and 80 are doubtful and they do not independently prove the age of the prosecutrix as child on the date of the alleged offence. Lastly, the learned Advocate appearing for the applicant submitted that since the date of the arrest i.e. 27.05.2019 the applicant is in jail. It will take long time to this Court to hear the appeal and decide it. With these anomalies in the evidence of the prosecution the sentence needs to be suspended.

5 The learned APP strongly opposes the application and submits that though the prosecution at this stage has not challenged the acquittal of the applicant under Sections 363 and 366 of the Indian Penal Code; yet, the reasons given by the Special Judge for convicting the applicant for the offence punishable under Section 6 of the POCSO Act are perfectly legal and correct. The prosecution had proved the age of the victim as minor on the date of the offence. She was not in a position to give consent for anything to the accused. When such heinous crime has been committed by the applicant in respect of a minor girl no sympathy need be shown to him.

6 It is to be noted that the prosecution had examined in all 8 witnesses to bring home the guilt of the accused. As aforesaid, at this stage

we are constraining ourselves to the conviction that has been awarded to the applicant under Section 6 of the POCSO Act only. The basis for conviction under that section is that the Special Judge had arrived at the conclusion that the prosecution has proved that the prosecutrix was child on the date of the offence. In order to prove that age the prosecutrix herself had entered the witness box, gave her age as 16 and her birth date in examination-in-chief. In cross-examination she denied the suggestion that she was admitted to school when she was 8-9 years of age. She has also denied the suggestion that she is more than 18 years of age. Except these two suggestions there is nothing in her cross-examination. The learned Special Judge has considered the entire evidence of the prosecutrix and the fact that the appellant-accused was relying on her said statement Exh.33 under Section 164 of the Code of Criminal Procedure. In her said statement she has given her age as 16 and, therefore, whether the applicant can be allowed to rely upon certain portion of the said statement under Section 164 of the Code of Criminal Procedure would be a question. Apparently, we may say that such bifurcation or segregation of the facts cannot be allowed and further in that portion itself she had stated that she was pregnant from the applicant and her pregnancy was of three months.

7 Further, as regards the deposition of PW 7 the Gramsevika is

concerned, it is to be noted that she was the Gramsevika since 2012, but she was giving her deposition on the basis of the record that was available with the Grampanchayat. In the said register, which has to be kept as per the provisions of Birth and Death Registration Act, the concerned authority had taken the said entry. This documentary evidence in the form of Exhs.32 and 80 has been relied, which can be considered prima facie here to support the contentions of the prosecutrix that she was aged 16 when the offence took place.

8 Therefore, without going into the further testimonies we can say prima facie that there was evidence against the applicant-appellant and, therefore, this cannot be the case where the sentence awarded to the applicant-appellant should be suspended. At the most the liberty can be given to the appellant to move this Court for an early hearing of an appeal and if the docket permits that can be given. Application stands rejected.

(Rajesh S. Patil, J)

(Smt. Vibha Kankanwadi, J.)