

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

979 CRIMINAL APPLICATION NO.2479 OF 2021
IN APEAL/522/2021

ARJUN NAMDEO MORE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Applicant : Mr. Shaikh Ashraf Patel.

APP for Respondent/State: Mr. S. D. Ghayal

Advocate for Respondent No.2: Mr. Pradeep G. Tambade.

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CORAM : **SARANG V. KOTWAL AND**
BHARAT P. DESHPANDE, JJ.

DATE : 23rd June, 2022.

PER COURT:

. We have heard Mr. Shaikh Ashraf Patel, learned counsel for the applicant, Mr. S. D. Ghayal, learned APP for the State and Mr. Pradeep G. Tambade, learned counsel for the respondent No.2.

2 This is an application by the applicant for suspension of sentence and release on bail. He has preferred Criminal Appeal No.522 of 2021. The appellant has challenged the judgment and order dated 31st August, 2021 passed in Special Case (POCSO) No.218 of 2019 passed by learned Special Judge (POCSO), Aurangabad. By the impugned judgment and order, he was convicted for commission of offences punishable under Sections 366 and 376 (1) (2) (f), (j), (n) of

the Indian Penal Code. He was sentenced to suffer rigorous imprisonment for ten years for the offence punishable under Section 366 and to pay fine of Rs.10,000/- and in default to suffer simple imprisonment for three months. For other offences, he was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.20,000/- and in default to suffer simple imprisonment for six months. He was acquitted from the offences punishable under Sections 363 and 366-A of the Indian Penal Code and Section 3(a) read with Sections 4 and 5 (j)(ii)(l)(n) read with Section 6 of the POCSO Act. The total fine amount was Rs.30,000/-.

3 The prosecution case is that the applicant was married to the elder sister of the victim. The FIR is lodged by the victim's mother PW-1. According to her, the victim was 15 years of age in October, 2019. The allegations are that, during that period the applicant had committed rape on her. She had become pregnant. The pregnancy was terminated. On these allegations, FIR was lodged. On this basis, investigation agency investigated the offences. During trial, seven witnesses were examined.

4 Learned counsel for the applicant submitted that the evidence of the victim herself shows that it was purely a consensual relationship and learned Judge has committed an error in observing

that she was compelled into this relationship. Such observation has no basis from the evidence. He further submitted that learned Judge has held that the victim was major at the time of incident and therefore, if it was a consensual relationship, the offence of rape or abduction from the lawful custody of the guardian are not made out.

5 Learned APP submitted that the school record shows that she was minor and therefore, even offences under the POCSO Act are attracted. Though applicant is acquitted of those charges, the State has preferred appeal against acquittal from those charges. He submitted that considering the seriousness of the offence, bail should not be granted to the applicant.

6 Learned counsel for the respondent No.2 also adopted the submissions of the learned APP and opposed this application.

7 We have considered these submissions and in particular we have perused the evidence of the victim herself. She has stated that the applicant was married to her elder sister and the victim and the applicant used to have physical relations when they were alone in the house. She has given instances when both of them were alone, there was consensual sex between them due to which she became pregnant. The applicant took her the house of his brother. There

again they had physical relations. They got married in a temple. After that, police came and took them along. In her cross-examination, she has categorically stated that the applicant never forced her for physical relations. She has also stated that she could be above 18 years when she went with the accused. Thus, her evidence shows that it was purely consensual relationship. The crucial question is whether she was a minor at that time. In this regard, learned Judge himself has observed in paragraph 18 that the prosecution had failed to establish that the victim was minor within the meaning of the POCSO Act. In this view of the matter, it would be improper to observe that the applicant has committed the offence of rape. The observation by learned Judge in paragraph 34 that the victim was compelled by the applicant for performing marriage and that there was no love relations between them, is absolutely unwarranted. In this view of the matter, the applicant deserves to be released on bail during the pendency of appeal. Hence, the following order :

ORDER

- I. The application is allowed.
- II. During pendency and final disposal of Criminal Appeal No.522 of 2021, the applicant is directed to be released on bail on his furnishing P. R. bond in the sum of

Rs.30,000/- (Rupees Thirty Thousand Only) with one or two sureties in the like amount.

III. The applicant shall deposit the fine amount imposed on him within a period of two months from the date he is released from jail.

IV. The application is disposed of accordingly.

nga [BHARAT P. DESHPANDE, J.]

[SARANG V. KOTWAL, J.]