

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

**CRIMINAL APPLICATION NO. 2623 OF 2021
IN
CRIMINAL APPEAL NO. 566 OF 2021**

Arjun s/o Ashok Patil	... Applicant
Versus	
The State of Maharashtra and another	... Respondents

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Mr. S. D. Hiwrekar, Advocate for applicant
Mr. R. B. Bagul, APP for respondent No.1 – State
Ms. N. V. Borse, Advocate (appointed) for respondent No.2

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 05th MAY, 2022

PRONOUNCED ON : 09th JUNE, 2022

ORDER :-

. This is an application for suspension of sentence of imprisonment. The applicant has been convicted for the offences punishable under Sections 451, 363, 366, 376(2)(i)(j), 323 of the Indian Penal Code and under Sections 3(a) and (b) punishable under Section 4 and Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, and therefore, sentenced to suffer rigorous imprisonment for one (1) year, one (1) year, three (3) years and fourteen (14) years, simple imprisonment for one (1) month, rigorous imprisonment for seven

(7) years and fourteen (14) years, respectively and pay a total fine of Rs.9,000/-. The substantive sentences have been directed to run concurrently.

2. The learned Advocate for the applicant would submit that the applicant was on bail pending trial. There is no direct evidence indicating his involvement in the offence in question. The victim was mentally retarded. The applicant was arrested on suspicion. He took me through the relevant evidence to ultimately urge for grant of application. According to him, it will take time for the appeal to come up for hearing.

3. The learned APP and the learned Advocate appointed to represent the victim would submit that the trial Court has, on appreciation of the evidence, rightly convicted the applicant. It is heinous and serious crime, as well. The victim was not more than eight (8) years of age at the relevant time. Both the learned Advocates reiterated the reasons given by the trial Court in support of conviction.

4. Considered the submissions advanced. Perused the entire evidence in the case. The incident took place in midnight of

19.02.2014. As per the case of the prosecution and the evidence as well, the victim (eight (8) years old girl) had slept between her parents in a hut near a brick kiln. The applicant allegedly lifted the victim at midnight (1.00 a.m.), took her to a nearby field and sexually assaulted her. It is in the evidence of the parents of the victim and other witnesses as well that little past 1.00 a.m., the parents woke up to find the victim not at the place. They, therefore, took search for her in the nearby, but in vain. All of them were therefore sitting at the brick kiln awaiting the victim. All of a sudden, they noticed the victim coming along a road that goes through the field. The victim was naked. Blood was oozing from her private part. There was a bite mark on her cheek. After a short while, the applicant emerged from the very road. He was, therefore, overpowered. The victim narrated her parents that the applicant lifted her from the bed. Took her to the nearby field. Undressed her and inserted his finger in her private part. The applicant was therefore overpowered and taken to the Police Station. The mother of the victim lodged the First Information Report. The statement of the victim was also recorded.

5. PW1 – Bharti (mother of the victim), although testified in her examination-in-chief to have had seen the applicant running away from the agricultural land, in her cross examination, she admitted to have had not seen the applicant running away.

6. PW2 – Kailash (father of the victim), testified in examination-in-chief as stated herein above. Other 2 – 3 witnesses have also given the evidence on similar lines.

7. True, the medical examination report of the victim suggests that she was subjected to penetrative sexual assault. According to the prosecution witnesses, the applicant had inserted a finger in her private part. The question is whether the applicant really is an author of the crime. No doubt, it is very unfortunate incident. Admittedly, there is no eye witness to the incident except the version of the victim. Admittedly, the victim was in the age group of 7 – 8 years at the relevant time. She was mentally challenged. There is on record a certificate Exh-60 indicating her to have not been in a condition of giving any proper statement. The certificate was issued by the Civil Surgeon, Jalgaon.

8. PW5 – Sanjay, testified that when recording of statement of victim was started, she was not giving proper answer. She was not in fit mental condition. They prepared her statement in question-answer form as per say of her parents and police, as well. This witness was none other than the Head Master of a school meant for mentally retarded children.

9. PW10 – Sandip, said to be a star witness, testified that the applicant was arrested on suspicion as he was being unknown person seen at and around the place whereat the victim was seen. It is also in the evidence of the prosecution witnesses that the road by which the victim and after a while the applicant emerged, is not a secluded place. Persons from the nearby places make use of the said road since early in the morning i.e. from 5.00 a.m. on-wards. Admittedly, the applicant was apprehended immediately. His medical examination report doesn't indicate him to have had a sexual act. The Chemical Analyser report ruled out ejaculation. It is just *prima-facie* difficult to imagine that for over four hours, both were together in a field with standing crop. It is the defence of the applicant that he was a professional Rickshaw driver. His Rickshaw developed mechanical defect. In the early morning, he csme there with a

mechanic. The prosecution witnesses have admitted that in the close-by, a breakdown auto-rickshaw was stationary. The victim gave her evidence before the Court about 5½ years after the incident. By that time, she was of the age of somewhat understanding. I have also gone through her evidence, to almost all the questions she replied either 'Yes' or 'No'. She attributed accusing finger towards the applicant. Her evidence, however, is to be appreciated in view of the fact that she was mentally retarded child. Her police statement was recorded as per the version given by the parents and the police. If for the time being, in view of mental status of the victim, we ignore her evidence, the only evidence there is that of the parents and other persons who apprehended the applicant only on suspicion since he was seen coming by the road from which the victim had emerged a while before. The evidence indicates the applicant to have been thrashed. Medical evidence doesn't indicate him to have indulged in sexual act. It will take time for the appeal to come up for hearing. The applicant was on bail pending trial.

10. In the fitness of things, I am inclined to grant the application. Needless to mention that the observations made herein above are tentative in nature.

11. The execution of substantive sentence of imprisonment to stand suspended pending the appeal. The applicant be released on his executing P. R. bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) with surety bond in the like amount.

12. The application stands disposed of.

13. Fee of the learned Advocate (appointed) to represent respondent No.2 is quantified at Rs.5,000/- (Rupees Five Thousand only).

[R. G. AVACHAT, J.]

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