

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

**CRIMINAL APPLICATION NO.3274 OF 2021
IN
CRIMINAL APPEAL NO.682 OF 2021**

Omprakash Jiyalal Jaiswal

..Applicant

Vs.

The State of Maharashtra
and anr.

..Respondent

Mr.Shrimant Mundhe, Advocate for applicant

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

Ms.Sunita Sonawane, Advocate for respondent no.2

**CORAM : R.G. AVACHAT, J.
RESERVED ON : FEBRUARY 16, 2022
PRONOUNCED ON : FEBRUARY 22, 2022**

ORDER :-

Heard.

2. This is an application for suspension of substantive sentence of imprisonment. The applicant/appellant herein has been convicted for the offences punishable under Sections 366-A and 376 of Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and seven years, respectively, with a direction to pay fine amount and in default of payment of fine, rigorous imprisonment for certain period. The applicant was in jail for four months during enquiry, investigation and trial and for little over two months since the judgment of conviction.

3. Learned counsel for the applicant would submit that it was a consensual relationship. There is no concrete evidence in proof of age of the victim. The applicant has wife and three children to look after. In the circumstances, learned counsel would urge for allowing the application.

4. Learned APP and learned counsel for the victim, would, on the other hand, submit that the applicant was married when the offence took place. He kidnapped and sexually exploited a fourteen years old girl, who was visiting Maharashtra for sale of sarees. According to him, age of the prosecutrix has been proved on the basis of her school record. The Headmaster of the school was examined. The father of the victim also gave her age. He, therefore, urged for rejection of the application.

5. The victim hails from Madhya Pradesh. She along with her her parents would visit Maharashtra for sale of sarees as hawkers. The evidence on record indicates that the applicant herein had given the father of the prosecutrix two SIM cards. Same indicates that there was some acquaintance between the two. There is no evidence to indicate the applicant had kidnapped the

prosecutrix. Both of them were together for little over one and half day. During the said period, the applicant had sexual intercourse with her. According to the prosecution, the prosecutrix, at the material time, was fourteen years of age. The offence took place in December, 2010.

6. In terms of Section 375 of I.P.C., a man is said to commit "rape", who has sexual intercourse with a woman with or without her consent, when she is under 16 years. As such, the prosecution was required to prove that on the given date, the prosecutrix was below 16 years of age. The evidence of the victim in that regard is hearsay. Her father is illiterate. He simply testified that his daughter was 14 years of age at the relevant time. The Investigating Officer had neither collected her school record nor examined authorities of the school, wherein the victim took education, were cited as witnesses by the prosecution. The trial Court, in exercise of its power, had issued witness summons to a particular school. The school official, in turn, appeared and placed on record certain school record wherefrom the date of birth of the prosecutrix is shown as 05.07.1999. While the witness had confronted with the very school record, he admitted that the very

next entry speaks of birth on the very same day. According to the witness, it pertains to the brother of the prosecutrix. He meant to say that they are twins, born on one and same day. There is no evidence to suggest on what basis the date of birth of the prosecutrix came to be recorded in the school record. According to the prosecutrix, she studied upto fourth standard. She did not give the school name. Whereas, according to the Principal of Abhinav Vidya High School, Shahgad, Dist. Sagar (Madhya Pradesh), the prosecutrix left the school after having passed second standard examination. This Court do not propose to make further observations as regards merit of the case.

7. The appeal is not likely to come up for hearing in the near future. The moot question involved in the appeal is, whether it was consensual act and even if it is consensual act, whether the prosecutrix was below sixteen years of age at the material time. The evidence in this regard needs to be reappreciated with the assistance of both learned APP and learned counsel for the applicant/appellant. It would, therefore, not be desirable to keep the applicant behind the bars, particularly when it will take time for the appeal to come for hearing in due course.

8. Hence, the following order:-
- (i) The application allowed.
 - (ii) During pendency of the appeal, the substantive sentence of imprisonment to stand suspended.
 - (iii) During pendency of the 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.
 - (iv) Legal fee of learned counsel for respondent no.2 (appointed) is quantified at Rs.5,000/- (Rupees Five Thousand).

[R.G. AVACHAT, J.]

KBP