

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.359 OF 2022
IN
CRIMINAL APPEAL NO. 88 OF 2022**

Vinayak Akaram Wagh ..Applicant/Appellant
Versus
The State of Maharashtra and Anr. ..Respondents

Umesh H. Pawar, Advocate for the Applicant/Appellant.
Ms. Vrushali Maindad, Advocate for the Respondent No.2.
Mr. Arfan Sait, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.

DATE : 28th March, 2022.

PC.

1. The Applicant has prayed for suspension of sentence of imprisonment and grant of bail. The Applicant is convicted by Judgment and order dated 21.12.2021 for offences under Section 376 of Indian Penal Code (for short “IPC”) and Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”). He is also convicted for the offences under Sections 8 and 12 of POCSO Act. He has been sentenced to suffer imprisonment of ten years for the offence under Section 6 of POCSO Act, three years for the conviction under Section 8 of POCSO Act

and three years for the conviction under Section 12 of POCSO Act. All the substantive sentences were directed to concurrently.

2. The case of the prosecution is that the victim girl was residing with her parents. In February, 2019 while the victim girl was going to classes, the Accused met her and told her that she is called by her family members and he would drop her at residence. The victim boarded the vehicle of accused. The Accused stopped vehicle near one lodge. He told her that he has some work and she should follow him. He took her in one room and told her that he loves her and would marry her. He committed sexual intercourse with the victim without her consent. She was threatened not to disclose the incident to anyone. Subsequently, it was noticed that she was pregnant. First Information Report was registered. On completing investigation, charge-sheet was filed.

3. Learned Advocate for the Applicant submitted that the Applicant was on bail during the trial. There was love affair between victim and accused. The physical relationship was consensual. The victim was major. The prosecution has not mentioned the particulars about the original documents of birth certificate in the list prepared

under Section 294 of Cr.P.C. The birth certificate of victim was not proved by examining independent witness. There is delay in lodging complaint. The victim has stated in the complaint that her birth year is 2000. In evidence she stated that on the date of testimony, she is more than twenty years. The offences under the POCSO Act, as well as under Section 376 of IPC are not proved. The First Information Report was lodged after seven months from the date of incident. The complaint was lodged by the victim under duress of family members. The Applicant has not misused the facility of bail. Reliance is placed on decisions relating to right of accused to defend himself by having access to all documents under Sections 207/208 of Cr.P.C. and providing list of documents relied by prosecution, proof of age etc.

4. Learned APP submitted that victim was minor at the time of incident. Assuming that the relationship of consensual, the consent of victim, if any is immaterial. The birth certificate is not disputed by the accused. The age of the victim was proved. DNA report supports the prosecution case. There is no reason to disbelieve the version of victim.

5. Learned Advocate for Respondent No. 2 submitted that the victim was child as per POCSO Act. She was sexually assaulted by the Accused by using force. She was threatened. She had conceived DNA report implicate the Accused, specific role has been attributed to the Applicant. Presumption under Section 29 of POCSO Act is not rebutted by Accused. The victim had suffered to mental trauma. The evidence of victim is corroborated by medical evidence. She relied upon order dated 21.12.2021 passed in Interim Application No.2983 of 2021 in the case of Dinesh Dhotre V/s State of Maharashtra and submitted that in similar case the application for suspension of sentence was rejected.

6. The Applicant was on bail during trial. There is no adverse report about misuse the facility of bail. The alleged incident had occurred about seven months prior to registration of First Information Report. The victim has stated that, she knows the Accused. He used to visit her house in February, 2019. She was taken to lodge by the Accused. She expressed love for her and promised that he would marry her. He committed forcible sexual intercourse with her. He threatened her and hence she did not

disclose the incident to her parents. She had conceived. Her statement was recorded on 09.07.2019. Her medical examination was conducted. She stated that she cannot give the location of lodge. From the evidence it is difficult to believe that she was taken to lodge under the pretext of work. The FIR was registered after about seven months from incident. She stated that, at the time of lodging First Information report, she had completed age of eighteen years. DNA report supports the prosecution case. The defence of the Accused that the relationship was consensual and the victim was major. It appears that birth certificate was not collected during the investigation. It was produced by the father of victim at the time of recording his evidence. Medical Officer has stated that, the victim had given history that the Accused had sexually assaulted her before five months, she was pregnant. There was no external injury on her person. The defence has disputed that the victim was minor. Considering all these aspects, case for suspension of sentence can be suspended.

7. Hence, I pass the following order:-

ORDER

- i. Interim Application No. 359 of 2022 is allowed;
- ii. During the pendency of Criminal appeal No.88 of 2022, the sentence of imprisonment imposed vide Judgment and Order dated 21st December, 2021 passed by learned Special Judge (POCSO) & Additional Sessions Judge, Islampur, in Special Case Child Prot. No.26 of 2019 is suspended and the applicant is directed to be released on bail on executing PR. Bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- iii. The applicant is permitted to furnish cash bail in the sum of Rs.25,000/- for a period of ten weeks in lieu of surety.
- iv. The applicant shall attend the trial Court once in six months on first Saturday of the month till the final disposal of the appeal;
- v. In the event, there are two consecutive defaults in attending the trial Court, the said fact may be brought to the notice of this court and in such eventuality, the prosecution will be at liberty to prefer an application for cancellation of bail.
- vi. the applicant shall not approach the victim and shall not cause any harassment to her.
- vii. Interim Application stands disposed of accordingly.

[PRAKASH D. NAIK, J.]