

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

**INTERIM APPLICATION NO.1374 OF 2022
IN
CRIMINAL APPEAL NO.177 OF 2019**

Ganesh Subhash Dhiwar Applicant

versus

State of Maharashtra & Anr. Respondents

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- Mr. Aniket Vagal a/w Kunal Pednekar, Advocate for Applicant.
- Mr. Yogesh Y. Dabke, APP for the State/Respondent.
- Mr. Amol B. Jagtap, Advocate for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 17th AUGUST, 2022**

P.C. :

1. The Applicant had earlier filed an application for bail vide Criminal Application No.1932 of 2018 in Criminal Appeal No.177 of 2019. That application was dismissed for want of prosecution. After that, the present application is filed for the Applicant's release on bail during pendency and final disposal of Criminal Appeal No.177 of 2019.

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2. Heard Mr. Aniket Vagal, learned counsel for the Applicant, Mr. Amol B. Jagtap, learned counsel for Respondent No.2 and Mr. Yogesh Y. Dabke, learned APP for the State.
3. The Applicant was convicted for commission of offence punishable u/s 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.3,000/-, in default of payment to suffer further rigorous imprisonment for six months. He was acquitted from the charges of commission of offence punishable u/s 363, 366-A of the Indian Penal Code. He was granted set off u/s 428 of Cr.PC.
4. Learned counsel for the Applicant submitted that the Applicant was an under trial prisoner for a period of about 9 months, i.e. from 11/01/2017 to 29/09/2017. After that he was taken in custody on 30/08/2018 i.e. on the date of the impugned judgment and order. Thus he has completed about 4 years and 7 months of actual imprisonment. Maximum punishment awarded to him is of 10 years. He has completed

almost half of the sentence. The Appeal is not likely to be heard within a reasonable period and thus there is possibility that he will have to undergo sentence without Appeal being heard. He submitted that the Applicant is a young boy. As of today he is 22 years of age. On the date of incident he was even younger. Therefore considering his future these years are very crucial in his life. Therefore the application may be considered sympathetically.

5. Learned counsel also referred to deposition of the victim, which strongly indicates that there was a love affair and she had willingly left her house to go with the Applicant.
6. Learned counsel for the Respondent No.2 opposed this application. He submitted that the prosecution has sufficiently proved that her date of birth was 03/07/2003 and therefore on the date of incident i.e. on 02/01/2017 she was below 18 years of age. He submitted that all the ingredients of offence u/s 376 of the Indian Penal Code as well as section 4 of the POCSO Act are established by the prosecution and therefore there is no scope to argue that the offence is not committed by the

Applicant. He further submitted that as to today, the Respondent No.2 is married and is residing in Hadapsar. Therefore, in case, bail is granted, condition may be imposed on the Applicant not to enter the area of Hadapsar police station.

7. Learned APP supported these submissions.
8. I have considered these submissions. I have perused the deposition of Respondent No.2. She has deposed that the Applicant was residing in her neighbourhood. They were knowing each other. The Applicant used to meet her near her school and used to talk with her for 5 to 10 minutes. On 02/01/2017, the Applicant called her near a garden. He told her that he loved her and on the next day, they should elope and perform marriage. PW.2 then met him on 03/01/2017. Both of them went to Hadapsar on a motorcycle and then went to Yavat. They stayed in a house. The Applicant tied a Mangalsutra and gave toe rings in token of having married. They stayed together from 03/01/2017 to 11/01/2017 as husband and wife. It is her case that during that time, they established physical relations on

4-5 occasions. After that the police came there and they were brought to police station.

9. Thus from her evidence it does appear that it was a consensual relationship. However, since according to the prosecution case she was below 18 years of age, her consent was immaterial. But the issue of her age will have to be considered at the final hearing stage. P.W.3 Dr.Manohar Kashinath Shelke had opined that after radiological examination, her age was found to be between 15-17 years, including the margin of error. P.W.7 Sharada Ravindra Waghmare was her school teacher, where the victim was taking education. She has produced a general register showing the victim's date of birth as 03/07/2003. However, there is no further record as to how this date of birth was mentioned by anybody or whether it was based on some documents. All these issues will have to be considered at the final hearing stage. At this stage the important consideration is that the Applicant has already completed about half of the sentence. He is a young boy of 22 years of age. Next five years

would be crucial in his life for taking education or making efforts to settle down his life. If he is acquitted after 5 years, he will suffer irreparable loss.

10. The victim on her own had willingly left with him. If at the final hearing, her age is proved to be more than 18 years at the time of incident, then the offence will not be made out. Therefore at this stage, I am inclined to consider the application of bail sympathetically. All the contentions raised, are left open to be decided at the stage of final hearing.

11. Considering apprehension expressed by the Respondent No.2, some reasonable conditions will have to be imposed on the Applicant, so that there is no harassment at his hands to the Respondent No.2.

12. Hence, the following order :

ORDER

- (i) During pendency and final disposal of the Criminal Appeal No.177 of 2019, the Applicant

is directed to be released on bail on his furnishing PR. bond in the sum of Rs.30,000/- (Rupees Thirty Thousand only), with one or two sureties in the like amount.

- (ii) The Applicant shall not enter the jurisdiction of Hadapsar Police Station during pendency of Criminal Appeal No.177 of 2019.
- (iii) The Applicant shall not try to contact the Respondent No.2 and shall not cause any harassment to her and her relatives.
- (iv) The Applicant shall amend the Appeal memo to include the Respondent No.2 as a party Respondent in the Appeal memo also, care should be taken to conceal her identity.
- (v) Learned counsel Mr. Amol B. Jagtap waives service of notice on behalf of Respondent No.2 for the purpose of final hearing of Criminal Appeal No.177 of 2019.
- (vi) Interim Application stands disposed of accordingly.

(SARANG V. KOTWAL, J.)